APPEAL NO. 161916
FILED NOVEMBER 16, 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 August 17, 2016, in (city), Texas, with (hearing officer) presiding as hearing officer. The hearing officer resolved the disputed issues by deciding that: (1) the compensable injury of (date of injury), extends to sprains/strains of the bilateral hip, groin, and thigh; (2) the compensable injury of (date of injury), does not extend to a right knee lateral meniscus tear or bilateral inguinal hernias; (3) the respondent/cross-appellant (claimant) reached maximum medical improvement (MMI) on March 28, 2015; (4) the claimant's impairment rating (IR) is zero percent; and (5) the first certification of MMI and assigned IR from (Dr. V) on September 15, 2014, did not become final under Section 408.123 and 28 TEX. ADMIN. CODE § 130.12 (Rule 130.12).

The appellant/cross-respondent (self-insured) appealed the determinations that the compensable injury of (date of injury), extends to sprains/strains of the bilateral hip, groin, and thigh; the first certification of MMI and assigned IR from Dr. V on September 15, 2014, did not become final; as well as the hearing officer's determinations of MMI and IR. The claimant cross-appealed the hearing officer's determination that the compensable injury of (date of injury), does not extend to a right knee lateral meniscus tear or bilateral inguinal hernias, as well as the hearing officer's determinations of MMI and IR. The self-insured responded to the claimant's cross-appeal, urging affirmance for the issues on which it prevailed. The appeal file does not contain a response from the claimant to the self-insured's appeal.

DECISION

Affirmed in part and reversed and remanded in part.

The claimant testified he was injured when he turned to caution children from crossing the street and his feet slipped, causing him to do the splits. The parties stipulated that the self-insured has accepted a (date of injury), compensable injury in the form of a right knee contusion.

EXTENT OF INJURY

The hearing officer's determination that the compensable injury of (date of injury), extends to sprains/strains of the bilateral hip, groin, and thigh is supported by sufficient evidence and is affirmed.

The hearing officer's determination that the compensable injury of (date of injury), does not extend to a right knee lateral meniscus tear or bilateral inguinal hernias is supported by sufficient evidence and is affirmed.

FINALITY PURSUANT TO SECTION 408.123

The parties stipulated that on September 15, 2014, Dr. V certified that the claimant reached MMI on September 15, 2014, with no permanent impairment and was the first doctor to certify MMI and determine impairment.

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 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.

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 this may include acknowledged receipt by the injured employee or insurance carrier, a statement of personal delivery, confirmed delivery by e-mail, confirmed delivery by facsimile transmission (fax), or some other confirmed delivery to the home or business address. 29 Tex.Reg. 2331, March 5, 2004.

The hearing officer, in the Discussion section of his Decision and Order stated:

> The evidence does show that [the] [c]laimant requested a designated doctor examination on January 15, 2015[,] for the issues of extent of injury, MMI, and [IR]. The evidence also shows that, on June 11, 2015, [the] [c]laimant's previous attorney faxed to the adjustor a [benefit review conference (BRC)] exchange that included [Dr. V's DWC-69]. Although this BRC exchange shows that [the] claimant had [Dr. V's DWC-69] as of June 11, 2015, it does not establish when [Dr. V's DWC-69] was delivered to [the] [c]laimant. No other evidence establishes when [Dr. V's DWC-69] was delivered to [the] [c]laimant by verifiable means.

The evidence establishes that the first valid certification was exchanged by the claimant to the self-insured on June 11, 2015, in the claimant's BRC initial exchange of information. Therefore, the first valid certification was in the claimant's possession at the time of the exchange on June 11, 2015. The Appeals Panel has previously held that the exchange of the first valid certification constitutes acknowledged receipt by the claimant. See APD 081248-s, decided October 3, 2008. Therefore, the hearing officer's finding that the evidence is insufficient to establish when the first certification of MMI and determination of no impairment from Dr. V was delivered to the claimant by verifiable means is so against the great weight and preponderance of the evidence as to be manifestly unjust and clearly wrong. Accordingly, we reverse the hearing officer's determination that the first certification of MMI and assigned IR from Dr. V on September 15, 2014, did not become final under Section 408.123 and Rule 130.12.

Because the hearing officer found that there was insufficient evidence to establish delivery to the claimant by verifiable means, the hearing officer made no further findings regarding the date of the dispute of the first certification or the applicability of any exceptions to finality as provided in Section 408.123. We remand the issue of whether the first certification of MMI and assigned IR from Dr. V on September 15, 2014, become final under Section 408.123 and Rule 130.12 for further consideration consistent with this decision.

MMI AND IR

The parties stipulated that the initial Texas Department of Insurance, Division of Workers' Compensation (Division)-selected designated doctor to determine MMI, IR, and extent of injury is (Dr. S). The hearing officer found that the certification from Dr. S that the claimant reached MMI on March 28, 2015, with a zero percent IR is supported by a preponderance of the evidence. However, since we have remanded the finality issue to the hearing officer for further consideration, we also reverse the hearing officer's determinations of MMI and IR and remand the issues of MMI and IR to the hearing officer for further action consistent with this decision.

SUMMARY

We affirm the hearing officer's determination that the compensable injury of (date of injury), extends to sprains/strains of the bilateral hip, groin, and thigh.

We affirm the hearing officer's determination that the compensable injury of (date of injury), does not extend to a right knee lateral meniscus tear or bilateral inguinal hernias.

We reverse the hearing officer's determination that the first certification of MMI and assigned IR from Dr. V on September 15, 2014, did not become final under Section 408.123 and Rule 130.12 and remand the finality issue to the hearing officer for further action consistent with this decision.

We reverse the hearing officer's determination that the claimant reached MMI on March 28, 2015, and remand the issue of MMI to the hearing officer for further action consistent with this decision.

We reverse the hearing officer's determination that the claimant's IR is zero percent and remand the IR issue to the hearing officer for further action consistent with this decision.

REMAND INSTRUCTIONS

On remand, the hearing officer is to make findings of fact regarding the date of the claimant's dispute of the first certification as well as any applicable exceptions to finality as provided in Section 408.123. The hearing officer is to then make a determination of whether the first certification of MMI and assigned IR from Dr. V on September 15, 2014, became final under Section 408.123 and Rule 130.12 consistent with the evidence.

The hearing officer is to then make a determination of MMI and IR consistent with the evidence.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Division, pursuant to Section 410.202 which was amended June 17, 2001, to exclude Saturdays and Sundays and holidays listed in Section 662.003 of the Texas Government Code in the computation of the 15-day appeal and response periods. *See* APD 060721, decided June 12, 2006.

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

LETICIA M. VACEK
100 MILITARY PLAZA
SAN ANTONIO, TEXAS 78205.

Margaret L. Turner
Appeals Judge

CONCUR:

K. Eugene Kraft
Appeals Judge

Carisa Space-Beam
Appeals Judge