APPEAL NO. 171530
FILED SEPTEMBER 6, 2017

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 April 6, 2017, with the record closing on May 31, 2017, 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 a lumbar disc protrusion at L4-5 with annular tearing but does not extend to right L5 lumbar radiculopathy; (2) the first certification of maximum medical improvement (MMI) and assigned impairment rating (IR) from (Dr. P) on May 11, 2016, did not become final under Section 408.123 and 28 TEX. ADMIN. CODE § 130.12 (Rule 130.12); (3) the appellant/cross-respondent (claimant) has not reached MMI; and (4) the claimant's IR is not ripe for adjudication.

The claimant appeals the hearing officer's determination that the compensable injury does not extend to right L5 lumbar radiculopathy as contrary to the preponderance of the evidence. The respondent/cross-appellant (carrier) responded, urging that the hearing officer's determination concerning the claimed right L5 radiculopathy is supported by the preponderance of the evidence.

The carrier appeals the hearing officer's determination regarding the issue of finality as being legally in error and contrary to the evidence. The carrier further complains of the hearing officer's determination that the compensable injury extends to a lumbar disc protrusion at L4-5 with annular tearing and of his decision concerning MMI and IR. The appeal file contains no response from the claimant to the carrier's cross-appeal.

DECISION

Affirmed in part and reversed and rendered in part.

It is undisputed that the claimant sustained a compensable injury on (date of injury), while assisting a heavy patient out of bed. The parties stipulated, in part, that the compensable injury extends to a lumbar sprain.

EXTENT OF INJURY

The hearing officer's determination that the compensable injury extends to a lumbar disc protrusion at L4-5 with annular tearing but not to right L5 lumbar radiculopathy is supported by sufficient evidence and is affirmed.

FINALITY OF FIRST CERTIFICATION

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, including IRs related to extent-of-injury disputes. The notice must contain a copy of a valid Report of Medical Evaluation (DWC-69), as described in Rule 130.12(c).

The hearing officer found that Dr. P's certification was a valid certification for purposes of Rule 130.12(c) and was the first certification of MMI and assignment of IR in the claim. Such findings are supported by the evidence.

In Appeals Panel Decision (APD) 041985-s, decided September 28, 2004, we 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 that 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, or some other confirmed delivery to the home or business address. In APD 041241-s, decided July 19, 2004, we held that where there is no verifiable evidence to establish when the notification of the MMI/IR was provided/delivered to the claimant, the hearing officer may rely on the testimony of the claimant to determine the date the notice was provided/delivered and "[h]ad there been a signature card in evidence indicating the date of receipt, the issue would have been more easily resolved." The claimant testified that she received a letter from the carrier in May 2016, and she acknowledged her signature dated May 21, 2016, on a United States Postal Service (USPS) certified mail return receipt "green card" addressed to the claimant; however, she indicated that she did not recall what documents were included with the letter she received on May 21, 2016.

Although Dr. P's May 11, 2016, certification of MMI and assignment of IR was not disputed by the claimant until October 14, 2016, the hearing officer determined that this first valid certification of MMI and first valid assignment of an IR did not become final under Section 408.123(e) and Rule 130.12(b) because the evidence failed to prove delivery of the certification to the claimant by verifiable means on a date certain. In the Discussion section of his Decision and Order, the hearing officer stated:

> [The] [c]arrier offered copies of a [Notification of MMI/First Impairment Income Benefit Payment (PLN-3)] dated May 12, 2016 (CR-B, page 3)

> and a [USPS] certified mail "green card" signed by [the] [c]laimant on May 21, 2016 (CR-D, pages 1 and 2), but there was nothing other than proximity in time indicating what was delivered to [the] [c]laimant by certified mail on May 21, 2016.

In evidence is carrier's Exhibit D, page 6, a copy of the carrier's Activity Notes retained in its records for this claim, which contains the following entry:

> This is to confirm that the mailing request, PLN-3 letter and DDE Rpt MMI-IR received on 05/12/2016 has been dispatched via certified mail on 05/13/2016 tracking numbers are:
>
> (claimant)…7015 0640 0001 5080 9983
> (claimant's atty law firm)…7015 0640 0001 5080 9990

We note the USPS return receipt tracking number listed in the preceding Activity Note entry is the same as the tracking number listed on Carrier's Exhibit D, page 1, a copy of a USPS certified mail receipt addressed to the claimant, and in Carrier's Exhibit D, page 2, a copy of a USPS return receipt "green card" addressed to the claimant and signed by her acknowledging receipt of certified mail on May 21, 2016. The hearing officer's determination that Dr. P's certification was not delivered to the claimant through verifiable means on a date certain, is so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. According to the facts presented in this case, Dr. P's certification of MMI and assignment of IR was delivered to the claimant on May 21, 2016, as evidenced by the carrier's Activity Notes which reflect that Dr. P's certification was sent to the claimant on May 13, 2016, by certified mail bearing tracking number 7015 0640 0001 5080 9983, and the USPS return receipt "green card" bearing the same tracking number signed by the claimant on May 21, 2016. We therefore reverse the hearing officer's determination that the first certification of MMI and assignment of IR from Dr. P was not delivered to the claimant through verifiable means on a date certain and hold that the first certification of MMI and assignment of IR from Dr. P was delivered to the claimant through verifiable means on May 21, 2016, a date more than 90 days prior to the claimant filing her dispute of such certification of MMI and assignment of IR on October 14, 2016.

Section 408.123(f) provides in part:

(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];

(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.

