

APPEAL NO. 142287  
FILED DECEMBER 18, 2014

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 September 3, 2014, with the record closing on September 29, 2014, in Tyler, 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 left shoulder tears of the labrum/tendon, left shoulder rotator cuff deficiency, or left shoulder tear of the supraspinatus and infraspinatus tendons; (2) the first certification of maximum medical improvement (MMI) and impairment rating (IR) assigned by (Dr. W) on May 7, 2013, did become final under Section 408.123 and 28 TEX. ADMIN. CODE § 130.12 (Rule 130.12); (3) the date of MMI is April 22, 2013; and (4) the appellant's (claimant) IR is seven percent.

The claimant appealed, disputing the hearing officer's determinations of the extent of the compensable injury, finality of the first certification, MMI and IR. The claimant contends that the evidence establishes that the compensable injury extends to the disputed conditions and that Dr. W misapplied 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). The respondent (carrier) responded, urging affirmance of the disputed determinations.

#### DECISION

Affirmed in part and reversed and rendered in part.

The parties stipulated that on [Date of Injury], the claimant sustained a compensable injury of a left rotator cuff sprain and left shoulder joint pain. The parties also stipulated that Dr. W was the Texas Department of Insurance, Division of Workers' Compensation (Division)-appointed designated doctor.

#### EXTENT OF INJURY

The hearing officer's determination that the compensable injury of [Date of Injury], does not extend to left shoulder tears of the labrum/tendon, left shoulder rotator cuff deficiency, or left shoulder tear of the supraspinatus and infraspinatus tendons is supported by sufficient evidence and is affirmed.

#### FINALITY PURSUANT TO SECTION 408.123

Section 408.123(e) provides that 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. 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.

The evidence reflects that the claimant received written notice of Dr. W's DWC-69 on May 24, 2013, by verifiable means. On August 2, 2013 (a date within 90 days of delivery by verifiable means of Dr. W's DWC-69), the claimant filed a Request to Schedule, Reschedule, or Cancel a Benefit Review Conference (BRC) (DWC-45). However, the claimant subsequently withdrew his request. In evidence is a Commissioner Order dated August 23, 2013, that states the Division received a request to withdraw a dispute during a BRC held on August 23, 2013. The order further states that the request was approved and it was determined that the issues of MMI and IR having been withdrawn, the first valid certification of MMI and IR is subject to finality. The order additionally gives notice to the parties that if they disagree with the Division's approval of the request to withdraw a dispute of MMI and IR, a DWC-45 may be submitted. The evidence does not indicate either party filed a dispute until March 7, 2014, when the claimant again requested a BRC on the issues of MMI and IR.

Rule 130.12(b)(3) provides that a dispute may not be revoked or withdrawn to allow the first valid certification of MMI and/or the first valid assignment of IR to become final except by agreement of the parties. The Division approved the claimant's August 23, 2013, request to withdraw the issues of MMI and IR. The carrier did not indicate any disagreement with the claimant's request to withdraw or the Division's approval of such request. The hearing officer's determination that the first certification of MMI and IR assigned by Dr. W on May 7, 2013, became final under Section 408.123 and Rule 130.12 is supported by sufficient evidence and is affirmed.

However, the hearing officer incorrectly found that there is no evidence to show that the claimant filed another DWC-45 after August 23, 2013, to dispute Dr. W's certification. As previously noted, in evidence was a DWC-45 filed by the claimant on March 7, 2014, for the issues of MMI and IR. The DWC-45 filed on March 7, 2014, was well after 90 days of delivery of written notice by verifiable means of Dr. W's DWC-69 and did not prevent Dr. W's certification of MMI/IR from becoming final. We reverse Finding of Fact No. 5 by striking because it is not supported by the evidence.

## **MMI/IR**

The hearing officer wrote a letter of clarification dated September 18, 2014, to Dr. W which submitted the following question: In your report you tie the date of MMI to the examination by (Dr. K). You state that therefore the MMI date is April 15, 2013. However, the only report I have seen from Dr. K is dated April 22, 2013. Please clarify the date used and the basis for the date.

Dr. W responded in a letter dated September 18, 2014, and stated that the hearing officer was correct the date of MMI should be April 22, 2013. Dr. W then submitted an amended DWC-69 which changed the MMI date certified from April 15, 2013, to April 22, 2013. The hearing officer then determined that the MMI date is April 22, 2013.

However, the hearing officer's determination that the first certification from Dr. W on May 7, 2013, became final under Section 408.123 and Rule 130.12 was affirmed. The first certification from Dr. W certified that the claimant reached MMI on April 15, 2013, not April 22, 2013. Because the first certification from Dr. W became final, the hearing officer's determination that the date of MMI is April 22, 2013, is wrong as a matter of law. The hearing officer's determination that the date of MMI is April 22, 2013, is reversed and a new decision rendered that the date of MMI is April 15, 2013, pursuant to Section 408.123 and Rule 130.12, and affirmed in this decision.

The hearing officer's determination that the claimant's IR is seven percent is supported by sufficient evidence and is affirmed.

## **SUMMARY**

We affirm the hearing officer's determination that the compensable injury of [Date of Injury], does not extend to left shoulder tears of the labrum/tendon, left shoulder rotator cuff deficiency, or left shoulder tear of the supraspinatus and infraspinatus tendons.

We affirm the hearing officer's determination that the first certification of MMI and IR assigned by Dr. W on May 7, 2013, became final under Section 408.123 and Rule 130.12.

We affirm the hearing officer's determination that the claimant's IR is seven percent.

We reverse the hearing officer's determination that the date of MMI is April 22, 2013, and render a new decision that the date of MMI is April 15, 2013.

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

**RICHARD GERGASKO, PRESIDENT  
6210 EAST HIGHWAY 290  
AUSTIN, TEXAS 78723.**

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Margaret L. Turner  
Appeals Judge

CONCUR:

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Cristina Beceiro  
Appeals Judge

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Carisa Space-Beam  
Appeals Judge