

APPEAL NO. 150457-s
FILED APRIL 16, 2015

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 December 11, 2014, in Fort Worth, Texas, with [hearing officer] Brown 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 January 16, 2014, did not become final under Section 408.123 and 28 TEX. ADMIN. CODE § 130.12 (Rule 130.12); and (2) the appellant's (claimant) IR is 6%, as of the MMI date of January 9, 2014.¹

The claimant appealed both of the hearing officer's determinations, contending that the hearing officer abused his discretion in making his findings of fact relating to his finality determination, and that the hearing officer did not give the designated doctor's MMI/IR certification presumptive weight. The carrier responded, urging affirmance of the hearing officer's determinations.

DECISION

Reversed and rendered.

The parties stipulated that the claimant sustained a compensable injury on [Date of Injury], that includes a right wrist volar² ganglion cyst excision and right interpositional arthroplasty with EPB tendon transfer. The claimant testified that she slipped and fell on the date of injury and injured her right wrist when she attempted to break her fall by catching herself with her right arm. In evidence is an operative report dated July 8, 2013, establishing that the claimant underwent an excision of volar wrist ganglion cyst and interpositional arthroplasty of the right wrist with EPB tendon transfer on that same date. We note that the parties did not stipulate to an MMI date; however, the Benefit Review Conference (BRC) report shows that the parties were not disputing that the date of MMI is January 9, 2014, as all doctors certified this date of MMI. All of the Reports of Medical Evaluation (DWC-69) in evidence list an MMI date of January 9, 2014.

ISSUE STATEMENT 1 CORRECTION

The BRC lists the following finality issue:

¹ We note that the decision and order does not reflect the entire zip code for the respondent's (carrier) registered agent for service of process.

² We note that the decision identifies this condition as "[v]olar" ganglion cyst. However, the medical records in evidence identify this condition as "volar" ganglion cyst.

Did the first certification of [MMI] and assigned [IR] from [Dr. S] on [January 16, 2014] become final under [Section 408.123] and Rule 130.12?

At the CCH the parties agreed to Issue Statement 1, the finality issue, as stated on the BRC report. However, the hearing officer's decision lists Issue Statement 1, the finality issue, as follows:

Did the first certification of [MMI] and assigned [IR] from [Dr. S] become final under [Section 408.123] and Rule 130.12?

Issue Statement 1 as listed in the decision and order is incorrect because it omits the date of the first MMI/IR certification assigned by Dr. S. We therefore reform the hearing officer's decision to state the following to reflect the actual issue as stated on the BRC report and agreed to by the parties at the CCH:

Did the first certification of [MMI] and assigned [IR] from [Dr. S] on [January 16, 2014] become final under [Section 408.123] and Rule 130.12?

STIPULATION CORRECTION

The parties stipulated at the CCH that on February 6, 2014, (Dr. N) certified that the claimant reached MMI on January 9, 2014, with an IR of 19%. However, the stipulation contained in the hearing officer's decision as Finding of Fact No.1.E. is the following:

1.E. On February 8, 2014, [Dr. N] certified that [the] [c]laimant reached MMI on January 9, 2014, with an IR of 19%.

The decision does not list the correct date of Dr. N's MMI/IR certification that was in the stipulation made by the parties at the CCH. Further, we note that in evidence is a DWC-69 from Dr. N dated February 6, 2014, certifying that the claimant reached MMI on January 9, 2014, with a 19% IR. Accordingly, we reform the hearing officer's decision by reforming Finding of Fact No. 1.E. to reflect the actual stipulation made by the parties to read as follows:

1.E. On February 6, 2014, [Dr. N] certified that the claimant reached MMI on January 9, 2014, with an IR of 19%.

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 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 also provides in part:

(f) An employee's first certification of [MMI] or assignment of an [IR] may be disputed after the period described by 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];

(B) a clearly mistaken diagnosis or a previously undiagnosed medical condition; or

(C) improper or inadequate treatment of the injury before the date of the certification or assignment that would render the certification or assignment invalid.

The hearing officer found that Dr. S's January 16, 2014, MMI/IR certification was the first valid certification for purposes of Rule 130.12(c), and that Dr. S's January 16, 2014, MMI/IR certification was provided to the claimant by verifiable means on January 24, 2014. The hearing officer's findings of fact are supported by sufficient evidence.

