APPEAL NO. 130341
FILED APRIL 15, 2013

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 17, 2012, in [City], Texas, with [hearing officer] presiding as hearing officer. With regard to the disputed issues, the hearing officer determined that: (1) the compensable injury of [date of injury], does not extend to a disc herniation at L4-5; (2) the appellant (claimant) reached maximum medical improvement (MMI) on May 20, 2011; (3) the claimant's impairment rating (IR) is three percent; and (4) the first certification of MMI and assigned IR by [Dr. H] on June 4, 2011, became final under Section 408.123 and 28 TEX. ADMIN. CODE § 130.12 (Rule 130.12).

The claimant appealed the hearing officer's determination on all of the issues. The appeal file does not contain a response from the respondent (carrier).

DECISION

Affirmed in part and reversed and rendered in part.

The claimant testified that he was employed as a millwright and was struck in the shoulder by a very heavy beam on [date of injury]. The parties stipulated that the claimant sustained a compensable injury at least in the form of a lumbar sprain/strain, thoracic sprain/strain, and right shoulder rotator cuff tear. The Request for Designated Doctor Examination (DWC-32) identifies the injuries accepted as compensable by the carrier as "[l]umbar spine, thoracic spine, right shoulder." The claimant stated on the record that he was relying on the treating doctor referral doctor, [Dr. KM] who certified that the claimant reached MMI on the stipulated statutory MMI date of July 10, 2012, with an assigned nine percent IR. The carrier stated that it was relying on the Texas Department of Insurance, Division of Workers' Compensation (Division)-selected designated doctor, Dr. H, who certified that the claimant reached MMI on May 20, 2011, with an assigned three percent IR.

EXTENT OF INJURY

There was conflicting medical evidence regarding the claimed herniations at L4-5. The hearing officer's determination that the compensable injury of [date of injury], does not extend to a disc herniation at L4-5 is supported by sufficient evidence and is affirmed.

FINALITY UNDER SECTION 408.123 AND RULE 130.12

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 Report of Medical Evaluation (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(f) provides in part that an employee's first certification of MMI or assignment of an IR may be disputed after the period described in 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];

It is undisputed that Dr. H's certification of MMI on May 20, 2011, and assigned three percent IR was the first valid certification of MMI and assignment of IR. The hearing officer made findings of fact that Dr. H's certification of MMI and IR were provided to the claimant by verifiable means on June 30, 2011, and that the claimant did not dispute Dr. H's certification of MMI and IR within 90 days after the date they were provided (by verifiable means).

The claimant, at the CCH and on appeal, contends that a former attorney had timely submitted a dispute of the first certification of MMI and assigned IR. In evidence is a Request for a Benefit Review Conference (BRC) (DWC-45) dated September 20, 2011, from the claimant's former attorney. There is no evidence when, or if, the DWC-45 was filed with the Division. Also in evidence is a Denial of Request to Schedule a [BRC] referencing a DWC-45 of December 9, 2011, from the claimant's former attorney.[1] The request for BRC was denied because there were insufficient efforts to resolve the disputed issues. *See* Appeals Panel Decision (APD) 111006-s, decided September 15, 2011. In evidence is another DWC-45 dated February 22, 2012, and filed with the Division on February 22, 2012. The hearing officer's finding that the claimant did not dispute Dr. H's certification of MMI or IR within 90 days after the date they were provided, is supported by sufficient evidence.

[1] This document was marked and admitted as Hearing Officer's Exhibit No. 4 but is not listed in the hearing officer's decision and order.

