APPEAL NO. 152374
FILED FEBRUARY 3, 2016

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 October 2, 2015, in (city), Texas, with (hearing officer) presiding as hearing officer. The hearing officer resolved the disputed issues by deciding that: (1) the compensable injury extends to loss of cervical lordotic curve but does not extend to spondylosis cervical, cervical disc protrusions at C2-3, cervical disc protrusions at C5-6, C6-7, cervical spinal canal stenosis, lumbar disc protrusion L2-3, L3-4, L4-5 and L5-S1, lumbar spinal canal stenosis, Schmorl's node L2, or chronic L2 10% height loss; (2) the first certification of maximum medical improvement (MMI) and impairment rating (IR) assigned by (Dr. H) on July 2, 2014, became final under Section 408.123; (3) the appellant (claimant) reached MMI on April 4, 2014; (4) the claimant's IR is 0%; and (5) the claimant had disability resulting from the compensable injury beginning on May 29, 2014, and continuing through June 25, 2014, and beginning on July 17, 2014, and continuing through October 1, 2014.

The claimant appealed the hearing officer's determinations regarding extent of injury, finality of the first certification of MMI and assignment of IR, MMI, and IR, urging that the evidence established that the compensable injury extends to each of the disputed conditions; that the first certification of MMI and assignment of IR did not become final pursuant to Section 408.123; and that the claimant has not reached MMI.

The respondent (self-insured) responded, urging affirmance of the hearing officer's determinations.

The hearing officer's determination that the compensable injury of (date of injury), extends to loss of cervical lordotic curve was not appealed and has become final pursuant to Section 410.169.

Although the hearing officer's disability determination was not appealed and has become final pursuant to Section 410.169, we note an incorrect date is listed in her Conclusion of Law No. 8 as discussed below.

DECISION

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

The parties stipulated that: (1) the compensable injury of (date of injury), extends to at least cervical, thoracic and lumbar sprains/strains; (2) the Texas Department of

Insurance, Division of Workers' Compensation (Division)-appointed designated doctor (DD) to determine MMI, IR, and extent of injury is (Dr. F), who certified that the claimant reached MMI on July 16, 2014, and assigned an IR of 0%; (3) the treating doctor referral, (Dr. HA) certified that the claimant reached MMI on July 16, 2014, and assigned an IR of 5% and alternatively, Dr. HA certified on August 15, 2014, that the claimant had not reached MMI; (5) the self-insured-selected required medical examination (RME) doctor is Dr. H, who certified that the claimant reached MMI on April 4, 2014, and assigned a 0% IR.

The claimant testified that he was working as a maintenance worker for the employer on (date of injury), when his supervisor grabbed him from behind resulting in the claimed injuries.

EXTENT OF INJURY

The hearing officer's determination that the compensable injury of (date of injury), does not extend to spondylosis cervical, cervical disc protrusions at C2-3, cervical disc protrusions at C5-6, C6-7, cervical spinal canal stenosis, lumbar disc protrusion L2-3, L3-4, L4-5 and L5-S1, lumbar spinal canal stenosis, Schmorl's node L2, or chronic L2 10% height loss is supported by sufficient evidence and is affirmed.

FINALITY AND 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. Rule 130.12(b)(1) provides, in part, that the first certification of MMI or assigned IR may be disputed by requesting and setting a benefit review conference (BRC) under Rule 141.1 or by requesting the appointment of a DD, if one has not been appointed. It is not disputed that a DD had been appointed in this case prior to Dr. H's examination and certification, nor is it disputed that no Request to Schedule, Reschedule, or Cancel a [BRC] (DWC-45) disputing Dr. H's certification was filed.

Although the hearing officer's decision contains no finding of fact or stipulation of the parties that Dr. H's certification of MMI and assignment of IR is the first valid certification and assignment in the case, this fact is not disputed by either party.

In Appeals Panel Decision (APD) 041985-s, decided September 28, 2004, the Appeals Panel noted that the preamble to Rule 130.12 stated that 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 also* APD 121814, decided December 10, 2012.

