APPEAL NO. 132117
FILED NOVEMBER 4, 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 August 5, 2013, with the record closing on August 8, 2013, in [City], Texas, with [hearing officer] presiding as hearing officer. The hearing officer resolved the disputed issues by deciding that: (1) the first assigned impairment rating (IR) from [Dr. W] on January 30, 2013, did not become final under Section 408.123 and 28 TEX. ADMIN. CODE § 130.12 (Rule 130.12); (2) the date of maximum medical improvement (MMI) is January 30, 2013, per [Dr. C], the second designated doctor appointed by the Texas Department of Insurance, Division of Workers' Compensation (Division); and (3) the appellant's (claimant) IR is 5% per Dr. C.

The claimant appealed all of the hearing officer's determinations, contending that Dr. W's MMI/IR certification was correct and has become final. The respondent (carrier) responds, 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] (we note Finding of Fact No. 1. D. incorrectly states the date of injury as August 31, 2009) that consisted of a contusion of the left testicle, a right hip sprain, a right knee sprain, a right ankle sprain, the herniated discs of the lumbar spine at L4-5 and L5-S1, a tear of the medial meniscus to the right knee and status post former abrasions to the right lower extremity. The parties also stipulated that: Dr. C was the second designated doctor appointed by the Division; Dr. C determined the claimant reached MMI on January 30, 2013, with a 5% IR; and the date the claimant reached statutory MMI is January 30, 2013, as certified by Dr. W, the claimant's treating doctor, and Dr. C, the second designated doctor. It is undisputed that the claimant was injured on [date of injury], when he slipped on a loose floorboard inside of an airplane and his right leg fell into the cargo hold.

The hearing officer noted in the Background Information section of the decision that:

> [Dr. W], treating doctor, examined [the] [c]laimant on January 30, 2013, and determined that [the] [c]laimant reached MMI on January 30, 2013, with a 22% IR. On February 4, 2013 [Dr. C] . . . determined that [the] [c]laimant reached MMI on January 30, 2013, with a 5% IR.

> Concerning the issue of finality of [Dr. W's] certification, the evidence presented establishes that [Dr. W's] certification was the first certification of MMI and assigned IR after the April 23, 2012, Decision and Order. [The] [c]laimant contended [that the] [c]arrier did not dispute this certification timely. [The] [c]arrier argued that it timely disputed [Dr. W's] certification when it filed its request for an examination by [Dr. C, the second designated doctor] [Request for Designated Doctor Examination (DWC-32)] with the Division on January 9, 2013. This request was filed even before [Dr. W's] report was issued and received by the [c]arrier on February 6, 2013.

In an unappealed finding of fact the hearing officer found that the carrier received notice of Dr. W's MMI/IR certification by verifiable means on February 6, 2013.

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.

In Appeals Panel Decision (APD) 061569-s, decided October 2, 2006, the Appeals Panel cited APD 052108, decided October 25, 2005, stating:

> The preamble to Rule 130.12 provides examples of what does and does not come within the meaning of Rule 130.12(a)(3) stating in part, "[i]n the event the first MMI/IR is the only certification and it is rescinded, or in the event an agreement or [Division] decision and order is entered but another certification on record is not selected, this would fall within the scope of this subsection. In these situations, the next certification received after this event would become the first certification that may become final if not disputed as provided in this section and by statute." For a subsequent MMI/IR certification to become final, it must be made after a decision that modifies, overturns, or withdraws a first MMI/IR certification that became final.

In the case on appeal, it was undisputed that the first valid certification of MMI/ IR came from [Dr. D], the first designated doctor appointed by the Division. However, in a

decision and order signed April 23, 2012, the hearing officer did not adopt Dr. D's MMI/IR certification and determined in part that the claimant had not reached MMI. It is undisputed that the April 23, 2012, decision has become final. It was also undisputed that the first certification after the April 23, 2012, decision and order was Dr. W's January 30, 2013, MMI/IR certification. Pursuant to Rule 130.12(a)(3), Dr. W's MMI/IR certification then became the first valid subsequent MMI/IR certification.

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.

