APPEAL NO. 152167
FILED JANUARY 13, 2016

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 8, 2015, and continued on September 30, 2015, in San Angelo, Texas, with presiding as hearing officer. The hearing officer resolved the disputed issues by deciding that: (1) the compensable injury of (date of injury), extends to an L2 transverse process fracture; (2) the compensable injury of (date of injury), does not extend to an aggravation to spondylosis in the lumbar spine, aggravation to sclerosis in the lumbar spine, lumbar radiculopathy, myofascial strain of the thoracic spine, myofascial strain of the lumbar spine, an aggravation of degenerative disc disease with disc bulging at L2-3, aggravation of degenerative disc disease with disc bulging at L3-4, aggravation of degenerative disc bulging at L4-5, aggravation of degenerative disc disease with disc bulging at L5-S1, thoracic pain, right hip pain, and right leg pain; (3) the respondent (claimant) had disability, only for the period beginning on May 1, 2014, and continuing through January 10, 2015; (4) the first certification of maximum medical improvement (MMI) and assigned impairment rating (IR) from (Dr. G) on September 10, 2014, did not become final under Section 408.123 and 28 TEX. ADMIN. CODE § 130.12 (Rule 130.12); (5) the claimant reached MMI on December 11, 2014; and (6) the claimant's IR is 20%.

The appellant (self-insured) appealed the hearing officer's finality, MMI, IR, and disability determinations based on sufficiency of the evidence. The self-insured also appealed the hearing officer's extent-of-injury determination that was favorable to the claimant. The claimant responded, urging affirmance.

The hearing officer's determination that the compensable injury of (date of injury), does not extend to an aggravation to spondylosis in the lumbar spine, aggravation to sclerosis in the lumbar spine, lumbar radiculopathy, myofascial strain of the thoracic spine, myofascial strain of the lumbar spine, an aggravation of degenerative disc disease with disc bulging at L2-3, aggravation of degenerative disc disease with disc bulging at L3-4, aggravation of degenerative disc bulging at L4-5, aggravation of degenerative disc disease with disc bulging at L5-S1, thoracic pain, right hip pain, and right leg pain, was not appealed and has become final pursuant to Section 410.169.

DECISION

Affirmed in part and reversed and rendered in part.

The parties stipulated that the claimant sustained a compensable injury on (date of injury), and that the compensable injury extends to an L2 compression fracture. The

Texas Department of Insurance, Division of Workers' Compensation (Division) appointed as designated doctor, (Dr. F), to opine on the issues of MMI, IR, and extent of injury. Dr. F examined the claimant on July 18, 2014, and certified in a Report of Medical Evaluation (DWC-69) that the claimant had not reached MMI for the compensable injury. Dr. F provided an alternate DWC-69 that also certified that the claimant had not reached MMI for the compensable injury and the extent-of-injury conditions in dispute.

The post-designated doctor required medical examination doctor, Dr. G, examined the claimant on September 10, 2014, and certified in a DWC-69 dated that same date that the claimant reached MMI on March 7, 2014, with a 10% IR, for the compensable injury using 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).[1] It is undisputed that Dr. G's certification dated September 10, 2014, is the first valid certification of MMI and assigned IR.

Subsequently, the Division appointed a second designated doctor, (Dr. W) and he examined the claimant December 11, 2014, and certified in a DWC-69 dated December 11, 2014,[2] that the claimant reached MMI on December 11, 2014, with a 20% IR using the AMA Guides.

EXTENT OF INJURY

The hearing officer's determination that the compensable injury of (date of injury), extends to an L2 transverse process fracture is supported by sufficient evidence and is affirmed.

DISABILITY

The hearing officer's determination that the claimant had disability only for the period beginning on May 1, 2014, and continuing through January 10, 2015, is supported by sufficient evidence and is affirmed.

FINALITY

[1] We note that the hearing officer's Finding of Fact No. 7 incorrectly references the MMI date as September 7, 2014, rather than March 7, 2014.
[2] We note that Dr. G provided an amended DWC-69 to correct a typographical error regarding the date of examination to correctly reflect that the date of the examination was December 11, 2014, rather than December 1, 2014.

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 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.

The hearing officer found that the first certification of MMI on March 7, 2014, and assignment of 10% IR by Dr. G was not delivered to the claimant by written verifiable means until after the claimant's attorney had filed a Request to Schedule, Reschedule, or Cancel a Benefit Review Conference (BRC) (DWC-45) to dispute that MMI certification and IR on March 27, 2015.

