APPEAL NO. 162510

FILED FEBRUARY 10, 2017

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). An expedited contested case hearing (CCH) was held on November 7, 2016, in (city), 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. A) on April 1, 2016, did not become final under Section 408.123 and 28 TEX. ADMIN. CODE § 130.12 (Rule 130.12); and (2) Dr. A was properly appointed as the designated doctor in accordance with Rule 127.1.

The appellant (carrier) appealed the hearing officer's determinations. The carrier contended that the evidence does not support the hearing officer's determinations. The appeal file does not contain a response from the respondent (claimant) to the carrier's appeal.

DECISION

Reversed and rendered.

The parties stipulated that the claimant sustained a compensable injury on (date of injury). The claimant testified he was injured while lifting and loading cement bags into a customer's car.

In a prior decision and order dated January 19, 2016, the presiding hearing officer stated the parties stipulated that the accepted compensable injury is a left shoulder strain, left trapezius strain, and a cervical strain. In that same decision and order the hearing officer determined that the compensable injury extends to a C3-4 disc herniation and C4 radiculopathy, that the claimant had not reached MMI as of November 18, 2015, as determined by (Dr. H), and because the claimant had not reached MMI he could not be assessed an IR at that time. Records of the Texas Department of Insurance, Division of Workers' Compensation (Division) show that decision was appealed, but that a written decision was not issued by the Appeals Panel and the hearing officer's decision and order became final on April 21, 2016. *See* Section 410.169.

Subsequently, Dr. A was appointed by the Division on the issues of MMI and IR. Dr. A examined the claimant for these purposes on March 23, 2016, and in a Report of

Medical Evaluation (DWC-69) dated April 1, 2016, Dr. A certified that the claimant reached MMI on May 22, 2015, with a two percent IR, using 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 May 16, 2000) (AMA Guides). Dr. A noted in his narrative report that the claimant stated he could not move his shoulder due to pain and that the claimant refused to perform external or internal rotation of his left shoulder due to claimed pain. Dr. A explained that he calculated four percent upper extremity impairment based on range of motion (ROM) measurements from his initial examination of the claimant on July 24, 2015, because ROM values were not available on the March 23, 2016, date of examination. Using Table 3 on page 3/20 of the AMA Guides, Dr. A converted four percent upper extremity impairment to two percent whole person impairment. Dr. A also assigned zero percent impairment for the claimant's cervical spine.

On September 7, 2016, the Office of Injured Employee Counsel (OIEC) sent the Division a request for a letter of clarification (LOC) to Dr. A because the claimant had had surgery to his neck on June 29, 2016. On September 23, 2016, the Division denied this request on the basis that it did not explain why clarification was necessary and appropriate to resolve a future or pending dispute, and because an LOC was inappropriate, a Presiding Officer's Directive would be submitted. On that same date the Division issued a Presiding Officer's Directive ordering a reexamination with Dr. A to determine whether the claimant's surgery impacted Dr. A's MMI/IR certification. On October 14, 2016, the Division ordered an MMI/IR examination with Dr. A to occur on November 1, 2016. However, the carrier filed an objection to that designated doctor examination and requested an expedited CCH and order staying that examination.

FINALITY OF DR. A'S APRIL 1, 2016, MMI/IR CERTIFICATION

In the case on appeal it must be determined whether the certified date of MMI of May 22, 2015, can be adopted given the prior decision holding the claimant had not reached MMI as of November 18, 2015. The hearing officer found that Dr. A's April 1, 2016, MMI/IR certification was the first subsequent determination of MMI and IR after the prior first certification was overturned by a final decision of the Division, and that the claimant did not dispute Dr. A's certification within 90 days of verified receipt. These findings were not appealed and have become final. The DWC-69 reflects that on his DWC-69 Dr. A certified on April 1, 2016, that the claimant reached MMI on May 22, 2015, with a two percent IR. Dr. A's April 1, 2016, is the first valid certification of MMI/IR because it does not contain a prospective date of MMI, it assigns an IR of two percent, and Dr. A, as the certifying doctor authorized by the Division, signed the DWC-69. As explained below, the fact that the certified date of MMI of May 22, 2015, is prior to the

previous decision holding the claimant had not reached MMI as of November 18, 2015, has no bearing upon whether or not the certification became final.

The hearing officer noted in the Discussion that the prior January 19, 2016, decision held the claimant had not reached MMI as of November 18, 2015, and that decision became final pursuant to Section 410.204(c) and Rule 143.5(b). The hearing officer noted that Dr. A based his two percent IR on the claimant's condition prior to November 18, 2015, which is a date that would be legally precluded from being the date of MMI because of the previous hearing officer's determination that the claimant had not reached MMI as of November 18, 2015. The hearing officer also stated that if the April 1, 2016, MMI/IR certification were determined to become final, the MMI date of May 22, 2015, would conflict with a hearing officer's prior determination that the claimant had not reached MMI as of November 18, 2015, and that the Division would be precluded from adopting the April 1, 2016, certification as a matter of law pursuant to Appeals Panel Decision (APD) 131674, decided September 11, 2013, APD 140982, decided July 10, 2014, and APD 131655, decided September 3, 2013.

