APPEAL NO. 132541
FILED DECEMBER 16, 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 was held on September 25, 2013, in [City], Texas, with [hearing officer] presiding as hearing officer. The hearing officer resolved the disputed issues by deciding that: (1) the impairment rating (IR) is 10%; and (2) the first certification of maximum medical improvement (MMI) and assigned IR from [Dr. A] on September 4, 2012, did not become final under Section 408.123 and 28 TEX. ADMIN. CODE § 130.12 (Rule 130.12). The appellant (carrier) appeals the hearing officer's determination of finality and IR, contending that Dr. A's certification became final and no exception under Section 408.123(f) applies. The appeal file does not contain a response from the claimant.

DECISION

Reversed and rendered.

The parties stipulated that: (1) on [date of injury], the claimant sustained a compensable injury; (2) the Texas Department of Insurance, Division of Workers' Compensation (Division)-appointed designated doctor, for the purpose of determining MMI and IR, is Dr. A; (3) the date of MMI is June 1, 2012; and (4) the claimant received the designated doctor's report on September 15, 2012. The claimant testified that he injured his back while lifting part of a tree trunk to place into a truck.

Section 408.123(e) provides that except as otherwise provided by this section, an employee's first valid certification of MMI and the 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 and that the notice must contain a copy of a valid Report of Medical Evaluation (DWC-69), as described in Rule 130.12(c). Rule 130.12(c) provides, in part, that a certification of MMI and/or IR assigned as described in subsection (a) must be on a [DWC-69]. The certification on the [DWC-69] is valid if: (1) there is an MMI date that is not prospective; (2) there is an impairment determination of either no impairment or a percentage [IR] assigned; and (3) there is the signature of the certifying doctor who is authorized by the [Division] under Rule 130.1(a) to make the assigned impairment determination.

Section 408.123(f)(1)(A) provides in pertinent 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 compelling medical evidence exists of a significant error by the

certifying doctor in applying the appropriate American Medical Association guidelines or in calculating the IR.

Dr. A examined the claimant on September 4, 2012, and found that the claimant reached MMI on June 1, 2012, with a 5% IR. The hearing officer states in Finding of Fact No. 4 that "[the] [c]laimant did not dispute Dr. [A's] [IR] within 90 days." This finding is supported by sufficient evidence and is affirmed. However, the hearing officer found that Dr. A's certification of MMI/IR did not become final because "[c]ompelling medical evidence exists of a significant error in calculating the [IR]." Dr. A used 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) to calculate the claimant's IR which was based on placing the claimant in Diagnosis-Related Estimate (DRE) Lumbosacral Category II: Minor Impairment. In the Background Information section, the hearing officer states that the certification was not performed in accordance with the AMA Guides because the claimant had a loss of relevant reflexes, and therefore, he should have been placed in DRE Lumbosacral Category III: Radiculopathy. Regarding his choice of IR, Dr. A explained that "[t]hough the claimant exhibited diminished reflex and a bit of atrophy in the left thigh, it is my opinion that he does not qualify for radiculopathy. He has resultant radiculitis, and even with the 1 cm atrophy in the left thigh, I would expect him to recover and this should not be permanent." Dr. A's placement of the claimant in DRE Lumbosacral Category II was in his discretion as a matter of medical judgment, and under the facts of this case, we disagree that this constitutes compelling medical evidence of a significant error by the certifying doctor in applying the appropriate AMA Guides or in calculating the IR per Section 408.123(f)(1)(A). Further, there was no evidence of an exception to finality of a clearly mistaken diagnosis or a previously undiagnosed medical condition or improper or inadequate treatment of the injury before the date of the certification or assignment that would render the certification or assignment invalid. *See* Section 408.123(f)(1)(B) and (C). Therefore, the hearing officer erred in finding an exception to finality. Without a timely dispute by the claimant, Dr. A's certification of MMI/IR on September 4, 2012, became final under Section 408.123 and Rule 130.12.

We reverse the hearing officer's determination that the first certification of MMI and assigned IR from Dr. A on September 4, 2012, did not become final under Section 408.123 and Rule 130.12, and we render a new decision that the first certification of MMI and assigned IR from Dr. A on September 4, 2012, became final under Section 408.123 and Rule 130.12.

The hearing officer determined that the first certification of MMI and IR assigned by Dr. A on September 4, 2012, did not become final and adopted the certification of IR

by [Dr. N], a doctor selected by the treating doctor to act in his place. Because we have reversed the hearing officer's finality determination, we reverse the hearing officer's determination that the IR is 10% as certified by Dr. N, and we render a new decision that the claimant's IR is 5% as certified by Dr. A.

SUMMARY

We reverse the hearing officer's determination that the first certification of MMI and assigned IR from Dr. A on September 4, 2012, did not become final under Section 408.123 and Rule 130.12, and we render a new decision that the first certification of MMI and assigned IR from Dr. A on September 4, 2012, became final under Section 408.123 and Rule 130.12.

We reverse the hearing officer's determination that the IR is 10% as certified by Dr. N, and we render a new decision that the claimant's IR is 5% as certified by Dr. A.

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

RICHARD J. GERGASKO, PRESIDENT
6210 EAST HIGHWAY 290
AUSTIN, TEXAS 78723.

Cristina Beceiro
Appeals Judge

CONCUR:

Carisa Space-Beam
Appeals Judge

Margaret L. Turner
Appeals Judge