The hearing officer also found in Finding of Fact No. 5 that the claimant did not dispute Dr. S's January 16, 2014, MMI/IR certification "within 91 days" after the date the certification was provided to her by verifiable means. As noted above, 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. Section 408.123(e) does not provide that an employee or a carrier has 91 days to dispute a first valid MMI/IR certification; rather, that provision states that the first valid MMI/IR certification has to be disputed before the 91st day after the date

written notification of the MMI/IR certification is provided by verifiable means. Also noted above, 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. Neither the Act nor Rules provide that a party disputing the first valid MMI/IR certification has 91 days after the date the certification was provided to the party by verifiable means to dispute that certification.

There is sufficient evidence to support the hearing officer's finding that the claimant did not dispute Dr. S's January 16, 2014, MMI/IR certification within 91 days after the date the rating was provided to her by verifiable means. As noted above, Section 408.123 and Rule 130.12 provide that the first valid MMI/IR certification may become final if not disputed within 90 days after the date written notification of the MMI/IR certification is provided by verifiable means. Therefore, we reform Finding of Fact No. 5 as follows to conform to Section 408.123(e), Rule 130.12(b), and the evidence:

The claimant did not dispute [Dr. S's] January 16, 2014, MMI/IR certification within 90 days after the date the rating was provided to her by verifiable means.

The hearing officer determined that the first MMI/IR certification from Dr. S on January 16, 2014, did not become final under Section 408.123 and Rule 130.12 because "[t]here was compelling medical evidence of a significant error in applying the appropriate [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)] in calculating [the] [c]laimant's IR pursuant to [Section 408.123(f)(1)(B)] in that [Dr. S] failed to rate a medical condition that the parties have stipulated to be included in the compensable injury." We note that the hearing officer made an incorrect statutory reference in Finding of Fact No. 6; the correct citation is Section 408.123(f)(1)(A). We also note that although the claimant prevailed in her argument regarding finality at the CCH, the claimant specifically listed Finding of Fact No. 6, Conclusion of Law No. 3, and the decision that the first MMI/IR certification from Dr. S on January 16, 2014, did not become final under Section 408.123 and Rule 130.12 as being disputed in her appeal.

The hearing officer discussed Appeals Panel Decision (APD) 132594-s, decided January 3, 2014, in his decision. The hearing officer noted that the Appeals Panel held that a subsequent determination that a compensable injury extends to a disputed condition is not, by itself, an exception to finality. The hearing officer also noted that there was no extent-of-injury dispute in the instant case, and that because the parties stipulated that the compensable injury includes right wrist volar ganglion cyst excision

and right interpositional arthroplasty with EPB tendon transfer, “it was incumbent on the certifying doctor to rate separately each condition that the parties have accepted as part of the compensable injury.” The hearing officer stated that Dr. S’s failure to rate the conditions stipulated to by the parties constitutes compelling evidence of a significant error in applying the appropriate AMA Guides in calculating the claimant’s IR.

In APD 132594-s, *supra*, the issues before the hearing officer were extent of the compensable injury, finality of the first MMI/IR certification, MMI, IR, and disability. The hearing officer in that case determined that the first valid MMI/IR certification did not become final because the certifying doctor did not consider and rate the extent-of-injury determinations the hearing officer found in favor of the claimant. The Appeals Panel stated that while a subsequent resolution of the extent of the compensable injury may be an element of one of the three exceptions contained in Section 408.123(f), that resolution in and of itself is not an exception to finality. The Appeals Panel noted that “there is no provision in either Section 408.123 or Rule 130.12 that provides that the exclusion of a condition in an assignment of IR constitutes an exception for finality,” and declined to read any such interpretation in those provisions and declined to follow any prior cases that may have read such an interpretation. The Appeals Panel held that the hearing officer’s resolution of the extent-of-injury dispute in favor of the claimant by itself would not allow the claimant to dispute the first MMI/IR certification because the 90-day period to do so had expired.

