APPEAL NO. 190180
FILED MARCH 28, 2019

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 October 22, 2018, with the record closing on December 19, 2018, in (city), Texas, with (administrative law judge) presiding as the administrative law judge (ALJ). The ALJ resolved the disputed issues by deciding that: (1) the first certification of maximum medical improvement (MMI) and assigned impairment rating (IR) from (Dr. A) on October 24, 2017, did not become final under Section 408.123 and 28 TEX. ADMIN. CODE § 130.12 (Rule 130.12); (2) the respondent (claimant) has not reached MMI; (3) because the claimant has not reached MMI, an IR cannot yet be determined; and (4) the claimant had disability resulting from an injury sustained on (date of injury), from June 22, 2018, to the present.

The appellant (self-insured) appealed, disputing the ALJ's determinations of finality, MMI, and IR. The claimant responded, urging affirmance of the ALJ's determinations. The ALJ's determination that the claimant had disability resulting from an injury sustained on (date of injury), from June 22, 2018, to the present, has not been appealed and has become final pursuant to Section 410.169.

DECISION

Reversed and remanded.

The evidence reflects the claimant sustained a lumbar injury when he picked up a tree trunk to load onto a trailer on (date of injury). The parties stipulated, in part, that on (date of injury), the claimant sustained a compensable injury in the form of a lumbar sprain/strain, lumbar radiculopathy, central posterior disc protrusion and annular fissure at L4-5, spinal canal stenosis at L4-5, disc desiccation at L4-5 with a central annular tear, and soft disc herniation on the left side of the lumbar area; and, that the Texas Department of Insurance, Division of Workers' Compensation (Division) selected Dr. A to determine MMI, IR, and disability. The evidence reflects that Dr. A was appointed as designated doctor for extent of injury as well.

The designated doctor, Dr. A, examined the claimant on October 3, 2017, and certified on October 24, 2017, that the claimant reached MMI on July 30, 2017, with a zero percent IR, for the compensable injury of a lumbar sprain/strain. Additionally, Dr. A provided alternate certifications on October 24, 2017, certifying that the claimant had not reached MMI which considered the compensable injury of a lumbar sprain/strain and disputed extent-of-injury conditions. In evidence is a copy of an e-mail dated October 24, 2017, to the claimant that states the designated doctor's examination report

is attached. The ALJ found that written notice of Dr. A's certification was delivered to the claimant by verifiable means on October 24, 2017. This finding of fact was not appealed.

Furthermore, the ALJ states in her decision that the self-insured requested a benefit review conference (BRC) on extent of injury on October 24, 2017. The parties resolved the extent-of-injury issue by agreement at the BRC. In evidence is a Benefit Dispute Agreement (DWC-24) which states that the parties agreed that the compensable injury of (date of injury), extends to lumbar radiculopathy, central posterior disc protrusion and annular fissure at L4-5, spinal canal stenosis at L4-5, disc desiccation at L4-5 with a central annular tear, and soft disc herniation on the left side of the lumbar area, but does not extend to a lower lumbar facet arthrosis and diffuse disc bulge at L2-3 with bilateral narrowing.

The ALJ states in her decision that the claimant did not request a BRC to dispute Dr. A's certification of MMI and IR within 90 days of October 24, 2017, and that he filed the dispute on June 22, 2018. The ALJ found that the claimant filed a Request to Schedule, Reschedule, or Cancel a [BRC] (DWC-45) disputing the designated doctor's certification of MMI and IR on June 22, 2018. This finding of fact was not appealed.

FINALITY

Section 408.123(e) provides that except as otherwise provided by this section, an employee's first valid certification of MMI and the 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(a)(1-3) provide that the certifications and assignments that may become final are: (1) the first valid certification of MMI and/or IR assigned or determination of no impairment; (2) the first valid assignment of IR after the expiration of 104 weeks from the date income benefits begin to accrue or the expiration date of any extension under Section 408.104, if the employee has not been certified as having reached MMI; or (3) the first valid subsequent certification of MMI and/or assignment of an IR or determination of no impairment received after the date a certification of MMI and/or assignment of an IR or determination of no impairment is overturned, modified or withdrawn by agreement of the parties or by a final decision of the commission or a court. Rule 130.12(a)(4) provides that a designated doctor may provide multiple IRs if there is a dispute over extent of injury. This rule subsection also provides that whichever rating from the designated doctor applies to the compensable injury once an extent-of-injury dispute has been resolved may become final if not disputed. Rule 130.12(a)(4) lastly provides that an extent-of-injury dispute does not constitute a dispute of the MMI/IR for purposes of finality under this subsection.

As stated above, the designated doctor, Dr. A, provided a certification of MMI and IR for the compensable injury and alternate certifications that included extent-of-injury conditions that were in dispute. Dr. A's alternate certifications certified that the claimant had not reached MMI. The ALJ states in her decision that the parties resolved the extent-of-injury dispute by agreeing that the compensable injury included several extent-of-injury conditions in dispute; thus, under Rule 130.12(a)(4), the certification by Dr. A that the claimant reached MMI on July 30, 2017, with a zero percent IR for the lumbar sprain/strain was not subject to finality. The ALJ determined that Dr. A's certification of MMI and IR on October 24, 2017, did not become final pursuant to Section 408.123 and Rule 130.12.

Rule 130.12(a)(4) Multiple Certifications

Rule 130.12(a)(4) provides that a designated doctor may provide multiple IRs if there is a dispute over extent of injury. Rule 130.12(c) provides that the certification on the Report of Medical Evaluation (DWC-69) is valid if: (1) there is an MMI date that is not prospective; (2) there is an impairment determination of either no impairment or a percentage [IR] assigned; and (3) there is the signature of the certifying doctor who is authorized by the Division under Rule 130.1(a) to make the assigned impairment determination.

