APPEAL NO. 061227
FILED AUGUST 3, 2006

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 4, 2006. 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 the required medical examination (RME) doctor, Dr. K, on May 9, 2001, did not become final under Section 408.123(e); and (2) that the respondent (claimant) reached MMI on September 25, 2002, with a 19% IR per Dr. I, the designated doctor. The appellant (self-insured) appealed the hearing officer's MMI, IR, and finality determinations. The claimant responded, urging affirmance.

DECISION

Reversed and remanded in part and affirmed in part.

The parties stipulated that the claimant sustained a compensable injury on _____. The claimant testified that he tripped over a box and fell on his right hip. The nature of the compensable injury was not defined, however the self-insured stated at the CCH that it had accepted a low back and right hip injury. In evidence is a letter dated November 14, 2005, from the Texas Department of Insurance, Division of Workers' Compensation (Division) regarding a "Dispute Resolution Denial" which states "No Extent of Injury exists. The [self-insured] states they are/have not denied the right hip and lumbar spine." The claimant testified that his treating doctor, Dr. M, only treated his low back injury, and that he never received treatment to his right hip although he continually complained of right hip pain.

On May 9, 2001, the claimant was examined by the RME doctor, Dr. K, and he certified that the claimant reached MMI on May 9, 2001, with a 7% IR using the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association (AMA Guides third edition). Dr. K assessed 5% impairment for the lumbar spine from Section (II)(B) Table 49, and 2% impairment for loss of range of motion (ROM), for a combined value of 7% whole person impairment, using the Combined Values Chart on pages 246 through 248. The claimant testified that because he continued to have right hip pain, he sought treatment for his right hip on November 16, 2003, at a hospital emergency room. The medical reports in evidence show that the claimant was diagnosed with severe degenerative arthritis of the right hip. The claimant underwent right total hip replacement surgery on February 8, 2005.

On September 30, 2005, the designated doctor, Dr. I, examined the claimant and certified that the claimant reached statutory MMI on September 25, 2002, with a 19% 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 fourth edition). Dr. I assessed 5% impairment for Diagnosis-Related Estimate (DRE) Lumbosacral Category II: Minor Impairment and 15% impairment for the lower extremity, for a combined value of 19% whole person impairment, using the Combined Values Chart on pages 322 through 324. Dr. I states in her medical report dated September 30, 2005, that the claimant "was given credit for a total hip replacement and a minor impairment of his back due to the herniated discs and limited ability for [ROM]". A letter of clarification dated October 21, 2005, was sent to the designated doctor asking whether she based her certification on claimant's condition as of the date of the examination, September 30, 2005, or on the date of statutory MMI, October 30, 2002. The parties did not stipulate to the date of statutory MMI. The evidence reflects that there is a conflict between Dr. I's certification that the date of statutory MMI is September 25, 2002, and the Division's letter of clarification that references a date of statutory MMI as October 30, 2002. The self-insured questioned whether Dr. I included the post-MMI right total hip replacement surgery in assessing the claimant's IR. The designated doctor responded on December 16, 2005, that the claimant's IR "is the same since no credit was given for the hip replacement." The claimant contends that he was misdiagnosed (or undiagnosed) regarding his right hip injury and that Dr. K's first certification of MMI and IR did not become final because there was compelling medical evidence of a clear misdiagnosis. The claimant argued that the designated doctor's, Dr. I, certification of MMI and IR had presumptive weight. The self-insured contends that Dr. I's certification rated the claimant's condition as of the date of the examination, September 30, 2005, which included a post-MMI right total hip replacement surgery, rather than rating the claimant's condition as of the date of statutory MMI, September 25, 2002.

FINALITY

Dr. K certified that the claimant reached MMI on May 9, 2001, with a 7% IR. A letter from the Division dated May 29, 2001, shows that the parties were sent written notification of Dr. K's certification of MMI and IR. The amended 28 TEX. ADMIN. CODE § 130.5(e) (Rule 130.5(e)), effective March 13, 2000, is applicable to the case under consideration. The amended version of Rule 130.5(e), provided:

> The first certification of MMI and [IR] assigned to an employee is final if the certification of MMI and/or the [IR] is not disputed within 90 days after written notification of the MMI and IR is sent by the [Division] to the parties, as evidenced by the date of the letter, unless based on compelling medical evidence the certification is invalid because of:
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> 1. a significant error on the part of the certifying doctor in applying the appropriate AMA Guides and/or calculating the [IR];
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> 2. a clear mis-diagnosis or a previously undiagnosed medical condition; or
>
> 3. prior improper or inadequate treatment of the injury which would render the certification of MMI or [IR] invalid.

The amended Rule 130.5(e) was repealed effective January 2, 2002.

In Appeals Panel Decision (APD) 020014-s, decided February 26, 2002, we held that the reasons stated in the decision of Fulton v. Associated Indem. Corp., 46 S.W.3d 364 (Tex. App.-Austin 2001, pet. denied) that held the original Rule 130.5(e), effective January 25, 1991, as invalid also applied to the amended Rule 130.5(e). Therefore the first certification of MMI and IR did not become final under the amended Rule 130.5(e). Section 408.123(e) and (f) which became effective June 18, 2003, regarding a 90-day dispute provision, are not retroactive and are therefore inapplicable to this case. Rule 130.12, which implements Section 408.123(e) and (f), provides in subsection (d) that Rule 130.12 applies only to those claims with the initial MMI and IR certification made on or after June 18, 2003. Accordingly, we affirm the hearing officer's decision that the first certification of MMI and IR from Dr. K on May 9, 2001, did not become final.

