APPEAL NO. 161017
FILED JULY 15, 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 May 2, 2016, in Denton, Texas, with (hearing officer) presiding as hearing officer. The hearing officer resolved the disputed issues by deciding that: (1) the first valid certification of maximum medical improvement (MMI) and assigned impairment by (Dr. E) the respondent's (carrier) post-designated doctor required medical examiner on September 25, 2015, submitted on October 2, 2015, became final under Section 408.123 and 28 TEX. ADMIN. CODE § 130.12 (Rule 130.12); (2) the appellant (claimant) reached MMI on May 27, 2015; and (3) the claimant's impairment rating (IR) is 6%.

The claimant appealed, disputing the hearing officer's determinations of finality, MMI, and IR. The claimant contends that the hearing officer's decision is so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust. The carrier responded, urging affirmance of the disputed finality, MMI, and IR determinations.

DECISION

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), and the first valid certification of MMI and assigned IR was by Dr. E on September 25, 2015, submitted on October 2, 2015. The claimant testified that he was working on a belt loader when he lost his footing and fell hitting his right shoulder. In evidence was a decision and order from a prior CCH that determined the compensable injury extends to a right shoulder SLAP lesion with labral tear, partial rotator cuff tear, and impingement syndrome. Additionally, in evidence is the operative report from a right shoulder surgery performed on July 9, 2015.

FINALITY

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.

The hearing officer found that the preponderance of the evidence did not establish that an exception to finality of the certification of MMI and assigned IR of Dr. E provided under Section 408.123 and Rule 130.12 applies in this case and the impairment evaluation of Dr. E was conducted in accordance with The Guides to the Evaluation of Permanent Impairment, fourth edition (1st, 2nd, 3rd, or 4th printing, including corrections and changes as issued by the American Medical Association prior to 16, 2000) (AMA Guides).

Dr. E examined the claimant on September 25, 2015, and certified that the claimant reached MMI on May 27, 2015, with a 6% IR. Dr. E stated in his narrative report that he is addressing the claimed compensable injury of a right shoulder contusion and was not considering the SLAP lesion for which the claimant received surgery. Dr. E stated he did not use the ROM (ROM) measurements he obtained from his examination because the claimant is post-surgery. Dr. E stated he averaged the active ROM measurements taken in the month of May from the health care providers that examined the claimant during that time period. In his narrative report, Dr. E gave the following ROM figures for the right shoulder: flexion 133 degrees, abduction 112 degrees, external rotation 63 degrees, and internal rotation 68 degrees. However, in the worksheet attached to Dr. E's certification of MMI and IR, Dr. E reported that the ROM measurement for flexion of the right shoulder was 113 degrees. Further, the worksheet reflects that Dr. E assigned 4% UE (UE) impairment for loss of ROM of the right shoulder for abduction of 112 degrees. The AMA Guides provide, in part, on page 3/43 that you measure abduction and record the goniometer readings and round the figures to the nearest 10 degrees. Using Figure 41, match the measured abduction angle to its corresponding impairment. Figure 41 provides that abduction of both 110 degrees and 120 degrees results in 3% impairment. Dr. E incorrectly assigned 4% impairment for loss of ROM for abduction of the right shoulder.

Using Dr. E's measurements contained in the worksheet for the claimant's loss of ROM of the right shoulder for flexion, abduction, internal rotation, and external rotation would result in 9% UE impairment rather than 10% UE impairment assigned by Dr. E. The 9% UE impairment when converted to whole person using Table 3 on page 3/20 of

the AMA Guides would result in 5% whole person impairment rather than 6% whole person impairment as assigned by Dr. E.

As previously noted the worksheet and the narrative give different numbers for the ROM measurement of the flexion of the right shoulder. In the worksheet Dr. E assigned 5% UE impairment for flexion of the right shoulder based on rounding the 113 degrees stated measurement of flexion to 110 degrees. The narrative noted the flexion measurement "average" for the right shoulder was 133 degrees which when rounded to either 130 degrees or 140 degrees would result in 3% UE impairment.

We hold in this case there is compelling medical evidence of a significant error by Dr. E in calculating the claimant's IR. Accordingly, we reverse the hearing officer's determination that the first MMI/IR certification from Dr. E on September 25, 2015, submitted on October 2, 2015, became final under Section 408.123 and Rule 130.12, and we render a new decision that the first MMI/IR certification from Dr. E on September 25, 2015, submitted on October 2, 2015, did not become final under Section 408.123 and Rule 130.12.

MMI/IR

The hearing officer determined that the claimant reached MMI on May 27, 2015, according to the certification of Dr. E. in his narrative report, Dr. E specifically stated that he was not considering the SLAP lesion for which the claimant had surgery. As previously noted, a prior CCH that determined the compensable injury extends to a right shoulder SLAP lesion with labral tear, partial rotator cuff tear, and impingement syndrome. Dr. E did not consider the entire compensable injury when certifying the claimant reached MMI on May 27, 2015. *See* Appeals Panel Decision (APD) 151592, decided October 6, 2015. Accordingly, we reverse the hearing officer's decision that the claimant reached MMI on May 27, 2015.

As previously noted, the worksheet and the narrative give different numbers for the ROM measurement of the flexion of the right shoulder. Additionally, using Dr. E's measurements contained in the worksheet for the claimant's loss of ROM of the right shoulder for flexion, abduction, internal rotation, and external rotation would result in 9% UE impairment rather than 10% UE impairment assigned by Dr. E. The 9% UE impairment when converted to whole person using Table 3 on page 3/20 of the AMA Guides would result in 5% whole person impairment rather than 6% whole person impairment as assigned by Dr. E. Accordingly, we reverse the hearing officer's determination that the claimant's IR is 6%.

There are two other certifications in evidence that consider the entire compensable injury. (Dr. J), the Texas Department of Insurance, Division of Workers'

Compensation (Division)-appointed designated doctor, examined the claimant on July 30, 2015, and certified that the claimant has not reached MMI. (Dr G), the claimant's treating doctor, examined the claimant on January 8, 2016, and certified that the claimant reached MMI on December 16, 2015, with a 5% IR.

Since there is more than one certification of MMI/IR in evidence, we do not consider it appropriate to simply render a decision regarding the claimant's date of MMI and assigned IR. Consequently we must remand the issues of MMI and IR to the hearing officer for further consideration based on the evidence.

SUMMARY

We reverse the hearing officer's determination that the first certification of MMI and assigned IR by Dr. E on September 25, 2015, submitted on October 2, 2015, became final under Section 408.123 and Rule 130.12 and render a new decision that the first certification of MMI and assigned IR by Dr. E on September 25, 2015, submitted on October 2, 2015, did not become final under Section 408.123 and Rule 130.12.

We reverse the hearing officer's determination that the claimant reached MMI on May 27, 2015, and remand the MMI issue to the hearing officer for further consideration based on the evidence.

We reverse the hearing officer's determination that the claimant's IR is 6% and remand the IR issue to the hearing officer for further consideration based on the evidence.

REMAND INSTRUCTIONS

On remand, the hearing officer is to make findings of fact, conclusions of law, and a decision regarding the issues of MMI and IR that is consistent with Section 408.1225(c), Section 408.125(c) and this decision. The hearing officer is to make a determination of MMI and IR based on the evidence.

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 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 Teas 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 **NEW HAMPSHIRE INSURANCE COMPANY** and the name and address of its registered agent for service of process is

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

Margaret L. Turner
Appeals Judge

CONCUR:

K. Eugene Kraft
Appeals Judge

Carisa Space-Beam
Appeals Judge