APPEAL NO. 130036
FILED FEBRUARY 28, 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 was held on November 8, 2012, in [City], Texas, with [hearing officer] presiding as hearing officer. The hearing officer determined that: (1) the first certification of maximum medical improvement (MMI) and impairment rating (IR) assigned by [Dr. D] on January 7, 2012, did not become final under Section 408.123; (2) the respondent (claimant) reached MMI on January 13, 2012; and (3) the claimant's IR is eight percent.

The appellant (self-insured) appealed, contending that the designated doctor's first valid certification of MMI and assignment of IR had become final pursuant to Section 408.123. The appeal file does not contain a response from the claimant.

DECISION

Reversed and remanded.

The claimant testified that she was playing volleyball as part of her duties and that she skidded to a stop, fell and was injured. The parties stipulated that the claimant "sustained a compensable injury on [date of injury], at least in the form of a right knee sprain/strain; lumbar sprain/strain; thoracic sprain/strain; and right [fifth] metatarsal fracture." The parties also stipulated that Dr. D, the Texas Department of Insurance, Division of Workers' Compensation (Division)-selected designated doctor certified that the claimant reached MMI on August 11, 2011, with a two percent IR and that [Dr. R], a treating doctor referral doctor, certified that the claimant reached MMI on January 13, 2012, with an eight percent IR.

FINALITY

The hearing officer, in the Background Information, commented that the self-insured "presented documentation that it mailed the certification [of MMI and IR] to [the] [c]laimant by certified mail. However, the United States Postal Service tracking system evidence that a notice was left at [the] [c]aimant's mailing address on January 21, 2012, and that the item was unclaimed on February 8, 2012." The hearing officer also commented: "[h]ence, it supports the position that [the] [c]laimant had not received a copy of the certification. . . ." It is undisputed that the claimant first disputed Dr. D's certification of MMI and assignment of IR on May 5, 2012. The hearing officer further quotes the preamble to 28 TEX. ADMIN. CODE § 130.12 (Rule 130.12) stating that Rule 130.12 provides that the 90-day period "begins when that party receives verifiable written notice of the MMI/IR certification." The hearing officer found that Dr. D's IR was

not provided to the claimant by verifiable means and that the claimant disputed Dr. D's IR timely.

Section 408.123(e) provides that except as otherwise provided by this section, an employee's first valid certification of MMI and the 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. Rule 130.12(b) provides, in part, that the first certification of MMI and IR must be disputed within 90 days of delivery of written notice through verifiable means, including IRs related to extent-of-injury disputes. The notice must contain a copy of a valid Report of Medical Evaluation (DWC-69), as described in Rule 130.12(c). Written notice is verifiable when it is provided from any source in a manner that reasonably confirms delivery to the party, and that this may include acknowledged receipt by the injured employee or insurance carrier, a statement of personal delivery, confirmed delivery by e-mail, confirmed delivery by facsimile transmission or some other confirmed delivery to the home or business address. See Appeals Panel Decision (APD) 041985-s, decided September 28, 2004; APD 121814, decided December 10, 2012.

The Appeals Panel has held that evidence of attempted delivery and the date notification was attempted can constitute written notice through verifiable means. See APD 100316, decided May 7, 2010; APD 080745, decided July 25, 2008; and APD 121814, supra. We note that the preamble to Rule 130.12 discusses how written notice is verifiable and goes on to state at 29 Tex. Reg. 2331, March 5, 2004:

> . . . a party may not prevent verifiable delivery. For example, a party who refuses to take personal delivery or certified mail has still been given verifiable written notice.

The hearing officer erred in finding that Dr. D's IR was not provided to the claimant by verifiable means and that the claimant had timely disputed Dr. D's IR.

EXCEPTIONS TO FINALITY

Section 408.123(f) provides in 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].

Dr. D examined the claimant on January 7, 2012, certified that the claimant reached MMI on August 11, 2011, and assessed a two percent IR. Dr. D gave range of

motion (ROM) measurements for the right little finger to arrive at a zero percent whole person (WP) IR for the right little finger. Dr. D rated a right knee injury ROM as zero percent WP impairment and assessed a Diagnosis-Related Estimate (DRE) Lumbosacral Category I: Complaints or Symptoms using 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 a zero percent WP IR for the lumbar spine.

