APPEAL NO. 140574
FILED MAY 12, 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 February 6, 2014, in [City], Texas, with [hearing officer] presiding as hearing officer. The hearing officer resolved the sole disputed issues by deciding that the first certification of maximum medical improvement (MMI) and assigned impairment rating (IR) from [Dr. H] on July 30, 2013, did not become final under Section 408.123 and 28 TEX. ADMIN. CODE § 130.12 (Rule 130.12).[1]

The appellant (claimant) appealed the hearing officer's finality determination. Although the claimant's appeal does not contain a specific argument regarding these findings, the claimant does list Findings of Fact Nos. 6 and 7 as being disputed by the claimant. The hearing officer's Finding of Fact No. 6 states that there was no showing of delivery to the respondent (carrier) by verifiable means or a date certain by which the carrier had received the certification earlier than the benefit review conference (BRC) on December 10, 2013. The hearing officer's Finding of Fact No. 7 states that there was compelling medical evidence of a significant error on the part of Dr. H 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). The carrier responded, urging affirmance of the hearing officer's finality determination.

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 do not affect the outcome of the hearing. This case is a situation that requires correction but does not affect the outcome of the hearing.

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[1] The issue was amended so it conforms to the issue actually litigated by correcting the date of the certification from July 24, 2013, to July 30, 2013.

The parties stipulated that the claimant sustained a compensable injury on [date of injury], and that in a report dated July 30, 2013, Dr. H, the post-designated doctor required medical examination doctor, certified that the claimant reached MMI on March 1, 2013, with a 20% IR. It is undisputed that the claimant underwent a total knee replacement of the left knee on June 5, 2012.

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 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 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];
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> (B) a 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.

As previously mentioned, the hearing officer determined that the first certification of MMI and assigned IR from Dr. H on July 30, 2013, did not become final pursuant to Section 408.123 and Rule 130.12. The hearing officer based his finality determination on Findings of Fact Nos. 6 and 7. The hearing officer's Finding of Fact No. 6 states that there was no showing of delivery to the carrier by verifiable means or a date certain by which the carrier had received the certification earlier than the BRC on December 10, 2013. Finding of Fact No. 6 is supported by sufficient evidence. The hearing officer's

determination that the first certification of MMI and assigned IR from Dr. H on July 30, 2013, did not become final pursuant to Section 408.123 and Rule 130.12 is supported by sufficient evidence and is affirmed.

Also, the hearing officer made an additional finding based on an exception to finality pursuant to Section 408.123(f)(1)(A). The hearing officer's Finding of Fact No. 7 states that there was compelling medical evidence of a significant error on the part of Dr. H in applying the AMA Guides. Finding of Fact No. 7 is legally incorrect and is not supported by the evidence. Finding of Fact No. 7 is struck from the hearing officer's decision, as explained below.

In the Discussion section of the decision, the hearing officer states that the carrier argued that "there was an exception to finality in that [Dr. H] failed to include the [range of motion (ROM)] measurements needed to calculate deductions pursuant to Table 66" of the AMA Guides, and that "[t]his argument was persuasive in light of language in [Appeals Panel Decision (APD) 132117, decided November 4, 2013], at page 5."

In APD 132117, *supra*, the Appeals Panel noted that "[t]o 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 [ROM] measurements or other values required by the AMA Guides. *See* Rule 130.1(c) and (d)." We clarify that APD 132117 does not stand for the proposition or inference that the mere exclusion of any ROM measurement or other values required by the AMA Guides in and of itself will constitute compelling medical evidence of a significant error in applying the AMA Guides or in calculating the IR pursuant to Section 408.123(f)(1)(A). The determination of whether there exists compelling medical evidence of a significant error by the certifying doctor in applying the AMA Guides or calculating the IR is based on the totality of the evidence. In this case, the certifying doctor's failure to include ROM measurements alone is not compelling medical evidence of a significant error by the certifying doctor in applying the AMA Guides or calculating IR for purposes of finality pursuant to Section 408.123(f). Furthermore, we note that Rule 130.12(c) does not require that a narrative report be included with the DWC-69 to be a valid certification. *See* APD 100483, decided June 9, 2010; APD 132383, decided December 18, 2013. In this case, the hearing officer's Finding of Fact No. 4 states that Dr. H's certification is valid for purposes of Rule 130.12(c) and that finding was not appealed.

