APPEAL NO. 160332
FILED APRIL 25, 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 22, 2015, with the record closing on January 25, 2016, in Fort Worth, Texas, with (hearing officer) presiding as hearing officer. The hearing officer resolved the disputed issues by deciding that: (1) the first certification of maximum medical improvement (MMI) and assigned impairment rating (IR) from (Dr. S) on June 23, 2014, did not become final under Section 408.123 and 28 TEX. ADMIN. CODE § 130.12 (Rule 130.12); (2) the appellant (claimant) reached MMI on June 23, 2014; (3) the claimant's IR is 10%; and (4) the claimant did not have disability resulting from the (date of injury), compensable injury beginning on June 24, 2014, and continuing through the September 22, 2015, CCH.

The hearing officer noted in the Discussion portion of the decision that the claimant died from an unrelated illness prior to attending the designated doctor examination scheduled subsequent to the September 22, 2015, CCH. The claimant's attorney appealed the hearing officer's MMI, IR, and disability determinations, contending those determinations are so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust. Although the claimant's attorney did not appeal the hearing officer's finality determination, she did specifically appeal the hearing officer's Finding of Fact No. 4 that Dr. S's June 23, 2014, MMI/IR certification was valid for the purposes of Rule 130.12(c), contending that finding is so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust. The respondent (carrier) responded, urging affirmance of the appealed determinations and finding of fact.

The hearing officer's determination that the first MMI/IR certification from Dr. S on June 23, 2014, did not become final under Section 408.123 and Rule 130.12 was not appealed by the parties and has become final pursuant to Section 410.169.

DECISION

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

The parties stipulated that the claimant sustained a compensable injury on (date of injury), that includes a left shoulder rotator cuff strain, and left shoulder sprain/strain, and that the date of statutory MMI is September 5, 2015. The claimant testified he was injured when a large tractor tire he tossed into the bed of a pickup truck bounced back

and struck him. The claimant testified he attempted to block the tire with his right arm and break his fall with his left arm but fell onto his left arm.

DISABILITY

The hearing officer's determination that the claimant did not have disability resulting from the (date of injury), compensable injury, beginning on June 24, 2014, and continuing through the September 22, 2015, is supported by sufficient evidence and is affirmed.

VALIDITY OF DR. S's JUNE 23, 2014, MMI/IR CERTIFICATION

As noted above the hearing officer's determination that the first MMI/IR certification from Dr. S on June 23, 2014, did not become final under Section 408.123 and Rule 130.12 was not appealed and has become final pursuant to Section 410.169. However, the claimant's attorney specifically appealed Finding of Fact No. 4, in which the hearing officer found that Dr. S's June 23, 2014, MMI/IR certification was valid for the purposes of Rule 130.12(c).

The Appeals Panel has held that "initially, a hearing officer should determine whether there is a first valid certification of MMI/IR before determining whether that first valid certification of MMI/IR has or has not become final." *See generally* Appeals Panel Decision (APD) 061569-s, decided October 2, 2006. A finality determination is contingent on there being a first "valid" certification of MMI and first "valid" assignment of IR as provided in Section 408.123 and Rule 130.12. Rule 130.12(c) provides that the certification on the Report of Medical Evaluation (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 [Texas Department of Insurance, Division of Workers' Compensation (Division)] under Rule 130.1(a) to make the assigned impairment determination. *See also* APD 100636-s, decided July 16, 2010.

Dr. S's MMI/IR certification is the only certification in evidence. All copies of Dr. S's DWC-69s in evidence reveal that he did not provide a date of MMI on his DWC-69. As noted above, Rule 130.12(c) requires that for an MMI/IR certification on a DWC-69 to be valid there must be an MMI date that is not prospective. Because none of Dr. S's DWC-69s in evidence contain a date of MMI, his MMI/IR certification failed to meet the requirements of a valid certification. Accordingly, we reverse Finding of Fact No. 4 finding that Dr. S's June 23, 2014, MMI/IR certification was valid for purposes of Rule 130.12(c) as being legally incorrect, and we render a new Finding of Fact No. 4 that Dr. S's June 23, 2014, MMI/IR certification was not valid for purposes of Rule 130.12(c).

MMI/IR

Section 408.1225(c) provides that the report of the designated doctor has presumptive weight, and the Division shall base its determination of whether the employee has reached MMI on the report of the designated doctor unless the preponderance of the other medical evidence is to the contrary. Section 408.125(c) provides that the report of the designated doctor shall have presumptive weight, and the Division shall base the IR on that report unless the preponderance of the other medical evidence is to the contrary, and that, if the preponderance of the medical evidence contradicts the IR contained in the report of the designated doctor chosen by the Division, the Division shall adopt the IR of one of the other doctors. Rule 130.1(c)(3) provides that the assignment of an IR for the current compensable injury shall be based on the injured employee's condition as of the MMI date considering the medical record and the certifying examination.

The only MMI/IR certification in evidence is from Dr. S, and as previously noted there is no DWC-69 from Dr. S in evidence that provides the date that Dr. S placed the claimant at MMI. In his attached narrative report Dr. S did not specify a date of MMI; rather, Dr. S opined that "[the claimant] is, by definition, at clinical MMI." In evidence is an EES-60 Request for Statistical Information Regarding an Incomplete DWC Form-069 signed by Dr. S in July 2014. In this document the Division notified Dr. S that he had indicated in his DWC-69 that MMI was reached but failed to provide a specific date of MMI. Dr. S indicated on the form that the date of MMI was June 23, 2014. We note that the form also specifically states that the "completing of this information does not modify, amend, or perfect any deficiencies in the above-referenced report." The EES-60 cannot be used to determine the date of MMI. *See generally* Rule 130.12.

There is no valid MMI/IR certification in evidence that can be adopted. Accordingly, we reverse the hearing officer's determinations that the claimant reached MMI on June 23, 2014, with a 10% IR, and we remand the issues of MMI and IR to the hearing officer to determine the claimant's MMI and IR.

SUMMARY

We affirm the hearing officer's determination that the claimant did not have disability resulting from the (date of injury), compensable injury beginning on June 24, 2014, and continuing through the September 22, 2015, CCH.

We reverse Finding of Fact No. 4 finding that Dr. S's June 23, 2014, MMI/IR certification was valid for purposes of Rule 130.12(c), and we render a new Finding of Fact No. 4 that Dr. S's June 23, 2014, MMI/IR certification was not valid for purposes of Rule 130.12(c).

We reverse the hearing officer's determination that the claimant reached MMI on June 23, 2014, and we remand the issue of MMI to the hearing officer for further action.

We reverse the hearing officer's determination that the claimant's IR is 10%, and we remand the issue of IR to the hearing officer for further action.

REMAND INSTRUCTIONS

On remand the hearing officer is to make a determination of the claimant's MMI and IR. The hearing officer is to keep the record open for the parties to submit any necessary exhibits regarding the issues of 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 **TPCIGA for Freestone Insurance Co, an impaired carrier** and the name and address of its registered agent for service of process is

MARVIN KELLY
9120 BURNET ROAD
AUSTIN, TEXAS 78758.

Carisa Space-Beam
Appeals Judge

CONCUR:

K. Eugene Kraft
Appeals Judge

Margaret L. Turner
Appeals Judge