

APPEAL NO. 111006-s
FILED SEPTEMBER 15, 2011

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 June 8, 2011.

The hearing officer resolved the sole disputed issue by determining that the first certification of maximum medical improvement (MMI)/impairment rating (IR) from (Dr. B), the appellant's (claimant) treating doctor, on October 12, 2010, did not become final pursuant to Section 408.123.

The claimant appealed the hearing officer's finality determination, contending that the respondent (carrier) in this case had to request a benefit review conference (BRC) in order to dispute the first valid certification of MMI/IR from Dr. B. The claimant argued that although the carrier filed two Requests for a [BRC] (DWC-45) within the prescribed 90-day period, the carrier failed to comply with 28 TEX. ADMIN. CODE §§ 130.12(b)(1) and 141.1(d) (Rules 130.12(b)(1) and 141.1(d)). The claimant contends that the carrier did not timely dispute Dr. B's first valid certification of MMI/IR as required by the Act and Rules because it specifically requested on the DWC-45s that the Texas Department of Insurance, Division of Workers' Compensation (Division) not set a BRC. The carrier responded, urging affirmance because the language "do not schedule a BRC" was ancillary language on the DWC-45 which did not render the DWC-45 invalid for purposes of disputing the first certification of MMI/IR under Rule 141.1.

DECISION

Reversed and rendered.

The parties stipulated that the claimant sustained a compensable injury on (date of injury); the carrier filed a Request for Designated Doctor (DWC-32) on September 17, 2010; and Dr. B issued the first valid certification of MMI/IR on October 12, 2010, which was delivered to the parties by verifiable means. Further, the parties stipulated that the October 18, 2010, and the November 8, 2010, DWC-45s were filed with the Division within the 90-day period in which to dispute the first valid certification of MMI/IR. It was undisputed by the parties that Dr. B's first valid certification of MMI/IR could not be disputed by requesting a designated doctor because a designated doctor had been appointed prior to October 12, 2010, the date of Dr. B's certification. No witnesses were called at the CCH.

The parties argue that this is a case of first impression and that the resolution of the finality issue is based on whether the DWC-45s, which state that the carrier does not want a BRC scheduled, were sufficient under the Act and Rules to dispute Dr. B's first valid certification of MMI/IR.

DISPUTE OF THE FIRST VALID CERTIFICATION OF MMI/IR UNDER RULE 141.1

In the Background Information section of his decision, the hearing officer stated:

Rule 141.1 provides that the first certification of MMI and IR may be disputed by filing a [DWC-45]. Rule 141.1 requires the disputing party to request a BRC by filing a [DWC-45] in a manner required by [the Division]. The [p]arties stipulated that, in this case, the [c]arrier timely filed two separate [DWC-45s]. However, the [c]laimant contends the [DWC-45s] were not valid because the [c]arrier wrote on the face of the [DWC-45] a request for [the Division] not to set a BRC. The [p]arties acknowledged that it is common practice by both [c]laimants and [c]arriers to request a BRC by filing a [DWC-45] and requesting [the Division] not to set a BRC. This was done because of the 2-BRC Rule, and as a means of complying with the 90-day rule to dispute the first certification. The DWC-45s filed by the [c]arrier in this case had this notation on the form. This common practice was sanctioned by [the Division], and establishes good cause for filing the DWC-45s with the ancillary language not to set for a BRC. The [c]arrier preserved the dispute of the first certification.

Evidence in this case reflects the [c]arrier contacted [the Division] several times to confirm they had timely and properly disputed the first certification. This was done on a form and in a manner prescribed by [the Division]. [The] [c]arrier timely filed two [DWC-45s], and [the Division] informed the [c]arrier that they had disputed the first certification. The ancillary language added to the [DWC-45s] did not render the [DWC-45] invalid for purposes of disputing the first certification of MMI and IR.