Dr. H performed an examination of the claimant on July 2, 2014. The doctor's DWC-69 and accompanying narrative are dated July 3, 2014. In her decision, the hearing officer notes that ". . . there is no verifiable means attesting to when the [c]laimant received a copy of [Dr. H's] certification." In support of her finding that Dr. H's certification was provided to the claimant by verifiable means on August 8, 2014, the hearing officer relies on Dispute Resolution Information System (DRIS) note No. 31 of that date which states, in part:

> "[Injured Employee (IE)] stated his attorney and workers' compensation doctor is disputing the RME report and sending him to another doctor for an evaluation. Reviewed DRIS notes and TXCOMP. Informed IE that there is no DWC-45 on file at this time. [Provided IE a DWC-45 for attorney to complete]. . . ."

While a review of the record reveals conflicting evidence concerning the date the claimant may have received a copy of Dr. H's certification, the hearing officer relied upon DRIS note No. 31 to find that the claimant was provided written notice of Dr. H's certification by verifiable means on August 8, 2014. We disagree. The DRIS note, which indicates only that the claimant's attorney and doctor are disputing Dr. H's report, does not constitute reasonable confirmation of delivery of written notice to the claimant on that date. Therefore, we reverse the hearing officer's finality determination and remand the issue of finality to the hearing officer to make findings of fact and conclusions of law consistent with the evidence in this case.

The hearing officer determined that the claimant reached MMI on April 4, 2014, with a 0% IR per Dr. H's certification of MMI and assignment of IR dated July 3, 2014. Because we have remanded the issue of finality to the hearing officer, we also reverse the hearing officer's determination that the claimant reached MMI on April 4, 2014, with a 0% IR, and we remand the issues of MMI and IR to the hearing officer for further action consistent with this decision.

We note that although Dr. H's certification and narrative are dated July 3, 2014, the hearing officer incorrectly lists the date of such certification as July 2, 2014, in both Conclusion of Law No. 5 and the Decision.

DISABILITY

We note that Conclusion of Law No. 8 contains an error in that it lists the end date of disability as September 14, 2014, rather than October 1, 2014, as listed in Issue No. 5 as revised by agreement of the parties and as determined by the hearing officer in her findings of fact and in her decision. Accordingly, we reform Conclusion of Law No. 8 to conform to the evidence, Finding of Fact No. 9 and the Decision as follows:

[The] [c]laimant had disability during the period at issue only beginning on May 29, 2014, and continuing through June 25, 2014, and beginning on July 17, 2014, and continuing through October 1, 2014.

SUMMARY

We reform the hearing officer's Conclusion of Law No. 8 to conform to the evidence, Finding of Fact No. 9 and the Decision as follows: [The] [c]laimant had disability during the period at issue only beginning on May 29, 2014, and continuing through June 25, 2014, and beginning on July 17, 2014, and continuing through October 1, 2014.

We affirm the hearing officer's determination that the compensable injury of (date of injury), does not extend to spondylosis cervical, cervical disc protrusions at C2-3, cervical disc protrusions at C5-6, C6-7, cervical spinal canal stenosis, lumbar disc protrusion L2-3, L3-4, L4-5 and L5-S1, lumbar spinal canal stenosis, Schmorl's node L2, or chronic L2 10% height loss.

We reverse the hearing officer's determination that the first certification of MMI and IR assigned by Dr. H became final under Section 408.123(e) and remand the issue of finality to the hearing officer for further action consistent with this decision.

We reverse the hearing officer's determination that the claimant reached MMI on April 4, 2014, and remand the issue of MMI to the hearing officer for further action consistent with this decision.

We reverse the hearing officer's determination that the claimant's IR is 0% and remand the issue of IR to the hearing officer for further action consistent with this decision.

REMAND INSTRUCTIONS

On remand, the hearing officer is to apply the correct legal standard to determine whether or not Dr. H's July 3, 2014, MMI/IR certification became final under Section 408.123 and Rule 130.12. The hearing officer is to make findings of fact, conclusions of law, and a decision regarding the issues of finality, MMI and IR that is consistent with this decision. The hearing officer is not to consider additional evidence on remand.

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 **ALDINE INDEPENDENT SCHOOL DISTRICT (a self-insured governmental entity)** and the name and address of its registered agent for service of process is

DR. WANDA BAMBERG, SUPERINTENDENT
14909 ALDINE WESTFIELD
HOUSTON, TEXAS 77032.

K. Eugene Kraft
Appeals Judge

CONCUR:

Carisa Space-Beam
Appeals Judge

Margaret L. Turner
Appeals Judge