MMI AND IR

The hearing officer erred in determining that the designated doctor's certification of MMI and IR is valid. Rule 130.1(c)(2)(A) provides that "the appropriate edition of the AMA Guides to use for all certifying examinations conducted before October 15, 2001 is the" [AMA Guides third edition], and Rule 130.1(c)(2)(B)(ii) provides that "the appropriate edition of the AMA Guides to use for certifying examinations conducted on or after October 15, 2001 is the [AMA Guides third edition] if, at the time of the certifying examination, there is a certification of MMI by a doctor pursuant to subsection (b) of this section made prior to October 15, 2001 which has not been previously withdrawn through agreement of the parties or previously overturned by a final decision."

The RME, Dr. K, examined the claimant on May 9, 2001, and on that same date certified that the claimant reached MMI with a 7% IR using the AMA Guides third edition. The designated doctor, Dr. I, examined the claimant on September 30, 2005, and she certified that the claimant reached statutory MMI on September 25, 2002, with a 19% IR, using the AMA Guides fourth edition. At the time Dr. I examined the claimant for a MMI certification, there was a certification of MMI by Dr. K that was made prior to October 15, 2001, and there was no indication that the certification had been previously withdrawn through agreement of the parties or previously overturned by a final decision. The AMA Guides third edition is the appropriate version of the AMA Guides to use in this case to assess the claimant's IR, therefore, the designated doctor used the wrong version of the AMA Guides and his September 30, 2005, certification was invalid. IRs assigned using the wrong edition of the AMA Guides shall not be considered valid. Rule 130.1(c)(2)(C).

We note that after January 1, 2002, carriers are entitled to request an RME to evaluate the claimant's MMI and IR only after a designated doctor had made an evaluation for the same issues. *See* Section 408.0041(f)[1] and Rules 126.5(b)(2) and 130.1(a)(1)(A)(iii). In this case, the self-insured's request for a RME evaluation was

[1] Section 408.0041 (Effective for a request for medical examination made to the Division by a carrier on or after January 1, 2002 and before the effective date of rules adopted by the workers' compensation commissioner after September 1, 2005.)

prior to the effective date of these changes, therefore the certification of the RME is valid.

Section 408.125(c) provides that the report of the designated doctor shall have presumptive weight, and the Division shall base the IR on that report unless the preponderance of the other medical evidence is to the contrary, and that, if the preponderance of the medical evidence contradicts the IR contained in the report of the designated doctor chosen by the Division, the Division shall adopt the IR of one of the other doctors. The only other MMI/IR certification in evidence is the report Dr. K, the RME doctor. Dr. K's medical report dated May 9, 2001, references "lower back pain and bilateral leg pain", but does not reference the hip injury. Although Dr. K's medical report noted that he measured ROM for the lower extremities, there is no indication that the RME doctor considered and assessed an impairment for the right hip injury. Rule 130.1(c)(3) provides that the assignment of an IR for the current compensable injury shall be based on the injured employee's condition as of the MMI date considering the medical record and the certifying examination.

Since there is no other certification of MMI/IR that rates the entire compensable injury based on the claimant's condition at MMI that is in accordance with the AMA Guides third edition this case is remanded back to the hearing officer. Dr. I is the current designated doctor for this case. If on remand, Dr. I is no longer qualified or is unwilling to serve as designated doctor, another designated doctor will have to be appointed. On remand the hearing officer shall: (1) reopen the CCH, and if necessary hold further proceedings to establish when the date of statutory MMI under Section 401.011(30)(b) would be (parties may stipulate to what the date of statutory MMI would be); (2) ask the parties if additional medical records of the compensable injury need to be provided to the designated doctor to determine MMI and IR, and if so, the parties shall provide those medical records to the hearing officer for her to send to the designated doctor; (3) inform the designated doctor what the date of statutory MMI would be and request that the designated doctor certify the claimant's date of MMI, which cannot be later than statutory MMI; (4) inform the designated doctor that the AMA Guides third edition, is the appropriate version of the AMA Guides to use in this case to assess the claimant's IR; (5) request that the designated doctor rate the entire compensable injury to the lumbar spine and right hip in accordance with the AMA Guides third edition; (6) request that the designated doctor assign an IR for the compensable injury based on the claimant's condition as of the date of MMI; (7) after the designated doctor has submitted another Report of Medical Evaluation (DWC-69) and narrative report certifying MMI and IR, the hearing officer shall provide the DWC-69 and narrative report to the parties and then hold further proceedings to allow the parties to respond to the report, including the submission of additional medical evidence if necessary; and (8) make a determination of MMI and IR.

We reverse the hearing officer's determination that the claimant reached MMI on September 25, 2002, with a 19% IR per Dr. I, the designated doctor, and remand back to the hearing officer for actions consistent with this decision.

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 new 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 Texas Government Code in the computation of the 15-day appeal and response periods. *See* APD 92642, decided January 20, 1993.

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

For service in person the address is:

JONATHAN BOW, EXECUTIVE DIRECTOR
STATE OFFICE OF RISK MANAGEMENT
300 W. 15TH STREET
WILLIAM P. CLEMENTS, JR. STATE OFFICE BUILDING, 6TH FLOOR
AUSTIN, TEXAS 78701.

For service by mail the address is:

JONATHAN BOW, EXECUTIVE DIRECTOR
STATE OFFICE OF RISK MANAGEMENT
P.O. BOX 13777
AUSTIN, TEXAS 78711-3777.

_____
Veronica L. Ruberto
Appeals Judge

CONCUR:

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Thomas A. Knapp
Appeals Judge

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Margaret L. Turner
Appeals Judge