APPEAL NO. 122147
FILED DECEMBER 11, 2012

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing (CCH) was held on September 18, 2012, in [City], Texas, with [hearing officer] presiding as hearing officer. The hearing officer resolved the disputed issues by deciding that: (1) the compensable injury of [date of injury], does not extend to bilateral lumbar radiculopathy, lumbar post-traumatic myositis, and thoracic strain; (2) the appellant (claimant) had disability resulting from an injury sustained on [date of injury], from January 19, 2012, through the date of the CCH; (3) the first certification of maximum medical improvement (MMI) and assigned impairment rating (IR) from [Dr. G] on January 18, 2012, became final under Section 408.123; (4) the claimant reached MMI on January 18, 2012; and (5) the claimant's IR is zero percent.

The claimant appealed, disputing the hearing officer's determinations of extent of injury; finality of the first certification of MMI/IR; MMI; and IR. The claimant contends that the first certification did not rate the entire compensable injury. The respondent (carrier) responded, urging affirmance of the disputed determinations. The hearing officer's determination that the claimant had disability resulting from an injury sustained on [date of injury], from January 19, 2012, through the date of the CCH was not appealed and has become final pursuant to Section 410.169.

DECISION

Affirmed in part, reversed and rendered in part, and reversed and remanded in part.

The parties stipulated that the claimant sustained a compensable injury on [date of injury], and that Dr. G is the Texas Department of Insurance, Division of Workers' Compensation (Division) appointed designated doctor to address MMI and IR. The claimant testified that he was injured when he was penned between a gate and the bumper of a truck. The hearing officer noted in the Background Information portion of his decision and order that the carrier accepted contusions/abrasions to the low back, chest, knees, left arm and 8th rib fracture.

EXTENT OF INJURY

The hearing officer's determination that the compensable injury does not extend to bilateral lumbar radiculopathy, lumbar post-traumatic myositis, and thoracic strain is supported by sufficient evidence and is affirmed.

FINALITY OF THE FIRST CERTIFICATION OF MMI/IR

Section 408.123(e) provides that except as otherwise provided by Section 408.123, an employee's first valid certification of MMI and first valid assignment of an IR is final if the certification or assignment is not disputed before the 91st day after the date written notification of the certification or assignment is provided to the employee and the carrier by verifiable means. 28 TEX. ADMIN. CODE § 130.12(b) (Rule 130.12(b)) provides, in part, that the first MMI/IR certification must be disputed within 90 days of delivery of written notice through verifiable means; that the notice must contain a copy of a valid Report of Medical Evaluation (DWC-69), as described in Rule 130.12(c); and that the 90-day period begins on the day after the written notice is delivered to the party wishing to dispute a certification of MMI or an IR assignment, or both. Section 408.123(f) provides in pertinent part that an employee's first certification of MMI or assignment of an IR may be disputed after the period described in Subsection (e) if: (1) compelling medical evidence exists of: (A) a significant error by the certifying doctor in applying the appropriate American Medical Association guidelines or in calculating the [IR] (B) [a] clearly mistaken diagnosis or a previously undiagnosed medical condition; or (C) improper or inadequate treatment of the injury before the date of the certification or assignment that would render the certification or assignment invalid.

The hearing officer's findings that Dr. G's certification of MMI and IR was provided to the claimant by verifiable means on February 2, 2012, and that the claimant did not dispute Dr. G's certification of MMI and IR within 90 days after the date the certification was provided are supported by sufficient evidence.

Dr. G examined the claimant on January 18, 2012, for purposes of determining MMI and IR and certified that the claimant reached MMI on January 18, 2012, with a zero percent IR. Dr. G listed the following diagnoses: knee sprain, back sprain, and rib fracture. Dr. G assessed zero percent impairment for the lumbar spine, placing the claimant in Diagnosis-Related Estimate Lumbosacral Category I: Complaints or Symptoms noting a full physical examination was performed with range of motion (ROM) and a neurologic examination including testing of reflexes and girth measurements to determine the presence of atrophy, and to evaluate for impairment of strength and sensation of the lower extremities as a result of the lumbar spine injury. Dr. G performed extension and flexion ROM measurements for both right and left knees and noted a neurological examination was performed which resulted in zero percent impairment with regard to strength and sensation. Dr. G also assessed zero percent impairment for the claimant's rib fracture noting it had healed without sequelae. Dr. G noted in his narrative report that the physical examination of the cervical, thoracic, and upper extremities was normal. However, he did not record any ROM measurements taken of the left arm and did not assess impairment for the left arm. No specific mention

is made of any chest contusion in the narrative of Dr. G. Dr. G did not rate the left arm or chest.