As previously noted, the parties stipulated that the compensable injury included a thoracic sprain/strain. Dr. D did not rate or diagnose a thoracic sprain/strain injury.

In APD 111227, decided October 13, 2011, the Appeals Panel reversed a hearing officer's determination that the first certification of MMI and assigned IR became final and rendered a new decision that the first certification did not become final. The certifying doctor had failed to rate the thoracic spine which had been administratively determined by the Division to be part of the compensable injury although the doctor had rated other parts of the body. In that decision, the Appeals Panel stated:

> The cases make clear that the failure to rate the entire compensable injury constitutes compelling medical evidence of a significant error by the certifying doctor in applying the appropriate AMA Guides or in calculating the IR.

Dr. D failed to rate the compensable thoracic sprain/strain as stipulated by the parties, and therefore, the exception in Section 408.123(f)(1)(A) applies. *See also* APD 121215, decided August 30, 2012.

We affirm the hearing officer's determination that the first certification of MMI and IR assigned by Dr. D on January 7, 2012, did not become final under Section 408.123 based on the fact that Dr. D did not rate the entire compensable injury.

MMI AND IR

As stated above, because Dr. D did not rate the entire compensable injury his certification of MMI and assignment of IR cannot be adopted. In evidence is the report of Dr. R, a doctor selected by the treating doctor acting in place of the treating doctor. Dr. R examined the claimant on January 13, 2012, certified clinical MMI on that date and assessed an eight percent IR. The hearing officer found that Dr. R's certification of MMI and IR was supported by a preponderance of the evidence. Dr. R diagnosed a right fifth phalanx fracture, a lumbar sprain/strain with superimposed multi-level IVD herniation and a right knee sprain/strain. Dr. R assessed a five percent impairment for the lumbar spine based on DRE Lumbosacral Category II: Minor Impairment and three

percent WP impairment for loss of ROM for the right little finger. Dr. R showed his calculation based on ROM figures in rating the little finger. However, Dr. R failed to assign an IR for a thoracic sprain/strain as stipulated to by the parties and therefore, failed to rate the entire compensable injury and his certification of MMI and IR cannot be adopted.

There are no other certifications of MMI and IR in evidence. Having affirmed the hearing officer's determination that Dr. D's January 7, 2012, MMI/IR certification did not become final under Section 408.123, albeit on an entirely different basis than found by the hearing officer, and there being no other certifications of MMI and IR that can be adopted, we reverse the hearing officer's determination that the claimant reached MMI on January 13, 2012, and that the claimant's IR is eight percent. We remand the issues of MMI and IR for further action consistent with this decision.

REMAND INSTRUCTIONS

The designated doctor for MMI and IR is Dr. D. On remand, the hearing officer is to determine if Dr. D is still qualified and available to serve as the designated doctor. If Dr. D is no longer qualified or available to serve as the designated doctor, another designated doctor is to be appointed.

The designated doctor is to be requested to give an opinion on MMI and IR for the compensable injury which includes a right knee sprain/strain; lumbar sprain/strain; thoracic sprain/strain; and right fifth metatarsal fracture. 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 doctor should show calculations based on the ROM figures. In rating the fifth metatarsal fracture use of the chart on page 3/16 of the AMA Guides would be helpful. The designated doctor is then to give an opinion of MMI and IR considering the claimant's medical record and the certifying examination.

After the designated doctor submits this certification of MMI and IR, the parties are to be provided with the designated doctor's report and are to be allowed an opportunity to respond. The hearing officer is then to make a determination on MMI and IR 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 **[a self-insured governmental entity]** and the name and address of its registered agent for service of process is

For service in person the address is:

[SELF INSURED GOVERNMENTAL ENTITY]
[ADDRESS]
[CITY], TEXAS [ZIP].

For service by mail the address is:

[SELF INSURED GOVERNMENTAL ENTITY]
[ADDRESS]
[CITY], TEXAS [ZIP].

Thomas A. Knapp
Appeals Judge

CONCUR:

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Carisa Space-Beam
Appeals Judge

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Margaret L. Turner
Appeals Judge