However, there was no issue of finality in the APDs cited by the hearing officer. The issues in those decisions were limited to a determination of MMI and IR without consideration of finality under Section 408.123 and Rule 130.12. We find APD 100636-s to be more applicable to the issues and facts in this case.

In APD 100636-s, *supra*, decided September 16, 2010, the parties stipulated that the claimant's statutory date of MMI was June 5, 2007. (Dr. L) examined the claimant on June 20, 2007, and certified that the claimant reached MMI on June 20, 2007, with a five percent IR. It was undisputed that Dr. L's MMI/IR certification was the first certification of MMI and IR, and that the claimant did not dispute that certification within 90 days after receipt of written notice by verifiable means. The hearing officer determined that because the parties stipulated that the statutory date of MMI was June 5, 2007, Dr. L's MMI date of June 20, 2007, is after the statutory date of MMI and prospective, and found that his June 20, 2007, date of MMI was invalid as it included an MMI date after the statutory date of MMI. The Appeals Panel stated that Dr. L's DWC-69 was a valid certification because it reflected a date of MMI that was not prospective, it contained an IR of five percent, and it was signed by the certifying doctor authorized by the Division. The Appeals Panel held that, given that Dr. L's first MMI/IR certification was the first valid certification and that the claimant did not timely dispute that certification, it became final pursuant to Section 408.123 and Rule 130.12. The fact that the certified date of MMI was after the statutory date of MMI had no bearing upon whether or not the certification became final.

Given that Dr. A's April 1, 2016, MMI/IR certification is the first valid certification and that the claimant did not dispute that certification within 90 days after receipt of written notice of the certification by verifiable means, Dr. A's April 1, 2016, MMI/IR certification became final pursuant to Section 408.123 and Rule 130.12. The evidence was insufficient to establish any of the exceptions to finality found in Section 408.123(f). Accordingly, we reverse the hearing officer's determination that the certification of MMI and assigned IR from Dr. A on April 1, 2016, did not become final under Section 408.123 and Rule 130.12, and we render a new decision that the certification of MMI and assigned IR from Dr. A on April 1, 2016, did become final under Section 408.123 and Rule 130.12.

APPOINTMENT OF DR. A FOR NOVEMBER 1, 2016, EXAMINATION

As discussed above, the Division ordered a subsequent designated doctor appointment with Dr. A to consider the surgery the claimant underwent after Dr. A's prior MMI/IR examination, and the carrier filed an objection to that designated doctor examination and requested an expedited CCH and order staying that examination. The hearing officer determined that Dr. A was properly appointed as the designated doctor in accordance with Rule 127.1. However, we have reversed the hearing officer's determination that the certification of MMI and assigned IR from Dr. A on April 1, 2016, did not become final under Section 408.123 and Rule 130.12, and have rendered a new decision that the certification of MMI and assigned IR from Dr. A on April 1, 2016, did become final under Section 408.123 and Rule 130.12. Given that Dr. A's April 1, 2016, MMI/IR certification has become final under Section 408.123 and Rule 130.12, Dr. A's subsequent appointment as designated doctor for the November 1, 2016, examination was improper. Accordingly, we reverse the hearing officer's determination that Dr. A was properly appointed as the designated doctor in accordance with Rule 127.1, and we render a new decision that Dr. A was not properly appointed as the designated doctor in accordance with Rule 127.1 for the November 1, 2016, examination.

SUMMARY

We reverse the hearing officer's determination that the certification of MMI and assigned IR from Dr. A on April 1, 2016, did not become final under Section 408.123 and Rule 130.12, and we render a new decision that the certification of MMI and assigned IR from Dr. A on April 1, 2016, did become final under Section 408.123 and Rule 130.12.

We reverse the hearing officer's determination that Dr. A was properly appointed as the designated doctor in accordance with Rule 127.1, and we render a new decision that Dr. A was not properly appointed as the designated doctor in accordance with Rule 127.1 for the November 1, 2016, examination.

The true corporate name of the insurance carrier is **EMPLOYERS MUTUAL CASUALTY COMPANY** and the name and address of its registered agent for service of process is

DONALD WEISE
2505 NORTH PLANO ROAD, SUITE 2000
RICHARDSON, TEXAS 75082.

Carisa Space-Beam
Appeals Judge

CONCUR:

K. Eugene Kraft
Appeals Judge

Margaret L. Turner
Appeals Judge