APPEAL NO. 121272
FILED AUGUST 31, 2012

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 5, 2012, in [City], Texas, with [hearing officer] presiding as hearing officer. Regarding the four disputed issues before him, the hearing officer determined that: (1) the first certification of maximum medical improvement (MMI) and assigned impairment rating (IR) from [Dr. B] on September 26, 2011, did not become final under Section 408.123 and 28 TEX. ADMIN. CODE § 130.12 (Rule 130.12); (2) the appellant (claimant) reached MMI on July 19, 2011; (3) the claimant's IR is six percent; and (4) the claimant had disability for the period beginning July 19 through September 26, 2011.

The hearing officer's determination that the claimant had disability beginning July 19 through September 26, 2011, has not been appealed and has become final pursuant to Section 410.169.

The claimant appealed, contending that the hearing officer erred in finding Dr. B's certification was invalid and had not become final and that the respondent (carrier) had "not properly disputed" Dr. B's first valid certification of MMI and assigned IR. The carrier responded, urging affirmance

DECISION

Reversed and rendered.

The hearing officer, in the Background Information section of his decision, stated that the claimant is a 58 year old delivery driver for an ice cream manufacturer and that the claimant was injured on [date of injury], when a box of ice cream being tossed to him struck him in the right arm, causing a right shoulder injury. The hearing officer further stated that the claimant had undergone two previous rotator cuff repairs of the right shoulder and was found to have a massive retracted re-current tear. The medical record shows that the claimant had surgery on November 22, 2010, performed by [Dr. H] to repair the injury. The claimant completed post-surgical physical therapy and Dr. H in a medical record dated July 19, 2011, noted that the claimant had reached "maximal" medical improvement and that the claimant would be sent for an MMI examination.

The parties stipulated that the claimant had sustained a compensable injury on [date of injury].[1] The hearing officer made an unappealed finding of fact (also a

[1] Although the stipulation was made on the record at the CCH it was not included in the hearing officer's decision and order.

stipulation) that the first valid certification of MMI and IR was made by Dr. B, a referral doctor from the treating doctor.

The carrier filed a Request for Designated Doctor (DWC-32) for the issues of MMI and IR on August 31, 2011. The claimant had been referred to Dr. B, who examined him on September 26, 2011. Dr. B certified the claimant at MMI on September 26, 2011, with a nine percent IR based on shoulder range of motion (ROM) deficits. In response to the carrier's DWC-32, [Dr. VB] was appointed as the designated doctor on the issues of MMI and IR. Dr. VB examined the claimant on October 19, 2011, and certified the claimant at MMI on July 19, 2011, the date of Dr. H's release of the claimant from treatment, and assessed a six percent IR based on shoulder ROM deficits.

The parties had stipulated, and the hearing officer had made an unappealed finding of fact, that the first valid certification of MMI and IR was by Dr. B. The hearing officer in other unappealed findings of fact found that Dr. B's certification of MMI and assigned IR was received by the carrier by verifiable means on October 6, 2011, and that the carrier did not file a DWC-32 or a Request for a Benefit Review Conference (BRC) (DWC-45) after receipt of Dr. B's certification.

The claimant contends that Dr. B's rating had become final pursuant to Section 408.123 and Rule 130.12(c). The carrier contends that filing a DWC-32 would have been fruitless because a designated doctor had already been appointed.

Section 408.123(e) provides that except as otherwise provided by Section 408.123, an employee's first valid certification of MMI and a first valid certification of an IR is final if the certification or assignment is not disputed before the 91st day after the date the written notification of the certification is provided to the employee and the carrier by verifiable means. Rule 130.12(b)(1) provides in part that an insurance carrier may dispute a first certification of MMI/IR in one of two manners, either under the provisions of Rule 141.1 or by requesting the appointment of the designated doctor, if one has not been previously appointed.

