

APPEAL NO. 152535  
FILED FEBRUARY 29, 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 (CCH) was held on September 21, 2015, with the record closing on November 17, 2015, in Houston, 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), extends to scotoma in the left eye and left retinal detachment; (2) the first certification of maximum medical improvement (MMI) and assigned impairment rating (IR) from (Dr. S) on January 30, 2014, became final under Section 408.123 and 28 TEX. ADMIN. CODE § 130.12 (Rule 130.12); (3) the appellant (claimant) reached MMI on January 30, 2014; and (4) the claimant has no permanent impairment as a result of the compensable injury.

The claimant appealed the hearing officer's finality, MMI, and IR determinations. The claimant contends that the January 30, 2014, MMI/IR certification from Dr. S, the treating doctor, was not a valid certification and therefore could not become final under Section 408.123 and Rule 130.12. The claimant also contends that he did not receive Dr. S's January 30, 2014, MMI/IR certification by verifiable means. The claimant further contends that he met all three of the finality exceptions contained in Section 408.123(f), and points out that the hearing officer failed to discuss any finality exceptions in the decision and order. The respondent (carrier) responded, urging affirmance of the hearing officer's determinations appealed by the claimant.

The hearing officer's determination that the compensable injury of (date of injury), extends to scotoma in the left eye and left retinal detachment has not been appealed and has become final pursuant to Section 410.169.

DECISION

Reversed and remanded.

It was undisputed that the claimant sustained a compensable injury on (date of injury). The parties stipulated that the carrier has issued a Notice of Disputed Issue(s) and Refusal to Pay Benefits (PLN-11) accepting a foreign body in the eyes, and that the Texas Department of Insurance, Division of Workers' Compensation (Division) appointed (Dr. J) as designated doctor for purposes of MMI, IR, and extent of injury. The claimant testified that hot oil bounced off an oil filter into his eyes while he was changing the oil on a vehicle.

## FINALITY

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 MMI/IR certification must be disputed within 90 days of delivery of written notice through verifiable means and that the notice must contain a copy of a valid Report of Medical Evaluation (DWC-69), as described in Rule 130.12(c). Rule 130.12(c) provides, in part, that a certification of MMI and/or IR assigned as described in subsection (a) must be on a DWC-69. The certification on the DWC-69 is valid if: (1) there is an MMI date that is not prospective; (2) there is an impairment determination of either no impairment or a percentage IR assigned; and (3) there is the signature of the certifying doctor who is authorized by the Division under Rule 130.1(a) to make the assigned impairment determination.

The hearing officer found in Finding of Fact No. 4 that "[Dr. S's] certification of MMI and determination of no permanent impairment as a result of the compensable injury was valid for purposes of Rule 130.12(c)." Dr. S's January 30, 2014, DWC-69 does not contain a prospective date of MMI, is signed by Dr. S, and shows Dr. S certified the claimant does not have any permanent impairment as a result of the compensable injury. Dr. S's January 30, 2014, MMI/IR certification meets the requirements of Rule 130.12(c) and is a valid certification. Accordingly, Finding of Fact No. 4 is sufficiently supported by the evidence.

The hearing officer also found in Finding of Fact No. 5 that "[Dr. S's] first valid certification of MMI and assignment of no impairment was provided to [the] [c]laimant by verifiable means." However, the hearing officer failed to find a specific date on which the claimant received written notice of Dr. S's first valid MMI/IR certification through verifiable means. Without a date specific, the hearing officer cannot determine whether a timely dispute was filed. Accordingly, we reverse the hearing officer's determination that the first MMI/IR certification from Dr. S on January 30, 2014, became final under Section 408.123 and Rule 130.12, and we remand the issue of finality of Dr. S's January 30, 2014, MMI/IR certification to the hearing officer to determine the date on which the claimant received Dr. S's first valid MMI/IR certification through verifiable means. See Appeals Panel Decision (APD) 121363, decided August 31, 2012.

Section 408.123(f) provides that 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) 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.

At the CCH and on appeal the claimant specifically argued that he met all three exceptions to finality found in Section 408.123(f). We note Dr. S stated in her narrative report dated January 30, 2014, that no lab or x-ray tests were performed, and that she did not use any edition of the Guides to the Evaluation of Permanent Impairment in making her MMI/IR determination. We further note the medical records in evidence established the claimant was first diagnosed with retinal detachment in the left eye on April 28, 2014.

The hearing officer failed to discuss or make any findings of fact, conclusions of law, or a decision as to whether there was compelling medical evidence to establish any of the three exceptions to finality found in Section 408.123(f). Because the hearing officer failed to address any of the finality exceptions, which were properly before her to decide, we remand this case to the hearing officer to determine if there is compelling medical evidence to establish any of the three finality exceptions found in Section 408.123(f).

### **MMI/IR**

Because we have reversed and remanded the issue of whether Dr. S's January 30, 2014, MMI/IR certification became final under Section 408.123 and Rule 130.12, we also reverse the hearing officer's determinations that the claimant reached MMI on January 30, 2014, and that the claimant has no permanent impairment as a result of the compensable injury, and we remand the issues of MMI and IR to the hearing officer for further action consistent with this decision.

### **SUMMARY**

We reverse the hearing officer's determination that the first certification of MMI and assigned IR from Dr. S on January 30, 2014, became final under Section 408.123 and Rule 130.12, and we remand the issue of finality of Dr. S's January 30, 2014, MMI/IR certification to the hearing officer for further action consistent with this decision.

We reverse the hearing officer's determination that the claimant reached MMI on January 30, 2014, and we 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 has no permanent impairment as a result of the compensable injury, and we 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 make a finding of fact stating the date on which the claimant received Dr. S's January 30, 2014, MMI/IR certification by verifiable means, and determine whether the claimant timely disputed Dr. S's January 30, 2014, MMI/IR certification. If the hearing officer determines that the claimant did not timely dispute Dr. S's January 30, 2014, MMI/IR certification, the hearing officer is then to determine whether there is compelling medical evidence of any of the finality exceptions found in Section 408.123(f). The hearing officer is then to make a determination whether the first valid certification of MMI and assigned IR from Dr. S on January 30, 2014, became final under Section 408.123 and Rule 130.12. Finally, the hearing officer is to determine the claimant's MMI and IR.

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 **LIBERTY INSURANCE CORPORATION** and the name and address of its registered agent for service of process is

**CORPORATION SERVICES COMPANY  
211 EAST 7TH STREET, SUITE 620  
AUSTIN, TEXAS 78701-3218.**

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Carisa Space-Beam  
Appeals Judge

CONCUR:

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K. Eugene Kraft  
Appeals Judge

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Margaret L. Turner  
Appeals Judge