In this case, although the hearing officer determined that the first certification of MMI and assigned IR did not become final, he made an additional finding that an

exception to finality applies pursuant to Section 408.123(f)(1)(A), thereby the first certification of MMI and assigned IR did not become final. The hearing officer found that there was compelling medical evidence of a significant error on the part of Dr. H in applying the AMA Guides. The evidence shows that Dr. H examined the claimant on July 24, 2013, and certified on July 30, 2013, that the claimant reached MMI on March 1, 2013, with a 20% IR. Dr. H's narrative report dated July 30, 2013, explains that he based the claimant's IR using Table 66, Rating Knee Replacements Results, on page 3/88 of the AMA Guides. We note that Table 66 is based on a point rating system that contains categories for pain status, ROM, stability, flexion contracture, extension lag, and alignment. These categories are labeled a through f. The sum of categories a, b, and c minus the sum of categories d, e, and f that results in a point score for a knee replacement. *See* Table 66, page 3/88 of the AMA Guides. The point score result is converted to an impairment percentage derived from Table 64, Impairment Estimates for Certain Lower Extremity Impairments. *See* Table 64, page 3/85 of the AMA Guides.

Using Table 66 Dr. H assessed a sum of 83 points for a left knee replacement for categories a, b, and c as follows: (a) pain from walking and stairs (30 points); (b) ROM at 138 degrees (28 points); and (c) stability at anteroposterior less than 5 mm (10 points) and mediolateral at 5 degrees or less (15 points). The sum of categories a, b, and c are 30 + 28 + 10 + 15 = 83 points. For the deduction categories d, e, and f, which are flexion contracture (d), extension lag (e), and alignment (f), Dr. H stated that "[t]here is no evidence of deduction such as flexion contractures or extensor lags and alignment is good." Using Table 64 on page 3/85, under "Total knee replacement," for a result of 83 points Dr. H placed the claimant in the "Fair result, 50-84 points" estimate which converts to a 20% whole person impairment (WPI).

At the CCH, the carrier alleged that Dr. H assessed 28 points, rather than the maximal point score of 25, under Table 66 for ROM. Under Table 66, category b states that for ROM add 1 point per 5 degrees and lists only 25 as the number of points for ROM. Dr. H assessed 138 degrees ROM for the left knee and calculated 28 points based on the ROM measurement of 138 degrees. In the instant case, even if we were to consider that 25 points is the maximum points for ROM under Table 66, the sum of categories a, b, and c would be 80 points (30 + 25 + 10 + 15 = 80), and under Table 64 the result of 80 points would still place the claimant in the "Fair result, 50-84 points" estimate for a 20% WPI, which is the same 20% IR assessed by Dr. H using the 28 points for ROM. Whether the ROM is 25 or 28 points, the point score result is between the 50 to 84 points estimate for a "Fair result" under Table 64 which converts to a 20% IR. In this case, the certifying doctor's IR contains no significant error in applying the AMA Guides or in calculating the IR, therefore, the exception under Section 408.123(f)(1)(A) does not apply.

Second, the carrier also argued that Dr. H failed to include measurements for categories d, e, and f, under Table 66. As previously mentioned, Dr. H stated in his narrative report dated July 30, 2013, that "[t]here is no evidence of deduction such as flexion contractures or extensor lags and alignment is good." Dr. H specifically states that there is no evidence of deductions for categories d, e, and f, under Table 66. Dr. H used his discretion as a matter of medical judgment to determine whether there were deductions or not under Table 66. Furthermore, as previously stated, Rule 130.12(c) does not require that a narrative report be attached to the DWC-69. Given that the hearing officer found that Dr. H's certification of MMI and IR is a valid certification, and Rule 130.12(c) does not require that a narrative report be attached to the certification, the certifying doctor's IR contains no errors in applying the AMA Guides or in calculating the IR and the exception under Section 408.123(f)(1)(A) does not apply.

Therefore, the hearing officer erred in finding an exception to finality and we strike Finding of Fact No.7 that there was compelling medical evidence of a significant error on the part of Dr. H in applying the AMA Guides.

Based on the hearing officer's Finding of Fact No. 6, that there was no showing of delivery to the carrier by verifiable means or a date certain by which the carrier had received the certification earlier than the BRC on December 10, 2013, we affirm the hearing officer's determination that the first certification of MMI and assigned IR from Dr. H on July 30, 2013, did not become final under Section 408.123 and Rule 130.12.

SUMMARY

We affirm the hearing officer's decision as reformed by striking Finding of Fact No. 7.

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
6210 EAST HIGHWAY 290
AUSTIN, TEXAS 78723.

Veronica L. Ruberto
Appeals Judge

CONCUR:

Carisa Space-Beam
Appeals Judge

Margaret L. Turner
Appeals Judge