

APPEAL NO. 160055
FILED MARCH 11, 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 November 30, 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), does not extend to a low back sprain/strain and a left hip sprain/strain; (2) the appellant (claimant) has disability resulting from the compensable injury from September 20, 2014, through the date of the CCH; (3) the first certification of maximum medical improvement (MMI) and assigned impairment rating (IR) from (Dr. N) on October 29, 2014, became final under Section 408.123 and 28 TEX. ADMIN. CODE § 130.12 (Rule 130.12); (4) the claimant reached MMI on June 9, 2014; and (5) the claimant's IR is eight percent. The claimant appealed, disputing the hearing officer's determination that the first certification of MMI and IR from Dr. N on October 29, 2014, became final under Section 408.123 and Rule 130.12, as well as the hearing officer's determinations of MMI and IR. The claimant additionally appealed the hearing officer's determination of the extent of the compensable injury. The respondent (self-insured) responded, urging affirmance of the disputed determinations.

The hearing officer's determination that the claimant had disability resulting from the compensable injury from September 20, 2014, through the date of the CCH was not appealed and has become final pursuant to Section 410.169.

DECISION

Affirmed in part and reversed and remanded in part.

The parties stipulated that the claimant sustained a compensable injury on (date of injury), that consisted of a right knee sprain and a horizontal tear of the posterior horn of the medial meniscus. The evidence reflects the claimant slipped while walking towards her office. In evidence are operative reports dated April 29, 2014; March 13, 2015; and November 13, 2015; which reflect the claimant had three operations to her right knee all of which included a partial medial meniscectomies.

EXTENT OF INJURY

The hearing officer's determination that the compensable injury of (date of injury), does not extend to a low back sprain/strain and a left hip sprain/strain is supported by sufficient evidence and is affirmed.

FINALITY

It was undisputed that the designated doctor, Dr. N provided the first certification of MMI and IR regarding the claimant's compensable injury of (date of injury). Dr. N examined the claimant on October 29, 2014, and he certified that the claimant reached MMI on June 9, 2014, with an eight percent IR due to loss of range of motion of the right knee.

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. 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. 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]; (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.

The hearing officer made a finding that the claimant did not dispute the first valid certification by Dr. N within 90 days after the date the rating was provided to her by verifiable means. However, the hearing officer failed to make a specific finding about the date the DWC-69 was delivered to the claimant by verifiable means.

In her discussion of the evidence the hearing officer noted that the claimant initially filed a request for a benefit review conference (BRC) on January 20, 2015, but used an incorrect form. The hearing officer further noted that the claimant filed a corrected Request to Schedule, Reschedule, or Cancel a [BRC] (DWC-45) disputing Dr. N's certification of MMI and assigned IR, which was approved by the Texas Department of Insurance, Division of Workers' Compensation (Division) on March 26, 2015, referencing a Dispute Resolution Information System note which she admitted as a hearing officer exhibit. However, we note that there is evidence in the record that indicates the DWC-45 was faxed to and received by the Division on March 20, 2015. The hearing officer did not discuss the March 20, 2015, date in her discussion but rather

concluded the claimant did not timely dispute Dr. N's certification of MMI/IR based on the date the Division "approved" the request. The hearing officer erred when she used the date the Division "approved" the request for a BRC disputing Dr. N's certification rather than the date the dispute was filed. See Appeals Panel Decision (APD) 042046, decided October 1, 2004, and APD 120857-s, decided July 6, 2012.

We reverse the hearing officer's determination that the first certification of MMI and assigned IR from Dr. N on October 29, 2014, became final under Section 408.123 and Rule 130.12 and remand that issue to the hearing officer for further action consistent with this decision.

MMI/IR

The issue of whether the first certification of MMI and assigned IR from Dr. N on October 29, 2014, became final under Section 408.123 and Rule 130.12 has been reversed and remanded to the hearing officer for reasons described above. Accordingly, we reverse the hearing officer's determinations that the claimant reached MMI on June 9, 2014, and that the claimant's IR is eight percent and remand the issues of MMI and IR to the hearing officer for further action consistent with this decision.

REMAND INSTRUCTIONS

On remand the hearing officer should make a specific finding regarding the date the first certification of MMI and assigned IR from Dr. N on October 29, 2014, was delivered to the claimant by verifiable means. Additionally, the hearing officer should make a finding on the specific date the claimant disputed the October 29, 2014, certification of MMI and assigned IR from Dr. N. The hearing officer is not to use the date the Division approved the dispute as the actual date of the dispute. The hearing officer should then make a determination of the finality of the first certification of MMI and assigned IR from Dr. N on October 29, 2014. The hearing officer should then make a determination of MMI and IR.

SUMMARY

We affirm the hearing officer's determination that the compensable injury of (date of injury), does not extend to a low back sprain/strain and a left hip sprain/strain.

We reverse the hearing officer's determination that the first certification of MMI and assigned IR from Dr. N on October 29, 2014, became final under Section 408.123 and Rule 130.12 and remand that issue to the hearing officer.

We reverse the hearing officer's determination that the claimant reached MMI on June 9, 2014, and remand the issue of MMI to the hearing officer.

We reverse the hearing officer's determination that the claimant's IR is eight percent and remand the issue of IR to the hearing officer.

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 **STATE OFFICE OF RISK MANAGEMENT (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:

**STEPHEN S. VOLLBRECHT, EXECUTIVE DIRECTOR
STATE OFFICE OF RISK MANAGEMENT
300 W. 15TH STREET
WILLIAM P. CLEMENTS, JR. STATE OFFICE BUILDING, 6TH FLOOR
AUSTIN, TEXAS 78701.**

For service by mail the address is:

**STEPHEN S. VOLLBRECHT, EXECUTIVE DIRECTOR
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P.O. BOX 13777
AUSTIN, TEXAS 78711-3777.**

Margaret L. Turner
Appeals Judge

CONCUR:

K. Eugene Kraft
Appeals Judge

Carisa Space-Beam
Appeals Judge