The hearing officer states in the Discussion portion of his decision that the preponderance of the evidence does not establish that the first certification of MMI and IR was delivered to the claimant by written verifiable means before the claimant filed a DWC-45 to dispute the MMI date and IR on March 27, 2015, as evidenced by the Division's Dispute Resolution Information System (DRIS) note in sequence number 103. The hearing officer states in his discussion that the claimant is a laborer and is not an educated man and he found the claimant credible when he testified that the first time he ever received a copy of Dr. G's certification of MMI and assigned IR was at the CCH.

In evidence is a letter dated October 6, 2014, from the self-insured addressed to the claimant and claimant's attorney referencing the self-insured's exchange of information which includes Dr. G's DWC-69 and narrative report. Also, a letter dated December 10, 2014, from the claimant's attorney addressed to the carrier's attorney referencing the claimant's exchange of information which includes Dr. G's report. This case is similar to Appeals Panel Decision 081248-s, decided October 3, 2008, in which the evidence established that the first valid certification of MMI and IR was exchanged by the claimant to the self-insured at a BRC. The Appeals Panel held that the claimant was in the possession of the first valid certification at the time of the exchange at the BRC which constituted acknowledged receipt by the claimant.

In this case, the first certification of MMI and assigned IR from Dr. G on September 10, 2014, was exchanged by the self-insured to the claimant on October 6, 2014, and by the claimant to the self-insured on December 10, 2014. The exchange of information constitutes acknowledged receipt of the first certification of MMI and IR by

the claimant. We note the expiration of 90 days from October 6, 2014, is January 1, 2015, and from December 10, 2014, it is March 10, 2015. The claimant disputed the first valid certification of MMI and IR on March 27, 2015, as evidenced by the DRIS notes and determined by the hearing officer. The claimant's filing of a DWC-45 on March 27, 2015, was not timely considering either October 6, 2014, or December 10, 2014, because it was filed after the expiration of the 90-day period to dispute first valid certification. Because the claimant did not timely dispute the first valid certification of MMI and IR within 90-days after the claimant's receipt of Dr. G's certification of MMI and IR, Dr. G's certification of MMI and IR became final under Section 408.123 and Rule 130.12.

The hearing officer's determination that the first valid certification by Dr. G certifying MMI on March 7, 2014, and assignment of 10% IR was not delivered to the claimant by written verifiable means until after the claimant's attorney had filed a DWC-45 to dispute that certification March 27, 2015, is legally incorrect. We note that the parties did not litigate any exceptions under Section 408.123(f).

Accordingly, we reverse the hearing officer's determination that the first certification of MMI and assigned IR from Dr. G on September 10, 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 assigned IR from Dr. G on September 10, 2014, became final under Section 408.123 and Rule 130.12.

MMI AND IR

As previously mentioned, Dr. G certified in a DWC-69 on September 10, 2014, that the claimant reached MMI on March 7, 2014, with a 10% IR. Given that we have reversed the hearing officer's determination that the first certification of MMI and IR from Dr. G on September 10, 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. G on September 10, 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 reached MMI on December 11, 2014, with a 20% IR and we render a new decision that the claimant reached MMI on March 7, 2014, with a 10% IR.

SUMMARY

We affirm the hearing officer's determination that the compensable injury of (date of injury), extends to an L2 transverse process fracture.

We affirm the determination that the claimant had disability only for the period beginning on May 1, 2014, and continuing through January 10, 2015.

We reverse the hearing officer's determination that the first certification of MMI and IR from Dr. G on September 10, 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. G on September 10, 2014, became final under Section 408.123 and Rule 130.12.

We reverse the hearing officer's determination that the claimant reached MMI on December 11, 2014, and we render a new decision that the claimant reached MMI on March 7, 2014.

We reverse the hearing officer's determination that the claimant's IR is 20% and we render a new decision that the claimant's IR is 10%.

The true corporate name of the insurance carrier is **CITY OF SAN ANGELO (a self-insured governmental entity)** and the name and address of its registered agent for service of process is

DWAIN MORRISON, MAYOR
72 W. COLLEGE AVENUE
SAN ANGELO, TEXAS 76903.

Veronica L. Ruberto
Appeals Judge

CONCUR:

Carisa Space-Beam
Appeals Judge

Margaret L. Turner
Appeals Judge