Within the prescribed 90-day period, the carrier's adjuster submitted to the Division two DWC-45s dated October 18, 2010, and November 8, 2010, respectively. Each DWC-45 contained language that the carrier was disputing Dr. B's first valid certification of MMI/IR. But each DWC-45 requested that the Division not schedule a BRC.

In evidence is a Denial of DWC045 for a [BRC] (CS-80) dated October 29, 2010, sent by the Division in response to the carrier's DWC-45 dated October 18, 2010. That CS-80 states that the DWC-45 is denied for the following reason:

You have already disputed the treating doctor's certification by requesting a designated doctor on a form 32. A form 45 is to request a [BRC] and should not be used for any other purpose. If you do not wish to schedule a BRC, please do not file a form 45.

Also, in evidence is a Dispute Resolution Information System (DRIS) note, sequence number 21 of 53, dated November 5, 2010, which indicates that the adjuster is advised that she may resubmit a detailed DWC-45, explaining that she is trying to dispute the first valid certification of MMI/IR within the 90-day time frame and that a DWC-32 had already been submitted prior to receiving Dr. B's certification.

As discussed above, the carrier resubmitted a DWC-45 dated November 8, 2010, which contained the language "do not schedule a BRC." In evidence is a DRIS note, sequence number 27 of 53, dated November 10, 2010, which states in part:

[Request] for the BRC was denied for the following reasons: No documentation of efforts to resolve dispute provided, Sec. IVJ [documentation of your efforts to resolve the issues] of DWC 45 did not incl. date opposing party was notified of dispute & insufficient description of the disputed issues and no benefit dispute issue was identified in Sec. III [issues to be mediated at the BRC].

Each of the carrier's DWC-45s, dated October 18, 2010, and November 8, 2010, were denied by the Division. In Finding of Fact No. 5, the hearing officer determined that each of these DWC-45s were incomplete.

Section 410.007, in part, requires the Division to determine the type of information that is most useful to parties to help resolve disputes regarding income benefits. Section 410.023, in part, requires the party requesting the BRC to provide documentation of efforts made to resolve the disputed issues before requesting the BRC. It also directs the commissioner to adopt guidelines by rule regarding the type of information necessary to satisfy this requirement. 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)(1), in part, provides that a first MMI/IR certification must be disputed within 90 days of delivery of written notice through verifiable means and that:

Only an insurance carrier, an injured employee, or an injured employee's attorney or employee representative . . . may dispute a first certification of MMI or assigned IR under [Rule] 141.1 (related to Requesting and Setting a [BRC]) or by requesting the appointment of a designated doctor, if one has not been appointed.

Rule 141.1, effective October 1, 2010, provides in part:

- (d) Request for [BRC]. A request for a [BRC] shall be made in the form and manner required by the [D]ivision. The request shall:
 - (1) identify and describe the disputed issue or issues;
 - (2) provide details and supporting documentation of efforts made by the requesting party to resolve the disputed issues, including but not limited to, copies of the notification provided in accordance with subsection (a) of this section, correspondence, e-mails, facsimiles [(fax)], records of telephone contacts, or summaries of meetings or telephone conversations . . . ;
 - (3) contain a signature by the requesting party attesting that reasonable efforts have been made to resolve the disputed issue(s) prior to requesting a [BRC], and that any pertinent information in their possession has been provided to the other parties . . . ; and
 - (4) be sent to the [D]ivision and opposing party or parties.
- (e) Complete Request. A request that meets the requirements of subsection (d) of this section is a complete request for a [BRC]. The [D]ivision will schedule a [BRC] if the request is complete and otherwise appropriate for a [BRC].
- (f) Incomplete Request. A request for a [BRC] that does not meet the requirements of subsection (d) of this section is an incomplete request and will be denied.
 - (1) A denied request for a [BRC] does not constitute a dispute proceeding, except as provided by subsection (g) of this section.
 - (2) The [D]ivision will notify the parties if a request is denied and state the reasons for the denial.
 - (3) Upon notice from the [D]ivision, the requesting party may submit a new request for a [BRC] that meets the requirements of this section.

