

APPEAL NO. 100636-s  
FILED JULY 16, 2010

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 April 21, 2010. The disputed issues before the hearing officer were:

- (1) Did the compensable injury of \_\_\_\_\_, extend to a large central and right central with right subarticular caudal disc extrusion/fragment at L5-S1?
- (2) Did the first certification of maximum medical improvement (MMI) and assigned impairment rating (IR) from (Dr. L) on June 20, 2007, become final under Section 408.123 and 28 TEX. ADMIN. CODE § 130.12 (Rule 130.12)?

The hearing officer determined that the compensable injury of \_\_\_\_\_, does not extend to a large central and right central with right subarticular caudal disc extrusion/fragment at L5-S1, and the first certification of MMI/IR from Dr. L on June 20, 2007, did not become final under Section 408.123 and Rule 130.12. The appellant/cross-respondent (claimant) appealed the hearing officer's extent-of-injury determination, and the respondent/cross-appellant (self-insured) responded, urging affirmance of the extent-of-injury determination. The self-insured cross-appealed the hearing officer's finality determination, and the claimant responded, urging affirmance.

**DECISION**

Affirmed in part, reversed and rendered in part.

**EXTENT OF INJURY**

The hearing officer's determination that the compensable injury of \_\_\_\_\_, does not extend to a large central and right central with right subarticular caudal disc extrusion/fragment at L5-S1, is supported by sufficient evidence and is affirmed.

**FINALITY**

The parties stipulated that: (1) the claimant sustained a compensable injury on \_\_\_\_\_; (2) the claimant's statutory date of MMI is June 5, 2007; (3) Dr. L certified an MMI date of June 20, 2007, with an IR of 5%; and (4) the claimant received notice of Dr. L's certification on July 17, 2007. It is undisputed that Dr. L's certification of MMI and IR dated June 20, 2007, is the first certification of MMI and IR and the claimant did not dispute Dr. L's certification of MMI and IR within 90 days after receipt of written notice of the certification on July 17, 2007, by verifiable means.

Section 408.123(e) provides that except as otherwise provided by this section, an employee's first valid certification of MMI and the 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 and that the notice must contain a copy of a valid Report of Medical Evaluation (DWC-69), as described in Rule 130.12(c).

### Validity of Dr. L's first certification of MMI and IR

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, in part, that a certification of MMI and/or IR assigned as described in subsection (a) must be on a [DWC-69]. The certification on the [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.

In APD 072003, decided December 20, 2007, the sole disputed issue was the claimant's IR. In that case, the designated doctor examined the claimant on June 21, 2006, and signed the DWC-69 on June 21, 2006, certifying the claimant reached MMI on June 21, 2006, with a 10% IR, however, the MMI date was crossed out and a date of July 8, 2006, was marked in its place, along with his initials. The hearing officer determined that the claimant's IR was 10%, however, the Appeals Panel reversed the IR determination because the IR assigned by the designated doctor was based on a prospective date of MMI. The Appeals Panel stated that the designated doctor's certification of MMI/IR could not be adopted because the designated doctor provided a prospective date of MMI of July 8, 2006, on his DWC-69 dated June 21, 2006. (See Rule 130.1(b)(4)(C)(i)), which provides that the date of MMI may not be prospective or conditional). (See *also* APD 061569-s, *supra*, in which the Appeals Panel discusses what constitutes a valid certification pursuant to Rule 130.12(c)).

In this case, in evidence is a DWC-69 with a certification date of June 20, 2007, that reflects that Dr. L examined the claimant on June 20, 2007, and he certified that the claimant reached MMI on that same date with a 5% IR. In the Discussion of the decision, the hearing officer states that "[s]ince the parties stipulated that [c]laimant's statutory date of MMI was June 5, 2007, [Dr. L's] certification of an MMI date of June 20, 2007, is after the statutory date of MMI and prospective." The hearing officer found that Dr. L's certification of an MMI date of June 20, 2007, and IR of 5% was invalid as it included an MMI date after the statutory date of MMI (i.e. June 5, 2007).

A date of MMI becomes prospective if it is projected to occur at some time after the certification of MMI is made. The key consideration is that the date of MMI was not after the date of certification, that is, signature of the certifying doctor, on the DWC-69. Pursuant to Rule 130.12(c)(1), a certification of MMI is invalid if it is prospective, however, in this case, the date of MMI was not prospective. The DWC-69 in evidence reflects that on his DWC-69, Dr. L certified on June 20, 2009, that the claimant reached MMI on that same date. Although the MMI date certified by Dr. L is after the date of MMI stipulated by the parties, the MMI date of June 20, 2007, is not prospective because it is not projected to occur at some time after the certification of MMI was made by Dr. L on June 20, 2007. The DWC-69 in evidence is the first valid certification of MMI/IR because: (1) the DWC-69 reflects that the MMI date is June 20, 2007, which is not a prospective MMI date; (2) an IR of 5% was assigned; and (3) Dr. L, as the certifying doctor authorized by the Division, signed the DWC-69.

#### Finality of Dr. L's first certification of MMI and assigned IR

Given that Dr. L's first certification of MMI/IR is the first valid certification, and that the claimant did not dispute Dr. L's certification of MMI/IR within 90 days after receipt of written notice of the certification by verifiable means, Dr. L's first certification of MMI/IR on June 20, 2007, became final pursuant to Section 408.123 and Rule 130.12. Review of the record indicates that the parties did not litigate an exception to finality under Section 408.123, as described in Section 408.123(f). Accordingly, we reverse the hearing officer's determination that the first certification of MMI and assigned IR by Dr. L on June 20, 2007, did not become final under Section 408.123 and Rule 130.12 and we render a new decision that the first certification of MMI and assigned IR by Dr. L on June 20, 2007, became final under Section 408.123 and Rule 130.12.

#### **SUMMARY**

We affirm the hearing officer's determination that the compensable injury of \_\_\_\_\_, does not extend to a large central and right central with right subarticular caudal disc extrusion/fragment at L5-S1.

We reverse the hearing officer's determination that the first certification of MMI and assigned IR by Dr. L on June 20, 2007, did not become final under Section 408.123 and Rule 130.12 and we render a new decision that the first certification of MMI and assigned IR by Dr. L on June 20, 2007, became final under Section 408.123 and Rule 130.12.

The true corporate name of the insurance carrier is **(a self-insured governmental entity)** and the name and address of its registered agent for service of process is

**EB  
(ADDRESS)  
(CITY), TEXAS (ZIP CODE).**

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Veronica L. Ruberto  
Appeals Judge

CONCUR:

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Thomas A. Knapp  
Appeals Judge

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Margaret L. Turner  
Appeals Judge