In APD 132117, decided November 4, 2013, the issues before the hearing officer were finality of the first assigned IR and IR. We note that in APD 132117, as in the instant case, the extent of the claimant’s compensable injury was not at issue. The hearing officer in that case determined that the first assigned IR did not become final because there was compelling medical evidence of a significant error by the certifying doctor in calculating the claimant’s IR because the certifying doctor included a condition that was not determined to be a part of the compensable injury. The Appeals Panel noted, as it did in APD 132594-s, *supra*, that “[t]here is no provision in either Section 408.123 or Rule 130.12 that states that the mere inclusion of a condition in an assignment of IR constitutes an exception for finality.” The Appeals Panel declined to read that interpretation in those provisions and declined to follow any prior cases that may have read such an interpretation.

In the instant case, the hearing officer correctly stated that extent of the claimant’s compensable injury was not at issue. As noted above, the parties stipulated at the CCH that the claimant sustained a compensable injury on [Date of Injury], that includes a right wrist volar ganglion cyst excision and right interpositional arthroplasty with EPB tendon transfer. It was undisputed by the parties that the claimant underwent an excision of volar wrist ganglion cyst and interpositional arthroplasty of the right wrist

with EPB tendon transfer on July 8, 2013. The hearing officer found Dr. S's failure to rate a medical condition that the parties stipulated to be included in the compensable injury constitutes compelling medical evidence of a significant error in applying the appropriate AMA Guides in calculating the claimant's IR pursuant to Section 408.123(f)(1)(A). However, as we have stated in APD 132117, *supra*, and APD 132594-s, *supra*, neither Section 408.123 nor Rule 130.12 provide that the mere inclusion or the exclusion of a condition in an assignment of IR constitutes an exception for finality, and we decline to read any such interpretation in those provisions. We hold that under the facts of this case, Dr. S's failure to rate a medical condition to which the parties have stipulated at the CCH to be included in the compensable injury does not, by itself, constitute compelling medical evidence of a significant error in applying the appropriate AMA Guides under Section 408.123(f)(1)(A). Accordingly, the hearing officer's determination that the first MMI/IR certification from Dr. S on January 16, 2014, did not become final on this basis is legal error.

Although the hearing officer made no specific findings regarding the finality exceptions found in Section 408.123(f)(1)(B) or (C), it is clear from his discussion that the hearing officer was persuaded that the evidence did not establish those exceptions in this case.

As there is no compelling medical evidence in this case to establish an exception to finality as found in Section 408.123(f)(1), we reverse the hearing officer's determination that the first MMI/IR certification from Dr. S on January 16, 2014, did not become final under Section 408.123 and Rule 130.12, and we render a new decision that the first MMI/IR certification from Dr. S on January 16, 2014, did become final under Section 408.123 and Rule 130.12.

MMI/IR

We note that the parties did not stipulate as to the date the claimant reached MMI. However, as noted above the BRC report in evidence states that the parties were not disputing that the date of MMI is January 9, 2014, as all doctors certified the same MMI date, and all the DWC-69s in evidence certify a January 9, 2014, MMI date. Given that Dr. S's January 16, 2014, MMI/IR certification has become final under Section 408.123 and Rule 130.12, we reverse the hearing officer's determination that the claimant's IR is 6% as of the MMI date of January 9, 2014, per (Dr. K), the post-designated doctor required medical examination doctor, and we render a new decision that the claimant reached MMI on January 9, 2014, with a 0% IR per Dr. S.

SUMMARY

We reverse the hearing officer's determination that the first MMI/IR certification from Dr. S on January 16, 2014, did not become final under Section 408.123 and Rule 130.12, and we render a new decision that the first MMI/IR certification from Dr. S on January 16, 2014, did become final under Section 408.123 and Rule 130.12.

We reverse the hearing officer's determination that the claimant's IR is 6% as of the MMI date of January 9, 2014, and we render a new decision that the claimant reached MMI on January 9, 2014, with a 0% IR per Dr. S.

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

**CT CORPORATION SYSTEM
1999 BRYAN STREET, SUITE 900
DALLAS, TEXAS 75201-3136.**

Carisa Space-Beam
Appeals Judge

CONCUR:

Veronica L. Ruberto
Appeals Judge

Margaret L. Turner
Appeals Judge