The hearing officer in Finding of Fact No. 8 states that "[n]o compelling medical evidence exists 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)] . . . that would render the certification or assignment invalid." Dr. H's certification for the compensable injury found MMI on May 20, 2011, based on Dr. H's examination on June 4, 2011, and that the claimant's condition for the compensable injury was stable. Dr. H rated the lumbar spine as Diagnosis-Related Estimate (DRE) Lumbosacral Category I: Complaints or Symptoms, zero percent impairment; the thoracic spine as DRE Thoracolumbar Category I: Complaints or Symptoms zero percent impairment; and a three percent whole person (WP) impairment of the right shoulder based on loss of range of motion (ROM) of the right shoulder. Dr. H lists right shoulder ROM figures:

Flexion 140, 141, 141 (rounded to 140°) three percent upper extremity (UE) impairment;

Extension 47, 47, 47 (rounded to 50°) zero percent UE impairment;

Abduction 140, 142, 142 (rounded to 140°) two percent UE impairment;

Adduction 45, 50, 48 (rounded to 50°) zero percent UE impairment;

Internal Rotation 72, 74, 74 (rounded to 70°) one percent UE impairment;

External Rotation 48, 47, 46 (rounded to 50°) one percent UE impairment;

(*See* pages 3/42 through 3/45 of the AMA Guides. Adding the UE impairment equals seven percent UE impairment of the right shoulder which converts to four percent WP impairment using Table 3 on page 3/20 of the AMA Guides. The claimant's right shoulder ROM impairment should be four percent WP impairment instead of the three percent WP impairment assessed by Dr. H.

Dr. KM, a doctor selected by the treating doctor acting in place of the treating doctor, in his report dated September 6, 2012, notes the ROM calculation error.

Dr. H's failure to properly apply his ROM figures to the AMA Guides constitutes compelling medical evidence of a significant error in calculating the IR. *See* APD 120255, decided April 2, 2012. The hearing officer's finding that no compelling medical evidence exists of a significant error in applying the appropriate AMA Guides that would render the certification or assignment invalid, is so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust because there is compelling medical evidence of a significant error on the part of the certifying doctor in calculating the IR in Dr. H's own report. Accordingly, we reverse the hearing

officer's determination that the first certification of MMI and assignment of IR from Dr. H on June 4, 2011, became final and render a new decision that the first certification of MMI and assigned IR from Dr. H on June 4, 2011, did not become final under Section 408.123 and Rule 130.12.

MMI

The hearing officer's determination that the claimant reached MMI on May 20, 2011, is supported by sufficient evidence and is affirmed.

IR

In evidence is the DWC-69 and narrative from Dr. KM, who is a referral doctor from the treating doctor. However, Dr. KM's certification cannot be adopted because Dr. KM rates radiculitis which is not part of the accepted compensable injury and does not rate the thoracic sprain/strain which is part of the compensable injury.

As noted above, Dr. H erred in applying his ROM figures to the tables in the AMA Guides. The Appeals Panel has previously stated that, where the certifying doctor's report provides the component parts of the rating that are to be combined and the act of combining those numbers is a mathematical correction which does not involve medical judgment or discretion, the Appeals Panel can recalculate the correct IR from the figures provided in the certifying doctor's report and render a new decision as to the correct IR. *See* APD 121194, decided September 6, 2012; APD 041413, decided July 30, 2004; APD 100111, decided March 22, 2010; and APD 101949, decided February 22, 2011.

In this case, we consider Dr. H's three percent IR an error that can be corrected without involving medical judgment or discretion. The hearing officer was persuaded that Dr. H's certification of MMI and IR was not contrary to the preponderance of the evidence, and after a calculation correction, that finding is supported by the evidence. Accordingly, we reverse the hearing officer's decision that the claimant has a three percent IR and we render a new decision that the claimant's IR is four percent.

SUMMARY

We affirm the hearing officer's determination that the compensable injury does not extend to a disc herniation at L4-5.

We affirm the hearing officer's determination that the claimant reached MMI on May 20, 2011.

We reverse the hearing officer's determination that the first certification of MMI and assigned IR from Dr. H on June 4, 2011, did become final under Section 408.123 and Rule 130.12 and render a new decision that the first certification of MMI and assigned IR from Dr. H on June 4, 2011, did not become final under Section 408.123 and Rule 130.12.

We reverse the hearing officer's determination that the claimant's IR is three percent and we render a new decision that the claimant's IR is four percent.

The true corporate name of the insurance carrier is **LIBERTY INSURANCE CORPORATION** 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.

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Thomas A. Knapp
Appeals Judge

CONCUR:

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Carisa Space-Beam
Appeals Judge

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Margaret L. Turner
Appeals Judge