The claimant contends that the certification cannot become final because Dr. G did not rate the entire compensable injury. In evidence is a Notice of Disputed Issue(s) and Refusal to Pay Benefits (PLN-11) dated June 7, 2011, which states the carrier accepts a diagnosis of "[c]ontusions/abrasions to the low back, chest, knees, left arm and 8th rib fracture as part of the compensable injury that occurred on [[date of injury]]." The Request for Designated Doctor Examination (DWC-32) is in evidence and identifies the insurance carrier as the requestor. The DWC-32 lists the injuries described to be compensable by the Division or accepted as compensable by the insurance carrier as: contusions/abrasions to the low back, chest, knees, left arm and 8th rib fracture.

The failure to rate the entire compensable injury constitutes compelling medical evidence of a significant error by the certifying doctor in applying the appropriate American Medical Association guidelines or in calculating the IR. *See* Appeals Panel Decision (APD) 120245, decided April 27, 2012; APD 111227, decided October 13, 2011; and APD 071283-s, decided September 13, 2007.

In this case, Dr. G did not rate an injury to the left arm or the chest. Dr. G listed the diagnoses as a knee sprain, back sprain, and rib fracture. Although Dr. G stated that he examined the upper extremities and the examination was normal, in assessing an IR he was still required to rate the left arm even though there may be no permanent impairment. *See* Rule 130.1(c)(3)(D)(i) which requires a description and explanation of specific clinical findings related to each impairment including zero percent IRs. Dr. G did not rate the chest or comment on the chest contusions/abrasions which have been accepted as part of the compensable injury. Further, we note that Dr. G based his impairment for the lumbar spine and knees on sprains. Dr. G failed to rate the entire compensable injury by failing to rate the left arm and chest. We hold that since Dr. G did not rate the left arm and chest, which have been accepted by the carrier as part of the compensable injury, the failure to do so is an exception to finality under Section 408.123(f)(1)(A).

Accordingly, we reverse the hearing officer's determination that the first certification of MMI and assigned IR by Dr. G on January 18, 2012, became final under Section 408.123. We render a new decision that the first valid certification of MMI and first valid assignment of an IR by Dr. G on January 18, 2012, did not become final under Section 408.123(f)(1)(A).

MMI AND IR

Section 401.011(30)(A) defines MMI as "the earliest date after which, based on reasonable medical probability, further material recovery from or lasting improvement to an injury can no longer reasonably be anticipated." Section 408.1225(c) provides that the report of the designated doctor has presumptive weight, and the Division shall base its determination of whether the employee has reached MMI on the report of the designated doctor unless the preponderance of the other medical evidence is to the contrary. Section 408.125(c) provides that the report of the designated doctor shall have presumptive weight, and the Division shall base the IR on that report unless the preponderance of the other medical evidence is to the contrary, and that, if the preponderance of the medical evidence contradicts the IR contained in the report of the designated doctor chosen by the Division, the Division shall adopt the IR of one of the other doctors. Rule 130.1(c)(3) provides that the assignment of an IR for the current compensable injury shall be based on the injured employee's condition as of the MMI date considering the medical record and the certifying examination.

The hearing officer determined that the claimant reached MMI on January 18, 2012, with a zero percent IR as certified by Dr. G. As previously discussed above, Dr. G failed to rate the entire compensable injury by failing to rate the left arm and chest. Accordingly, the hearing officer's determination that the claimant reached MMI on January 18, 2012, with a zero percent IR is reversed.

