APPEAL NO. 122326
FILED JANUARY 10, 2013

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 October 2, 2012, in [City] Texas, with [hearing officer] presiding as hearing officer. The hearing officer determined that the appellant (claimant) reached maximum medical improvement (MMI) on May 20, 2011, with a 14% impairment rating (IR) and that the first certification of MMI and assigned IR from [Dr. S] did not become final under Section 408.123 and 28 TEX. ADMIN. CODE § 130.12 (Rule 130.12).

The claimant appealed the finality determination, contending that the respondent (carrier) had not properly disputed the first certification of MMI or assigned IR pursuant to Rule 130.12. The claimant also appealed the MMI date and IR. The carrier responded, urging affirmance.

DECISION

Reversed and remanded.

It is undisputed that the claimant, a landscaper, sustained a compensable injury to his right upper extremity on [date of injury], while cutting cane. In a Notice of Disputed Issue(s) and Refusal to Pay Benefits (PLN-11) dated April 18, 2011, the carrier accepted as the compensable injury "right hand, neck sprain, medial nerve release/intramuscular transposition of ulnar nerve with camitz procedure of right upper extremity [and] cervical radiculopathy." The parties stipulated that [Dr. Sm] was the Texas Department of Insurance, Division of Workers' Compensation (Division) designated doctor appointed to determine, among other things, MMI and IR. The parties also stipulated that Dr. S issued the first certification of MMI and IR in this claim.

FINALITY AND MMI/IR

Section 408.123 provides in part:

(e) Except as otherwise provided by this section, 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.

(f) An employee's first certification of [MMI] or assignment of an [IR] may be disputed after the period described by 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) 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.

Rule 130.12(b)(1) provides in part:

Only an insurance carrier, an injured employee, or an injured employee's attorney or employee representative under [Rule] 150.3(a) may dispute a first certification of MMI or assigned IR under [Rule] 141.1 (related to Requesting and Setting a Benefit Review Conference [BRC]) or by requesting the appointment of a designated doctor, if one has not been appointed.

The parties stipulated that Dr. Sm was appointed as the designated doctor for MMI and IR. In a Report of Medical Evaluation (DWC-69) dated July 8, 2010, Dr. Sm certified that the claimant was not at MMI but was expected to reach MMI on or about October 8, 2010.

Subsequently, Dr. S a doctor selected by the treating doctor acting in place of the treating doctor, examined the claimant on August 22, 2011, certified the claimant at MMI on July 5, 2011, with a 43% IR. Dr. S's diagnoses were right carpal tunnel syndrome (CTS) and right rotator cuff impingement. The IR was calculated using Table 16, page 3/57 of the Guides to the Evaluation of Permanent Impairment, fourth edition (1st, 2nd, 3rd, or 4th printing, including corrections and changes as issued by the American Medical Association prior to May 16, 2000) (AMA Guides), for severe median nerve entrapment at the wrist and severe ulnar nerve entrapment at the elbow. Dr. S rated impairment for the peripheral nerves, and right shoulder range of motion (ROM). The carrier acknowledged receipt of Dr. S's report on August 26, 2011.

On September 21, 2011, the carrier requested a designated doctor for MMI, IR and return to work. Dr. Sm was again appointed as the designated doctor. Dr. Sm examined the claimant on October 13, 2011, and on a DWC-69 and in a narrative dated October 13, 2011, certified the claimant reached MMI on May 20, 2011, with a 15% IR

based on ROM impairments of the right wrist and right shoulder, as well as radial and ulnar nerve impairments.

[Dr. O] performed a peer review on October 31, 2011, and concluded that the IR's given by Dr. S did not comport with the requirements of the AMA Guides. Dr. O, subsequently acting as a carrier required medical evaluation doctor, in a DWC-69 and narrative dated January 31, 2012, certified MMI on May 20, 2011, with a 14% IR, based on an examination of January 17, 2012. Dr. O rated nerve injuries associated with the upper extremity, wrist, hand and fingers, CTS and bilateral shoulders.

Dr. Sm, the designated doctor, amended his October 13, 2011, report after receiving a letter of clarification. Dr. Sm, on a DWC-69 and narrative, again referencing his October 13, 2011, examination certified MMI on May 20, 2011, with an 8% IR.