- (g) Incomplete Request Denials. If a party disagrees with the [D]ivision's determination that the request was incomplete, or, if a party has good cause for failing to meet the requirements of subsection (d) of this section, the party may pursue an administrative appeal of the [D]ivision's determination in accordance with Chapter 142 of this title (relating to Dispute Resolution—[CCH]). The party may also request an expedited [CCH] in accordance with [Rule] 140.3 of this title (relating to Expedited Proceedings).

The preamble to Rule 141.1, in pertinent part, provides:

Comment: A commenter recommends that the Division modify [Rule] 141.1(f) of this title to provide that submitting an incomplete request for a BRC will be sufficient to stop the first certification of [MMI] and [IR] from becoming final under [Section] 408.123(e).

Agency Response: The Division disagrees. The Division has noted instances where parties will submit a [DWC-45] for the purposes of preventing a first certification of MMI or IR from becoming final under [Section] 408.123(e) and [Rule] 130.12 of this title (relating to Finality of the First Certification of [MMI] and/or [IR]), but specifically say on the form that they do not want to proceed with a BRC. The purpose of requesting a BRC is to resolve a dispute and a party submitting a BRC request should be prepared to move forward with the BRC at the time the request is made. The purpose of these rules is to provide a timely and efficient mechanism to parties who need to resolve disputes regarding certain aspects of a workers' compensation claim. Consequently, if a party wants to dispute the first certification of MMI or IR on a claim, then [Rule] 130.12 of this title requires a party to either request a BRC or request a designated doctor examination. After a complete request is submitted, approved, and a BRC scheduled, the party has established a dispute of the first certification of MMI and/or IR in accordance with [Section] 408.123(e), effective as of the date the request was filed. A party may obtain a CCH under [Rule] 141.1(g) of this title to determine that they had good cause for filing an incomplete request for a BRC and retain the original date of filing the request for a BRC. (35 TexReg 7430, 2010).

Therefore, the hearing officer erred in finding that: the carrier timely filed the DWC-45s in a manner prescribed by the Division; the ancillary language written on the DWC-45s (requesting that a BRC not be set) did not render the forms invalid for purposes of disputing the first certification of MMI/IR from Dr. B; and the carrier had

good cause for filing the two incomplete DWC-45s. The hearing officer's findings are legally incorrect because Rule 130.12 provides that parties may only dispute the first valid certification of MMI/IR under either Rule 141.1 or by requesting the appointment of a designated doctor if one has not been appointed. Importantly, it does not state that the parties may dispute the first valid certification of MMI/IR by submitting a DWC-45, because submitting a DWC-45 is only one element of, not synonymous with, establishing a dispute under Rule 141.1. The Division's preamble to Rule 141.1 states that only after a complete request is submitted, approved, and a BRC scheduled has a party established a dispute of the first valid certification of MMI and/or IR, effective the date the party filed the request, in accordance with Section 408.123(e). This statement corresponds with the plain language of Rule 141.1, which provides that the Division will set a BRC within either 20 or 40 days if a complete request is received. In this case, therefore, the carrier failed to establish a dispute of the first valid certification of MMI/IR, because its DWC-45 specifically requested that the Division not set a BRC. Such a request fails to establish a dispute under Rule 141.1, and therefore, does not comply with Rule 130.12.

We reverse the hearing officer's determination that the first certification of MMI/IR from Dr. B on October 12, 2010, did not become final as legal error and render a new decision that the first certification of MMI and assigned IR from Dr. B on October 12, 2010, did become final.

The true corporate name of the insurance carrier is **ARCH INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**CT CORPORATION SYSTEM
350 NORTH ST. PAUL STREET
DALLAS, TEXAS 75201.**

Cynthia A. Brown
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Margaret L. Turner
Appeals Judge