Although the claimant did not argue that she met an exception to finality under Section 408.123(f)(1)(B), in his Finding of Fact No. 8, the hearing officer stated:

> 8. If Dr. [P's] certification that [the] [c]laimant reached [MMI] on December 11, 2015, with a [zero percent] [IR] were understood to have become final under Rule 130.12, there was compelling [medical] evidence of an exception to finality under [Section] 408.123(f)(1)(B) for a clearly mistaken diagnosis.

In the Discussion portion of the decision, the hearing officer further stated that:

> If Dr. [P's] certification were understood to have become final pursuant to Rule 130.12, there was an exception to finality under [Section] 408.123(f)(1)(B), a clearly mistaken diagnosis. Dr. [P] rated a lumbar sprain/strain and certified IR 13 days after the injury event. The compensable injury extends to include a lumbar sprain and a lumbar disc protrusion at [L4-5] with annular tearing.

As noted by the hearing officer, it is indeed true that Dr. P certified that the claimant attained MMI 13 days following the date of injury; however, Dr. P's examination was conducted on May 6, 2016, more than five months post injury and subsequent to MRI testing. In his narrative report, Dr. P acknowledged that he reviewed the MRI report of February 16, 2016, which revealed a 2 mm disc protrusion at L4-5 with an annular tear. He further noted such findings were determined to be chronic or of an indeterminate duration, and that considering the medical record and the mechanism of injury as described by the claimant, he was of the opinion that the compensable diagnosis of lumbar sprain/strain was accurate.

In APD 142307, decided December 22, 2014, the Appeals Panel struck the hearing officer's finding that the first certification of MMI/IR did not become final due to compelling medical evidence of a clearly mistaken diagnosis or previously undiagnosed medical condition of a SLAP tear of the superior labrum and labral tear. In that case the

initial medical records referenced an MRI indicating a problem in the claimant's anterior superior labrum including an impression of a "possible SLAP tear" in the left shoulder and, for such reason, the Appeals Panel held there was no compelling medical evidence of a clearly mistaken diagnosis or previously undiagnosed medical condition of the left shoulder which included a SLAP tear of the superior labrum and a labral tear.

In this case, as in APD 142307, *supra*, there is no compelling medical evidence of a clearly mistaken diagnosis or a previously undiagnosed medical condition, a lumbar disc protrusion at L4-5 with annular tearing. The initial medical records indicate that the claimant was treated for back pain and radicular pain to the lower extremity. Prior to the date of the first certification of MMI/IR, the claimant's treating doctor requested EMG/NCV testing to confirm a diagnosis of radiculopathy as well as lumbar MRI testing which identified the disputed condition of a lumbar disc protrusion at L4-5 with annular tearing.

The hearing officer's finding that if Dr. P's certification of MMI and assignment of IR were understood to become final under Rule 130.12, there was compelling medical evidence of an exception to finality under Section 408.123(f)(1)(B) for a clearly mistaken diagnosis is so against the great weight and preponderance of the evidence as to be clearly wrong and unjust because compelling medical evidence does not exist of a clearly mistaken diagnosis or previously undiagnosed medical condition. We therefore strike that portion of Finding of Fact No. 8 that there was compelling medical evidence of an exception to finality under Section 408.123(f)(1)(B) for a clearly mistaken diagnosis.

Although the hearing officer's Decision and Order contains no findings of fact, conclusions of law, decision or discussion regarding an exception to finality under Section 408.123(f)(1)(C), the claimant's position at the benefit review conference and argument at the CCH was that she met this exception to finality because she received improper and inadequate medical treatment for the injury prior to May 11, 2016, the date of Dr. P's certification of MMI and assignment of IR that would render such certification and assignment invalid. In order for the exception to finality in Section 408.123(f)(1)(C) to apply, there must be compelling medical evidence of improper or inadequate treatment before the date of certification or assignment. *See* APD 110527, decided June 3, 2011. In this case, no doctor opined that the claimant received improper or inadequate treatment for her injury. There is no compelling medical evidence that the claimant received improper or inadequate treatment for her injury before May 11, 2016, the date of Dr. P's MMI/IR certification.

For the reasons discussed hereinabove, we reverse the hearing officer's determination that the first certification of MMI and assignment of IR from Dr. P did not

become final under Section 408.123 and Rule 130.12 and render a new decision that the first certification of MMI and assignment of IR from Dr. P on May 11, 2016, became final under Section 408.123 and Rule 130.12. We, accordingly, further reverse the hearing officer's determinations that the claimant has not reached MMI and that the claimant's IR is not ripe for adjudication and render a new decision that the claimant reached MMI on December 11, 2015, with a zero percent IR as certified by Dr. P on May 11, 2016.

SUMMARY

We affirm the hearing officer's determination that the compensable injury extends to a lumbar disc protrusion at L4-5 with annular tearing but not to right L5 lumbar radiculopathy.

We reverse the hearing officer's determination that the first certification of MMI and assignment of IR from Dr. P did not become final under Section 408.123 and Rule 130.12 and render a new decision that the first certification of MMI and assignment of IR from Dr. P on May 11, 2016, did become final under Section 408.123 and Rule 130.12.

We reverse the hearing officer's determination that the claimant has not reached MMI and render a new decision that the claimant reached MMI on December 11, 2015, as certified by Dr. P on May 11, 2016.

We reverse the hearing officer's determination that the claimant's IR is not ripe for adjudication and render a new decision that the claimant's IR is zero percent, as assigned by Dr. P on May 11, 2016.

The true corporate name of the insurance carrier is **COMMERCE AND INDUSTRY 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