APPEAL NO. 132865
FILED JANUARY 27, 2014

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 October 24, 2013, in [City], Texas, with [hearing officer] presiding as hearing officer. The hearing officer resolved the disputed issues by deciding that: (1) the first certification of maximum medical improvement (MMI) and assigned impairment rating (IR) on February 7, 2013, from [Dr. K], the designated doctor appointed by the Texas Department of Insurance, Division of Workers' Compensation (Division), 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 August 20, 2012; and (3) the claimant's IR is 4%.

The claimant appealed the hearing officer's finality and IR determinations, contending that Dr. K's February 7, 2013, MMI/IR certification was provided to the respondent (carrier) by verifiable means and therefore that certification became final under Section 408.123 and Rule 130.12. The claimant further contends that the MMI/IR certification from [Dr. O], the post-designated doctor required medical examination doctor, cannot be adopted because his Report of Medical Evaluation (DWC-69) does not contain the correct diagnosis codes for the claimant's compensable injury. The carrier responded, urging affirmance. The hearing officer's determination that the claimant reached MMI on August 20, 2012, was not appealed and has become final pursuant to Section 410.169.

DECISION

Affirmed as reformed.

Section 410.203(b) was amended effective September 1, 2011, to allow the Appeals Panel to affirm the decision of a hearing officer as prescribed in Section 410.204(a)(1). Section 410.204(a) provides in part that the Appeals Panel may issue a written decision on an affirmed case as described in subsection (a-1). Subsection (a-1) provides that the Appeals Panel may only issue a written decision in a case in which the panel affirms the decision of a hearing officer if the case: (1) is a case of first impression; (2) involves a recent change in law; or (3) involves errors at the CCH that require correction but does not affect the outcome of the hearing. This case is a situation that requires correction but does not affect the outcome of the hearing.

The parties stipulated that the claimant sustained a compensable injury on [date of injury], at least in the form of left tibia and fibula fractures, and that the claimant reached MMI on August 20, 2012.

The hearing officer found in Finding of Fact No. 3 that Dr. K's IR was not provided to the carrier by verifiable means, and in Finding of Fact No. 4 that compelling medical evidence exists of 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) by Dr. K. Based on these findings, the hearing officer determined that the first MMI/IR certification from Dr. K on February 7, 2013, did not become final under Section 408.123 and Rule 130.12. The claimant appealed the hearing officer's finality determination, contending that Dr. K's February 7, 2013, MMI/IR certification was provided to the carrier by verifiable means.

In evidence is a Notification of [MMI]/First Impairment Income Benefit Payment (PLN-3) dated March 12, 2013, addressed to the claimant, stating that "[w]e have received a report from [Dr. K] (copy attached) certifying that you have reached MMI on [August 20, 2012], and have been assigned a whole body IR of 15%." It was undisputed that the carrier filed a Request for a Benefit Review Conference (DWC-45) on June 24, 2013, which is not within 90 days of March 12, 2013.

Section 408.123(e) provides that except as otherwise provided by this section, 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 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) 041985-s, decided September 28, 2004, the Appeals Panel noted that the preamble to Rule 130.12 stated that written notice is verifiable when it is provided from any source in a manner that reasonably confirms delivery to the party and that this may include acknowledged receipt by the injured employee or insurance carrier. See also APD 080469-s, decided May 29, 2008. In APD 080301-s, decided April 16, 2008, the hearing officer believed that the carrier had the first valid MMI/IR certification by the date of its PLN-3, and the evidence reflected that the carrier did have that certification. The carrier's PLN-3 referenced the first valid MMI/IR certification and stated that a copy of that certification was attached. The Appeals Panel held that a carrier's reference to the first MMI/IR certification in a PLN-3 and its sending a copy of the MMI/IR certification to the Division established acknowledged receipt of the first MMI/IR certification. Under the facts of this case, the carrier's PLN-3 dated March 12, 2013, to the claimant stating that it had received the

report from Dr. K certifying that the claimant reached MMI on August 20, 2012, with a 15% IR, and that a copy of Dr. K's report was attached, established an acknowledged receipt by the carrier on March 12, 2013, of the first MMI/IR certification by Dr. K on February 7, 2013. Therefore, the hearing officer's Finding of Fact No. 3, that Dr. K's IR was not provided to the carrier by verifiable means is not supported by sufficient evidence. Accordingly, we reform the hearing officer's findings of fact by striking Finding of Fact No. 3.