In this case, Dr. A provided a certification with an IR of zero percent for the compensable injury and alternate certifications that the claimant has not reached MMI for the disputed extent-of-injury conditions. However, the alternate certifications do not contain multiple IRs or ratings as stated in Rule 130.12(a)(4). Further, the alternate certifications do not contain the requirements for a valid certification as stated in Rule 130.12(c). The evidence reflects that Dr. A's certification that the claimant reached MMI on July 30, 2017, with a zero percent IR for the lumbar sprain/strain is the first valid certification of MMI and IR for purposes of finality pursuant to Section 408.123.

Rule 130.12(b) Dispute of First Certification

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. Rule 130.12(b)(1) provides, in part, that only an insurance carrier, an injured employee, or an injured employee's attorney or employee representative under Rule 150.3(a) may dispute a first certification of MMI and IR under Rule 141.1 (related to Requesting and

Setting a BRC) or by requesting the appointment of a designated doctor, if one has not been appointed.

The ALJ found that written notice of Dr. A's certification was delivered to the claimant by verifiable means on October 24, 2017, and that the claimant filed a DWC-45 disputing the designated doctor's certification of MMI and IR on June 22, 2018. These findings of fact were not appealed. The claimant did not request a BRC to dispute Dr. A's certification of MMI and IR within 90 days of October 24, 2017. Accordingly, we reverse the ALJ's determination that the first certification of MMI and assigned IR from Dr. A on October 24, 2017, did not become final under Section 408.123 and Rule 130.12.

Section 408.123(f) Exceptions

Section 408.123(f) provides that 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. The Appeals Panel has held that neither Section 408.123 nor Rule 130.12 provide that the mere inclusion or the exclusion of a condition in an assignment of IR constitutes an exception for finality, and we decline to read any such interpretation in those provisions. *See* Appeals Panel Decision (APD) 132117, decided November 4, 2013, and APD 132594-s, decided January 3, 2014.

At the CCH the claimant argued that he met an exception to finality found in Section 408.123(f). The ALJ failed to discuss or make any findings of fact, conclusions of law, or a decision as to whether there was compelling medical evidence to establish any of the three exceptions to finality found in Section 408.123(f). Because the ALJ failed to address any of the finality exceptions, we remand this case to the ALJ to determine if there is compelling medical evidence to establish any of the three finality exceptions found in Section 408.123(f).

MMI/IR

Because we have reversed and remanded the issue of whether Dr. A's certification of MMI and IR on October 24, 2017, became final under Section 408.123 and Rule 130.12, we also reverse the ALJ's determinations that the claimant has not reached MMI and because the claimant has not reached MMI, an IR cannot yet be

assigned, and we remand the issues of MMI and IR to the ALJ for further action consistent with this decision.

We note that Dr. A re-examined the claimant on November 16, 2018, and certified on November 29, 2018, that the claimant had not yet reached MMI. Dr. A states in his narrative report dated November 29, 2018, that the claimant "has developed arachnoiditis and his doctor has requested a psychological evaluation to get a stimulator put in, but it has been denied. [The claimant] has severe deficit in his left leg and drags it as he is walking. Further improvement is anticipated with appropriate treatment." As previously mentioned, the parties stipulated that the claimant sustained a compensable injury in the form of a lumbar sprain/strain, lumbar radiculopathy, central posterior disc protrusion and annular fissure at L4-5, spinal canal stenosis at L4-5, disc desiccation at L4-5 with a central annular tear, and soft disc herniation on the left side of the lumbar area. Also, in evidence is a DWC-24 which specifically states that the compensable injury does not extend to a lower lumbar facet arthrosis and diffuse disc bulge at L2-3 with bilateral narrowing.

SUMMARY

We reverse the ALJ's determination that the first certification of MMI and assigned IR from Dr. A on October 24, 2017, did not become final under Section 408.123 and Rule 130.12, and we remand the issue of finality of Dr. A's certification of MMI and IR on October 24, 2017, to the ALJ for further action consistent with this decision.

We reverse the ALJ's determination that the claimant has not reached MMI and we remand the issue of MMI to the ALJ for further action consistent with this decision.

We reverse the ALJ's determination that because the claimant has not reached MMI, an IR cannot yet be assigned, and we remand the issue of IR to the ALJ for further action consistent with this decision.

REMAND INSTRUCTIONS

On remand the ALJ is to determine whether Dr. A's certification of MMI and IR on October 24, 2017, became final under Section 408.123 and Rule 130.12, then the ALJ is to determine whether there is compelling medical evidence of any exceptions to finality found in Section 408.123(f). Finally, the ALJ is to determine the claimant's MMI and IR.

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 ALJ, 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 **STATE OFFICE OF RISK MANAGEMENT (a self-insured governmental entity)** and the name and address of its registered agent for service of process is

For service in person the address is:

STEPHEN S. VOLLBRECHT, EXECUTIVE DIRECTOR
300 W. 15TH STREET
WILLIAM P. CLEMENTS, JR. STATE OFFICE BUILDING, 6TH FLOOR
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For service by mail the address is:

STEPHEN S. VOLLBRECHT, EXECUTIVE DIRECTOR
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Veronica L. Ruberto
Appeals Judge

CONCUR:

Carisa Space-Beam
Appeals Judge

Margaret L. Turner
Appeals Judge