There is only one other certification in evidence. On July 7, 2012, Dr. T], a referral doctor acting in place of the treating doctor, examined the claimant for purpose of determining whether the claimant reached MMI and if so, assign an IR. Dr. T certified that the claimant had not yet reached MMI. Dr. T stated that the claimant needed a bilateral lower extremity EMG/NCV for a more comprehensive assessment of his back pain and may need an MRI. Dr. T recommended that the claimant be sent for a consultation to a dolorologist/anesthesiologist or physiatrist for evaluation and consideration of epidural steroid injections. However, in his certification, Dr. T assessed the following conditions: lumbar spine/strain/sprain post-traumatic myositis, bilateral lower extremity radicular symptoms of undetermined etiology, left knee contusion, chest wall contusion, rib fracture, and thoracic spine strain. The hearing officer's determination that the claimant's compensable injury does not extend to bilateral lumbar radiculopathy, lumbar post-traumatic myositis, and thoracic strain is affirmed. Dr. T considered conditions that were not part of the claimant's compensable injury in certifying that the claimant had not yet reached MMI. Accordingly, his certification cannot be adopted. There is no other certification in evidence.

Therefore, because there are no certifications of MMI/IR that can be adopted, we reverse the hearing officer's determinations that the claimant reached MMI on January 18, 2012, and that the claimant's IR is zero percent and remand the issues of MMI/IR to the hearing officer for further action consistent with this decision.

REMAND INSTRUCTIONS

Dr. G is the designated doctor in this case. On remand, the hearing officer is to determine whether Dr. G is still qualified and available to be the designated doctor. If Dr. G is no longer qualified or available to serve as the designated doctor, then another designated doctor is to be appointed to determine MMI/IR for the compensable injury of [date of injury].

The hearing officer is to advise the designated doctor that the carrier has accepted contusions/abrasions to the low back, chest, knees, left arm and 8th rib fracture as part of the compensable injury of [date of injury], and that it has been administratively determined by the Division that the compensable injury does not extend to bilateral lumbar radiculopathy, lumbar post-traumatic myositis, and thoracic strain.

The hearing officer is to advise the designated doctor that Rule 130.1(c)(3) provides that the doctor assigning the IR shall: (A) identify objective clinical or laboratory findings of permanent impairment for the current compensable injury; (B) document specific laboratory or clinical findings of an impairment; (C) analyze specific clinical and laboratory findings of an impairment; and (D) compare the results of the analysis with the impairment criteria and provide the following: (i) [a] description and explanation of specific clinical findings related to each impairment, including zero percent [IRs]; and (ii) [a] description of how the findings relate to and compare with the criteria described in the applicable chapter of the AMA Guides. The doctor's inability to obtain required measurements must be explained.

The designated doctor is then to be requested to give a certification of MMI/IR for the claimant's compensable injury of [date of injury], based on the claimant's condition as of the MMI date, which can be no later than the date of statutory MMI, considering the claimant's medical record and the certifying examination.

The parties are to be provided with the hearing officer's letter to the designated doctor and the designated doctor's response. The parties are to be allowed an opportunity to respond. The hearing officer is then to make a determination on MMI/IR consistent with this decision.

SUMMARY

We affirm the hearing officer's determination that the compensable injury does not extend to bilateral lumbar radiculopathy, lumbar post-traumatic myositis, and thoracic strain.

We reverse the hearing officer's determination that the first certification of MMI and assigned IR by Dr. G on January 18, 2012, became final under Section 408.123 and we render a new decision that the first valid certification of MMI and first valid assignment of an IR by Dr. G on January 18, 2012, did not become final under Section 408.123(f)(1)(A).

We reverse the hearing officer's determinations that the claimant reached MMI on January 18, 2012, and that the claimant's IR is zero percent and remand the issues of MMI/IR to the hearing officer.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Division, pursuant to Section 410.202 which was amended June 17, 2001, to exclude Saturdays and Sundays and holidays listed in Section 662.003 of the Texas Government Code in the computation of the 15-day appeal and response periods. *See* APD 060721, decided June 12, 2006.

The true corporate name of the insurance carrier is **AMERICAN ZURICH INSURANCE COMPANY** and the name and address of its registered agent for service of process is

CORPORATION SERVICE COMPANY
211 EAST 7TH STREET, SUITE 620
AUSTIN, TEXAS 78701.

Margaret L. Turner
Appeals Judge

CONCUR:

Cynthia A. Brown
Appeals Judge

Thomas A. Knapp
Appeals Judge