APPEAL NO. 151869
FILED NOVEMBER 18, 2015

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 July 6, 2015, and continued to August 20, 2015, in San Antonio, Texas, with (hearing officer) presiding as hearing officer. The hearing officer resolved the disputed issues by deciding that: (1) the impairment rating (IR) is 7%; and (2) the first certification of maximum medical improvement (MMI) and assigned IR from (Dr. H) on December 19, 2014, did not become final under Section 408.123 and 28 TEX. ADMIN. CODE § 130.12 (Rule 130.12).

The appellant (claimant) timely appealed, disputing the hearing officer's determinations based on sufficiency of the evidence. The respondent (carrier) responded, urging affirmance.

DECISION

Reversed and rendered.

The parties stipulated that: (1) on (date of injury), the claimant sustained a compensable injury to his right knee in the form of medial and lateral meniscus tears when he twisted his knee in steel mesh; (2) the designated doctor, Dr. H, was appointed to determine MMI and IR; (3) the designated doctor determined that the claimant reached MMI on October 10, 2014, with an IR of 16%; (4) the post-designated doctor required medical examination (RME) doctor, (Dr. B), determined that the claimant reached MMI on October 10, 2014, with an IR of 7%; and (5) the claimant reached MMI on October 10, 2014.

FINALITY

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].

The hearing officer found that the carrier did not dispute Dr. H's certification of MMI and IR within 90-days after the date the rating was mailed to the claimant. There is sufficient evidence to support the hearing officer's finding, as explained below.

The hearing officer states in the Discussion portion of his decision that the carrier mailed Dr. H's certification of MMI and IR to the claimant on January 2, 2015, and filed a Request to Schedule, Reschedule, or Cancel a Benefit Review Conference (BRC) (DWC-45) on April 3, 2015. We note that the hearing officer did not make a finding of when the carrier received the first valid certification of MMI and IR; however, given the hearing officer's discussion and the evidence presented at the CCH, the carrier had receipt of Dr. H's certification of MMI and IR by January 2, 2015, the date the carrier mailed Dr. H's certification to the claimant. Therefore January 2, 2015, was the beginning of the 90-day period for the carrier to dispute the certification of MMI and IR. Also, we note that the hearing officer finds that the carrier filed the DWC-45 on April 3, 2015; however, in evidence is a copy of the carrier's DWC-45 dated April 3, 2015, showing the DWC-45 was hand-delivered to the Texas Department of Insurance, Division of Workers' Compensation and filed on April 6, 2015. The hearing officer's discussion and the evidence indicates that the carrier did not timely dispute the first valid certification of MMI and IR within 90-days after the carrier's receipt of Dr. H's certification of MMI and IR.

Next, the hearing officer found that there was compelling medical evidence 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 renders Dr. H's certification of MMI and assignment of IR, an exception to finality. This finding is not supported by the evidence and is legally incorrect.

Dr. H examined the claimant on December 19, 2014, and certified in a DWC-69 dated December 21, 2014, that the claimant reached MMI on October 10, 2014, with a 16% IR using the AMA Guides. As previously mentioned, the parties stipulated that the claimant sustained a compensable injury to his right knee in the form of medial and lateral meniscus tears. Dr. H diagnosed the claimant with: severe chondromalacia,

right knee; tear medial and lateral menisci; torn anterior cruciate; residual stiffness of the knee; and atrophy of the musculature of the leg.

Dr. H assessed a 16% IR based on 3% whole person impairment (WPI) for right thigh atrophy from Table 37 ("Impairment from Leg Muscle Atrophy") on page 3/77, 5% WPI for right calf atrophy from Table 37, and 8% WPI for loss of range of motion (ROM) for the right knee from Table 41 ("Knee Impairments") on page 3/78, combined to result in the 16% IR. The hearing officer states in the Discussion portion of the decision that Dr. H assigned an IR for both ROM and atrophy in arriving at a 16% IR, and that "it is clear from the [AMA Guides] that one cannot use both methods to derive an appropriate [IR]."

In Appeals Panel Decision (APD) 040147, decided March 3, 2004, the designated doctor assessed a 17% IR based on 3% impairment from Table 37 ("Impairment from Leg Muscle Atrophy") on page 3/77, 4% impairment for loss of ROM from Table 41("Knee Impairments") on page 3/78, and 10% impairment from Table 62 ("Arthritis Impairments Based on Roentgenographically Determined Cartilage Intervals"), combined to result in the 17% IR. In that case, the RME doctor opined that it is improper to combine the Tables because it would result in rating the claimant's arthritic condition twice (once in Table 37 and again in Table 4) and this constituted "stacking" or "piling on." Both the designated doctor and the hearing officer also cited Section 3.2 page 3/75 of the AMA Guides to say that:

> In general, only one evaluation should be used to evaluate a specific impairment. In some instances, however, as with the example on p. 77, a combination of two or three methods may be required.

In that case, the hearing officer accorded presumptive weight to the designated doctor's report and commented that the designated doctor had the discretion to utilize more than one Table to arrive at the IR. The Appeals Panel affirmed the hearing officer's IR determination and noted that no provision in the AMA Guides specifically precludes the designated doctor's approach to assessing the claimant's IR and that it was a difference in medical judgment on how to rate the claimant's injury.

In the instant case, as in APD 040147, *supra*, the designated doctor assessed an impairment for the claimant's compensable injury and it was within his medical judgment on how to rate the claimant's right knee injury by utilizing more than one Table to arrive at the claimant's IR. We hold that under the facts of this case, that Dr. H's assignment of a 16% IR using Table 37 and Table 41 does not, by itself, constitute compelling medical evidence of a significant error in applying the appropriate AMA Guides under Section 408.123(f)(1)(A). Accordingly, the hearing officer's determination that the first

MMI/IR certification from Dr. H on December 19, 2014, did not become final on this basis is legal error. Furthermore, we note that the finality issue references December 19, 2014, the date of examination, rather than the date of the certification December 21, 2014. *See* Section 408.123.

In this case, there were no other finality exceptions pursuant to Section 408.123(f)(1) argued by the parties. As there is no compelling medical evidence in this case to establish an exception to finality as found in Section 408.123(f)(1), we reverse the hearing officer's determination that the first certification of MMI and IR from Dr. H on December 19, 2014, 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 IR from Dr. H on December 21, 2014, the date of the certification, did become final under Section 408.123 and Rule 130.12.

IR

As previously mentioned, Dr. H certified in a DWC-69 on December 21, 2014, that the claimant reached MMI on October 10, 2014, with a 16% IR. Given that we have reversed the hearing officer's determination that the first certification of MMI and IR from Dr. H on December 19, 2014, did not become final under Section 408.123 and Rule 130.12, and we have rendered a new decision that the first certification of MMI and IR from Dr. H on December 21, 2014, the date of the certification, did become final under Section 408.123 and Rule 130.12, we reverse the hearing officer's determination that the claimant's IR is 7% and we render a new decision that the claimant's IR is 16%.

SUMMARY

We reverse the hearing officer's determination that the first certification of MMI and IR from Dr. H on December 19, 2014, 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 IR from Dr. H on December 21, 2014, the date of the certification, became final under Section 408.123 and Rule 130.12.

We reverse the hearing officer's determination that the claimant's IR is 7% and we render a new decision that the claimant's IR is 16%.

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.

Veronica L. Ruberto
Appeals Judge

CONCUR:

Carisa Space-Beam
Appeals Judge

Margaret L. Turner
Appeals Judge