APPEAL NO. 160629

FILED MAY 31, 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 was held on March 14, 2016, in Austin, Texas, with (hearing officer) presiding as hearing officer. The hearing officer resolved the disputed issues before her by deciding that: (1) the first certification of maximum medical improvement (MMI) and assigned impairment rating (IR) from (Dr. W) on May 21, 2015, became final under Section 408.123 and 28 TEX. ADMIN. CODE § 130.12 (Rule 130.12); (2) respondent (claimant) reached MMI on May 12, 2015; and (3) the IR is 17%.

The appellant (carrier) appeals the hearing officer's determinations based upon sufficiency of the evidence and further argues an exception to finality under Section 408.123(f)(1)(A) because compelling medical evidence exists that Dr. W erred 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). The claimant responds urging affirmance.

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 Dr. W was selected by the Texas Department of Insurance, Division of Workers' Compensation (Division) as designated doctor (DD) to determine MMI and IR.

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. Rule 130.12(b)(1) provides, in part, that the first certification of MMI or assigned IR may be disputed by requesting and setting a benefit review conference (BRC) under Rule 141.1 or by requesting the appointment of a DD, if one has not been appointed. In her decision, the hearing officer found that Dr. W's certification of MMI and assignment of IR is the first valid certification and assignment in the case and such finding is not disputed by either party. It is further undisputed that the carrier's Request to Schedule, Reschedule, or Cancel a [BRC] (DWC-45) disputing Dr. W's certification is dated November 9, 2015.

In support of her decision that Dr. W's certification and assignment of MMI/IR became final by operation of law, the hearing officer determined in Finding of Fact No. 7 that Dr. W's certification and assignment were provided to the carrier by verifiable means on or before July 10, 2015. In her decision, the hearing officer stated that "(Dr. J)] [the carrier's choice of physician who conducted a post-DD required medical examination (RME)] noted in his report that the Division received a [RME Notice or Request for Order Form (DWC-22)] on July 10, 2015; therefore the request for a post-DD RME exam establishes a reasonable expectation that [the] [C]arrier] received the DD report before this date." We disagree. The carrier's request for a post-DD RME may suggest that the carrier had actual knowledge of Dr. W's certification and assignment but no evidence was presented that reasonably confirms delivery or that written notification was provided to the carrier by verifiable means. Although the hearing officer cites Appeals Panel Decision (APD) 041985-s, decided September 28, 2004, in support of her determination that the filing of the DWC-22 supported her finding that Dr. W's certification and assignment were provided to the carrier by verifiable means on or before July 10, 2015, she misinterprets our decision in that case. In APD 041985-s, we noted that although there was some evidence that a DWC-69 was mailed to the claimant, "no evidence was presented to indicate that the written notification was provided/delivered to [the] claimant by verifiable means. There was no signature card, or other verifiable evidence indicating when the notification was provided/delivered to [the] claimant." We noted further that although the hearing officer determined that the claimant had actual knowledge of the certification, "[the] case does not turn on whether the hearing officer believes [the] that claimant received a [DWC-69]. . . . The issue is whether the 90-day rule's clock was triggered. We conclude that it was not because [the] carrier has not shown that there was provision/delivery of written notice through *verifiable means."* Similarly, in this case, there was no showing that provision/delivery of written notice was made through verifiable means.

The hearing officer further cites APD 080301-s, decided April 26, 2008, in support of her decision; however, that case is also distinguishable. In APD 080301-s, we held that the carrier received the first certification of MMI/IR by verifiable means

because the carrier acknowledged receipt in its Notification of MMI/First Impairment Income Benefit Payment (PLN-3) notifying the claimant that it was disputing such certification and stating that a copy of the doctor's report was attached to the PLN-3. There was no such acknowledgment by the carrier in this case.

We accordingly reverse the hearing officer's decision that the first certification of MMI and IR assigned by Dr. W on May 21, 2015, became final under Section 408.123 and Rule 130.12 and render a new decision that the first certification of MMI and IR assigned by Dr. W on May 21, 2015, did not become final under Section 408.123 and Rule 130.12.

MMI/IR

We find no error in Dr. W's application of the AMA Guides. Furthermore, the hearing officer's finding that the preponderance of the other medical evidence admitted is not contrary to Dr. W's certification of MMI and assignment of IR is supported by sufficient evidence. Accordingly, the hearing officer's determinations that the claimant reached MMI on May 12, 2015, and that the claimant's IR is 17% as certified by Dr. W are affirmed.

SUMMARY

We reverse the hearing officer's determination that the first certification of MMI and IR assigned by Dr. W on May 21, 2015, became final under Section 408.123 and Rule 130.12 and render a new decision that the first certification of MMI and IR assigned by Dr. W on May 21, 2015, did not become final under Section 408.123 and Rule 130.12.

We affirm the hearing officer's determination that the claimant reached MMI on May 12, 2015.

We affirm the hearing officer's determination that the claimant's IR is 17%.

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

CORPORATION SERVICE COMPANY
211 EAST 7TH STREET, SUITE 620
AUSTIN, TEXAS 78701-3218.

K. Eugene Kraft
Appeals Judge

CONCUR:

Carisa Space-Beam
Appeals Judge

Margaret L. Turner
Appeals Judge