APD 121272, decided August 31, 2012, is similar to the case on appeal. In APD 121272, the carrier filed a DWC-32 requesting a designated doctor on the issues of MMI and IR; however, after the carrier filed the DWC-32 and before a designated doctor was appointed, the treating doctor issued the first MMI/IR certification. The hearing officer in that case stated that the carrier's filing of a DWC-32 prior to the treating doctor's MMI/IR certification was effective to prevent the finality of the treating doctor's MMI/IR certification in the meantime. The Appeals Panel reversed, stating that the hearing officer's comment was an incorrect application of Rule 130.12(b)(1) and held that the carrier failed to timely dispute the treating doctor's first valid certification of MMI and IR by failing to timely request a benefit review conference (BRC). As in APD 121272, the carrier in the instant case requested a designated doctor before the first valid certification was issued by Dr. W, the treating doctor, and Dr. C, the second designated doctor, issued a MMI/IR certification after Dr. W issued the first valid certification. The evidence did not establish that the carrier timely requested a BRC. The carrier in this case failed to timely dispute Dr. W's MMI/IR certification. However, the hearing officer determined that an exception to finality applied in this case, as discussed below.

The hearing officer determined that the first IR from Dr. W on January 30, 2013, did not become final under Section 408.123 and Rule 130.12 because there was a significant error by Dr. W in calculating the IR. The hearing officer stated the following in the Background Information section of the decision:

> . . . according to [Section] 408.123(f)(1)(A) [Dr. W] committed a significant error in calculating the [IR] since [Dr. W] awarded [the] [c]laimant 5% impairment for a hernia. A hernia is not part of the compensable injury. Also on [Dr. W's] DWC-69 form there was no diagnostic code to identify lumbar herniations. The first certification from [Dr. W] did not become final.

Therefore, we must determine whether an exception under Section 408.123(f) exists in this case.

Section 408.123 provides:

> (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) 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 parties did not litigate an exception to finality under Section 408.123(f). The hearing officer found that "[t]here was significant error by [Dr. W], treating doctor, in calculating the [IR]" because Dr. W included a hernia in her IR. Compensability of a hernia has not been specifically argued or litigated in this case, although the claimant contends that Dr. W is the only doctor who considers and rates the entire compensable injury. However, under the facts of this case we disagree that the mere fact that Dr. W included a hernia in her IR constitutes 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) under Section 408.123(f)(1)(A). To determine whether or not a certifying doctor has made a significant error in applying the AMA Guides an examination must be made of the certifying doctor's DWC-69, narrative report, and the AMA Guides. To properly assess an IR the certifying doctor must explain in the narrative report how he or she derived the assigned IR, including any range of motion measurements or other values required by the AMA Guides. *See* Rule 130.1(c) and (d). If, after consulting the AMA Guides, the certifying doctor's IR contains no errors in applying the AMA Guides or in calculating the IR, the exception under Section 408.123(f)(1)(A) does not apply. There 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. We decline to read any such interpretation in those

provisions, and we decline to follow any prior cases that may have read such an interpretation.

The hearing officer in this case erred in determining the first assigned IR from Dr. W on January 30, 2013, did not become final under Section 408.123 and Rule 130.12; we therefore reverse that determination and we render a new decision that the first valid certification of MMI and IR from Dr. W on January 30, 2013, became final under Section 408.123 and Rule 130.12. Given that Dr. W's MMI/IR certification became final, we reverse the hearing officer's determination that the claimant reached MMI on January 30, 2013, with a 5% IR per Dr. C and we render a new decision that the claimant reached MMI on January 30, 2013, with a 22% IR per Dr. W.

The true corporate name of the insurance carrier is **NEW HAMPSHIRE 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.

Carisa Space-Beam
Appeals Judge

CONCUR:

Veronica L. Ruberto
Appeals Judge

DISSENTING OPINION:

I respectfully dissent. I would affirm the hearing officer's determinations that the first assigned IR from Dr. W on January 30, 2013, did not become final pursuant to Section 408.123 and Rule 130.12; the date of MMI is January 30, 2013; and the claimant's IR is 5%. The parties stipulated at the CCH conditions that the compensable injury consisted of: a contusion of the left testicle, a right hip sprain, a right knee sprain, a right ankle sprain, the herniated discs of the lumbar spine at L4-5 and L5-S1, a tear of the medial meniscus to the right knee and status post former abrasions to the right

lower extremity. No extent-of-injury issue was requested or litigated at the CCH. I would affirm the hearing officer's determinations rather than remand this case to the hearing officer to add the extent-of-injury issue regarding a hernia, because the parties stipulated to the conditions included in the compensable injury and did not request to add an extent-of-injury issue. The certification from Dr. W included an assessment of impairment for a hernia, a condition that was not stipulated by the parties to be included in the compensable injury. Precedent has held that rating a condition not included in the compensable injury is an exception to the finality rule. *See* APD 060170-s, decided March 22, 2006; and APD 111227, decided October 13, 2011. I see no reason to depart from prior precedent.

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Margaret Turner
Appeals Judge