As mentioned above, the hearing officer also based her determination that the first MMI/IR certification from Dr. K on February 7, 2013, did not become final under Section 408.123 and Rule 130.12 on her Finding of Fact No. 4 that there was compelling medical evidence of a significant error in applying the appropriate AMA Guides by Dr. K. We note that although the claimant's appeal does not contain a specific argument regarding this finding, the claimant does list Finding of Fact No. 4 as being disputed by the claimant. The hearing officer's finding that compelling medical evidence exists of a significant error in applying the appropriate AMA Guides by Dr. K is supported by sufficient evidence and is affirmed. Given that we have affirmed this finding, we affirm the hearing officer's determination that the first MMI/IR certification by Dr. K on February 7, 2013, did not become final under Section 408.123 and Rule 130.12.

The claimant also appealed the hearing officer's determination that the claimant's IR is 4%. The claimant specifically argued that Dr. O's MMI/IR certification cannot be adopted because his DWC-69 fails to list the correct diagnosis codes for the claimant's compensable injury. The claimant cites to APD 120672, decided May 21, 2012, to support his contention.

In APD 120672, *supra*, the hearing officer, after determining the extent of the claimant's injury, sent the designated doctor a letter of clarification requesting the designated doctor to discuss and rate each component of the compensable injury, which was a right wrist sprain/strain, carpal tunnel syndrome, ulnar nerve compression, and reflex sympathetic dystrophy/causalgia. The designated doctor responded in a narrative report dated December 16, 2011, and assessed a 7% whole person impairment for the compensable injury. The designated doctor attached a DWC-69 for each diagnosis separately and another DWC-69 for the entire compensable injury. However, all of the attached DWC-69s contained an incorrect statutory MMI date. The designated doctor then submitted another DWC-69 with the correct statutory MMI date, with a 0% IR. The hearing officer specifically found that in a report dated December 16, 2011, the designated doctor certified that the claimant's IR is 0%, and that this certification was not contrary to the preponderance of the evidence. The Appeals Panel noted that the designated doctor's December 16, 2011, narrative report assessed a 7%

IR for the compensable injury, not a 0% IR as found in the subsequent DWC-69 adopted by the hearing officer. The Appeals Panel also noted that the subsequent DWC-69 with a 0% IR contained only one diagnosis code in the medical status information portion of the DWC-69, and that the DWC-69 contained no explanation for the change in the impairment assessed from 7% to 0%. The Appeals Panel reversed the hearing officer's determination that the claimant had an IR of 0% as being so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust. We note that APD 120672 does not stand for the proposition that an IR cannot be adopted for the sole reason that the DWC-69 contains an improper diagnosis code.

In the case on appeal, Dr. O assessed a 4% IR based on range of motion (ROM) deficits of the claimant's left leg. Dr. O noted in his narrative report that the claimant had sustained tibia and fibula fractures of the left leg. The parties stipulated that the claimant sustained a compensable injury at least in the form of left tibia and fibula fractures. The claimant points out that Dr. O's DWC-69 contains a diagnosis code for the "ankle (unspecified)", while Dr. K's DWC-69 contains a diagnosis code specifically for a closed fracture of the tibia and fibula. The claimant contends that Dr. O used an incorrect diagnosis code on his DWC-69 and therefore his 4% IR cannot be adopted. The carrier notes in its response that the parties stipulated the claimant suffered tibia and fibula fractures, which are bones in the lower leg that run down to the ankle, and that this is where the fracture occurred. The carrier maintains that while the two doctors use different codes, neither code is inaccurate. We agree with the carrier's position. Further, Dr. O noted in his narrative report the claimant's tibia and fibula fractures, and his assigned impairment was based on ROM deficits of the claimant's left ankle and hind foot.

The hearing officer's determination that the claimant's IR is 4% is supported by sufficient evidence and is affirmed.

SUMMARY

We affirm the hearing officer's decision as reformed by striking Finding of Fact No. 3.

We affirm the hearing officer's determination that the first MMI/IR certification by Dr. K on February 7, 2013, did not become final under Section 408.123 and Rule 130.12.

We affirm the hearing officer's determination that the claimant's IR is 4%.

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

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Carisa Space-Beam
Appeals Judge

CONCUR:

Cristina Beceiro
Appeals Judge

Margaret L. Turner
Appeals Judge