APPEAL NO. 160262
FILED APRIL 7, 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 January 13, 2016, in Houston, Texas, with (hearing officer) presiding as hearing officer. The hearing officer resolved the disputed issues by deciding that: (1) the certification of maximum medical improvement (MMI) and assigned impairment rating (IR) from (Dr. C) dated January 22, 2009, did not become final pursuant to Section 408.123 and 28 TEX. ADMIN. CODE § 130.12 (Rule 130.12); (2) the appellant (claimant) reached MMI on October 3, 1994; (3) the claimant's IR is 10%; and (4) the first certification of MMI and assigned IR from (Dr. T) dated April 19, 1993, did not become final under Rule 130.12(h).

The claimant appealed, disputing the hearing officer's determination of MMI and IR, arguing the preponderance of the evidence is contrary to the hearing officer's findings and that the correct IR is 56%. The claimant additionally disputes the hearing officer's finding that on April 19, 1993, Dr. T certified the claimant reached MMI on April 19, 1993, with a 0% IR and was the first doctor to certify MMI and assign an IR. The respondent (carrier) responded, urging affirmance of the hearing officer's determinations.

DECISION

Reversed and remanded.

The claimant sustained an injury on (date of injury), when he was involved in a motor vehicle collision while in the course and scope of his employment. Following a course of treatment, the claimant was examined on April 19, 1993 by Dr. T who certified that the claimant reached MMI on April 19, 1993, and assigned an IR of 0% pursuant to the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association (AMA Guides third edition).

FINALITY

At issue before the hearing officer was whether the first certification of MMI and assigned IR from Dr. C dated January 22, 2009, became final under Section 408.123 and Rule 130.12. Although the hearing officer, in her decision, determined the certification and assigned IR from Dr. C dated January 22, 2009, did not become final under Section 408.123 and Rule 130.12, she failed to make any corresponding finding

of fact regarding the certification of Dr. C. We note further that in her Conclusion of Law No. 3, the hearing officer mistakenly refers to "[t]he certification of MMI and assigned IR from [Dr. C] dated January 2, 2009 . . ." when, in fact, such certification of MMI and assignment of IR is dated January 22, 2009.

The hearing officer noted in the "Statement of the Case" that at the carrier's request and because it was actually litigated, she added the issue of whether the first certification of MMI and assigned IR from Dr. T dated April 19, 1993, became final. The hearing officer determined in her second Conclusion of Law No. 4 that the first certification of MMI and assigned IR from Dr. T dated April 19, 1993, did not become final under Rule 130.12(h).[1] In her decision the hearing officer mistakenly references Rule 130.102(h) when deciding the first certification of MMI and assigned IR from Dr. T dated April 19, 1993, did not become final.

Rule 130.5(e) which was effective January 25, 1991, provided:

The first [IR] assigned to an employee is considered final if the rating is not disputed within 90 days after the rating is assigned.

The rule as initially written did not contain any exceptions. *See* Appeals Panel Decision (APD) 92670, decided February 1, 1993. The Appeals Panel noted in APD 93489, decided July 29, 1993, that the application of Rule 130.5(e) is not absolute and opined that compelling medical evidence of a new, previously undiagnosed medical condition or improper or inadequate treatment of an injury could render an initial certification of MMI invalid. In APD 941748, decided February 13, 1995, the Appeals Panel analyzed various cases and summarized that the common thread in APD 93501, decided August 2, 1993, APD 931115, decided January 20, 1994, and APD 941069, decided September 20, 1994, is that the element of the compensable injury that was not included in the initial IR was diagnosed or arose after the expiration of the 90-day period. The case went on to explain that therefore, the claimant was unaware of its existence, and, more significantly, the attendant impairment associated with that non-rated portion of the compensable injury during the relevant period. Accordingly, the claimant could not have disputed the rating on the basis of its failure to include a rating for all of the permanent impairment related to the compensable injury within 90 days. In *Rodriguez v. Service Lloyds Insurance Company*, 997 S.W.2d 248 (Tex. 1999), the court held that the 90-day period for disputing an initial IR that was contained in Rule 130.5(e) had no exceptions and that the Texas Department of Insurance, Division of Workers' Compensation's (Division) Appeals Panel could not create ad hoc exceptions to that rule. In *Fulton v. Associated Indemnity Corporation*, 46 S.W.3d 364 (Tex. App.-Austin 2001, pet. denied), the court held that Rule 130.5(e), which provided that the first IR assigned to an employee is considered final if the rating is not disputed within 90

[1] The hearing officer misnumbered her Conclusions of Law listing two No. 4s.

days after the rating is assigned, was invalid because it impermissibly shortened the statutory time period allotted to an injured worker to achieve MMI. Exceptions to finality under the 90-day rule were subsequently put into Rule 130.5(e), effective March 13, 2000, which was repealed effective January 2, 2002, and then codified into the Labor Code, effective June 18, 2003.[2]

The hearing officer in the instant case based her determination on finality on a Rule provision which was not in effect at the time the certification of MMI and assigned IR from Dr. T was provided. Additionally, the hearing officer failed to make findings of fact regarding the finality issue as it applied to Dr. C. Accordingly, we reverse the hearing officer's determinations of finality regarding the certifications of MMI and assigned IR from both Dr. C and Dr. T and remand the finality issues to the hearing officer for further action consistent with this decision.

MMI AND IR

Because we have reversed and remanded the issues of finality regarding the certifications of MMI and assigned IR from both Dr. C and Dr. T, we likewise reverse and remand the issues of MMI and IR 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. T dated April 19, 1993, did not become final under Rule 130.12(h) and remand this issue to the hearing officer.

We reverse the hearing officer's determination that the first certification of MMI and assigned IR from Dr. C dated January 22, 2009, did not become final under Section 408.123 and Rule 130.12 and remand this issue to the hearing officer.

We reverse the hearing officer's determination that the claimant reached MMI on October 3, 1994, and remand this issue to the hearing officer.

We reverse the hearing officer's determination that the claimant's IR is 10% and remand this issue to the hearing officer.

REMAND INSTRUCTIONS

On remand the hearing officer is to apply the applicable law to the issues of finality of the certifications of MMI and assigned IR of both Dr. C and Dr. T. Additionally the hearing officer is to make findings of fact and conclusions of law to

[2] Section 408.123 effective June 18, 2003, and amended effective September 1, 2005.

support her decision on the issues of finality of the certifications and assigned IR from both Dr. C and Dr. T.

The hearing officer is to then make findings of fact and conclusions of law and a determination of MMI and IR supported by the evidence. No new evidentiary hearing on remand is necessary.

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* Appeals Panel Decision 060721, decided June 12, 2006

The true corporate name of the insurance carrier is **CNA FINANCIAL CORPORATION** and the name and address of its registered agent for service of process is

CT CORPORATION SYSTEMS
1999 BRYAN STREET, SUITE 900
DALLAS, TEXAS 75201.

K. Eugene Kraft
Appeals Judge

CONCUR:

Carisa Space-Beam
Appeals Judge

Margaret L. Turner
Appeals Judge