The claimant contends that the carrier did not timely, or properly, dispute Dr. S's August 22, 2011, report which the carrier received by verifiable means on August 26, 2011. The claimant asserts that the 90th day after August 26, 2011, was November 24, 2011. The carrier contends that it timely disputed Dr. S's certification of MMI and assessment of IR by requesting a designated doctor on September 21, 2011. The carrier filed a Request for [BRC] (DWC-45) to address MMI and IR on February 10, 2012. The hearing officer, in concluding that Dr. S's certification of MMI and assessment of IR did not become final, found that the carrier filed a Request for Designated Doctor Examination (DWC-32) requesting a designated doctor examination disputing Dr. S's certification on September 21, 2011, and "checked that the purpose of the exam was for MMI and IR. Therefore, [the] [c]arrier timely disputed the first certification of MMI and assigned IR from [Dr. S]." We disagree.

The plain language of Rule 130.12(b)(1) provides that filing a DWC-32 will dispute a first valid certification of MMI/IR only if a designated doctor has not previously been appointed. It is undisputed in this case that a designated doctor, Dr. Sm, had been appointed on June 22, 2010, prior to the examination by Dr. S. Therefore, under the facts of this case and pursuant to Rule 130.12(b)(1), the carrier could only dispute Dr. S's first valid certification of MMI/IR by filing a DWC-45 because a designated doctor, Dr. Sm, had previously been appointed. *See* Appeals Panel Decision (APD) 121740, decided October 29, 2012. The evidence in this case reflects that no DWC-45 was timely filed within 90 days of the delivery of Dr. S's first valid certification of MMI/IR by verifiable means to the carrier. The carrier did not file a DWC-45 to address MMI/IR until February 10, 2012. Therefore, Finding of Fact No. 8, stating that the carrier filed a DWC-32 requesting a designated doctor examination disputing Dr. S's certification on September 21, 2011, is so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust.

We reverse the hearing officer's determination that the first certification of MMI and assigned IR from Dr. S did not become final under Section 408.123 and Rule 130.12 as a matter of law because Rule 130.12(b)(1) clearly provides that a dispute of a first certification of MMI and assigned IR can only be made by requesting and setting a BRC if a designated doctor has previously been appointed, as was in this case.

The parties at the CCH litigated the exceptions to finality found in Section 408.123(f)(1)(A)(B)(C). The carrier argued that Dr. S improperly calculated the IR which would be an exception under Section 408.123(f)(1)(A). The carrier also argued that there was expert medical evidence explaining how Dr. S's report was incorrect. Also a question was raised whether Dr. S had rated the entire compensable injury.

The hearing officer failed to make any finding on whether any of the exceptions to finality in Section 408.123(f)(1) were established by the evidence, which would preclude Dr. S's certification of MMI and assessment of IR from becoming final. We remand the case to the hearing officer for further consideration consistent with this decision.

Because we have reversed the hearing officer's determinations that the first certification of MMI and assigned IR rating from Dr. S did not become final under Section 408.123 and Rule 130.12, we also reverse the hearing officer's determinations that the claimant reached MMI on May 20, 2011, and the IR is 14% and remand those issues to the hearing officer pending the hearing officer's determination on remand regarding the finality issue.

No further evidence is to be admitted; however, the parties are to be allowed an opportunity to comment and respond to the opposing arguments. The hearing officer is to then make a determination on whether an exception to Section 408.123(f)(1) applies. The hearing officer is also to make a determination on the issues of finality, MMI and IR which are supported by the evidence on remand.

SUMMARY

We reverse the hearing officer's determination that the first certification of MMI and assigned IR rating from Dr. S did not become final under Section 408.123 and Rule 130.12 and remand the case to the hearing officer for further action consistent with this decision.

We reverse the hearing officer's determinations that the claimant reached MMI on May 20, 2011, and the IR is 14% and remand those issues to the hearing officer for further action consistent with this decision.

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 **ACE AMERICAN INSURANCE COMPANY** and the name and address of its registered agent for service of process is

CT CORPORATION SYSTEM
350 NORTH ST. PAUL STREET
DALLAS, TEXAS 75201.

Thomas A. Knapp
Appeals Judge

CONCUR:

Cynthia A. Brown
Appeals Judge

Margaret L. Turner
Appeals Judge