In this case, a designated doctor had already been appointed so the carrier could only dispute the first certification by requesting and setting a BRC as provided for by Rule 141.1. Rule 130.12(b)(1) is quite clear that if a designated doctor had previously been appointed, as in the instant case, the only way to dispute the first certification was by requesting a BRC as provided for by Rule 141.1. Appeals Panel Decision 111227 decided October 13, 2011, is a similar case where the first valid certification of MMI and first valid certification of IR was by the designated doctor and the Appeals Panel held that since the first valid certification was provided by a designated doctor "the only way to dispute the first valid certification of MMI and assignment of an IR was to request a

BRC pursuant to Rule 141.1." However, the hearing officer, in the Background Information portion of his decision, commented:

> [The] [c]arrier's logic is persuasive that it's filing of a DWC-32 requesting a designated doctor on issues of [MMI] and [IR] was effective to prevent finality of the examination by [Dr. B] which occurred in the meantime.

We hold that the hearing officer's comment is an incorrect application of Rule 130.12(b)(1) and we hold that the carrier failed to timely dispute Dr. B's first valid certification of MMI and IR by failing to timely request a BRC.

The hearing officer also determined that Dr. B's certification "is invalid" because it contains a significant error in applying 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). We will first note that the "validity" of a certification of MMI and/or IR is determined as provided in Rule 130.12(c). Rule 130.12(c) provides that the report must be on a Report of Medical Evaluation (DWC-69) and this certification is valid if: (1) the MMI date is not prospective; (2) there is impairment determination of either no impairment or a percentage of [IR] assigned; and (3) the report is signed by the certifying doctor who is authorized under Rule 130.1(a) to make the impairment determination. Dr. B's report meets this criteria and Dr. B's report was not "invalid."

The question in this case becomes whether Dr. B's report contains an exception under Section 408.123(f). Section 408.123 provides in pertinent 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];

The hearing officer comments that another reason that Dr. B's impairment certification cannot become final is because there was a significant error in applying the AMA Guides and calculating the IR "because Dr. [B] failed to show his [ROM] calculations, and merely stated the final whole person impairment results." The hearing officer's statement is factually incorrect. At the bottom of page 4 of his report Dr. B sets out his ROM measurements for both the right and left shoulders. (Carrier's Exhibit G, page 4, and Claimant's Exhibit 3, page 6.) In response to a letter of clarification dated March 1, 2012, Dr. B refers to those figures and states that he used the AMA Guides for

ROM testing and referred to the Figures and page numbers in the AMA Guides that he used. We have checked those figures and they are correct using Dr. B's measurements. The hearing officer is incorrect when he states that Dr. B's "impairment evaluation report thus fails to meet the requirements of the [AMA] Guides for an [IR] report" because Dr. B failed to show his ROM measurements.

The hearing officer further states: "Dr. [B] failed to justify the use of the date of his examination as the date of [MMI], other than to state that he found no other satisfactory dates reported in the available medical documentation." The issue in this case is not whether Dr. B has adequately explained his certification of MMI but rather whether one of the exceptions to finality under Section 408.123(f), previously quoted, is applicable. The hearing officer does not direct us to compelling medical evidence of a significant error by Dr. B in applying the appropriate AMA Guides or in calculating the IR.

Accordingly, we reverse the hearing officer's determination that the first valid certification of MMI and assigned IR from Dr. B on September 26, 2011, did not become final under Section 408.123 and Rule 130.12 and we render a new decision that the first valid certification of MMI and assigned IR from Dr. B on September 26, 2011, did become final under Section 408.123 and Rule 130.12.

The hearing officer determined that the first valid certification of MMI and IR assigned by Dr. B on September 26, 2011, did not become final and adopted the certification of MMI/IR by the designated doctor, Dr. VB. Because we are reversing the hearing officer's finality determination, we also reverse the hearing officer's determination that the claimant reached MMI on July 19, 2011, with a six percent IR as certified by Dr. VB and render a new decision that the claimant reached MMI on September 26, 2011, with a nine percent IR as certified by Dr. B, because Dr. B's first valid certification of MMI and IR assigned on September 26, 2011, became final in accordance with the provisions in Section 408.123 and Rule 130.12.

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

CORPORATION SERVICE COMPANY
211 EAST 7TH STREET, SUITE 620
AUSTIN, TEXAS 78701-3218.

Thomas A. Knapp
Appeals Judge

CONCUR:

Cynthia A. Brown
Appeals Judge

Margaret L. Turner
Appeals Judge