APPEAL NO. 220994
FILED AUGUST 25, 2022

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 May 10, 2022, 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 compensable injury of (date of injury), does not extend to right shoulder supraspinatus moderate grade articular surface partial thickness tearing; right shoulder infraspinatus blended fibers tearing; right shoulder glenoid labral derangement, favor type IIB SLAP lesion; left shoulder articular surface supraspinatus critical zone fraying and fibrillation; left shoulder tearing of supraspinatus and infraspinatus tendons at blended insertion; or left shoulder glenoid derangement, SLAP type II lesion; (2) the appellant/cross-respondent (claimant) reached maximum medical improvement (MMI) on September 18, 2019; (3) the claimant's impairment rating (IR) is 10%; and (4) the first certification of MMI and assigned IR from (Dr. G) on March 6, 2020, did not become final under Section 408.123 and 28 Tex. Admin. Code § 130.12 (Rule 130.12).

The claimant appealed the ALJ's determinations of extent of injury, MMI, and IR. The respondent/cross-appellant (carrier) cross-appealed the determinations of finality, MMI, and IR. The carrier responded to the claimant's appeal, urging affirmance of the extent-of-injury issue. The appeal file does not contain a response from the claimant to the carrier's cross-appeal.

DECISION

Affirmed in part and reversed and rendered in part.

The parties stipulated in part that: (1) the claimant sustained a compensable injury on (date of injury); (2) the compensable injury of (date of injury), extends to bilateral shoulder sprain/strains; (3) (Dr. T) was properly appointed by the Texas Department of Insurance, Division of Workers' Compensation (Division) as designated doctor to determine MMI, IR, and the extent of the claimant's injury; (4) the date of statutory MMI is July 23, 2021; and (5) the claimant first disputed the first certification of MMI and assigned IR from Dr. G by filing a Request to Schedule, Reschedule, or Cancel a Benefit Review Conference (DWC-45) on October 12, 2021. The claimant testified that he was injured on (date of injury), when he was pulling on a pipe that got stuck.

The ALJ is the sole judge of the weight and credibility of the evidence (Section 410.165(a)) and, as the trier of fact, resolves the conflicts and inconsistencies in the evidence. *Texas Employers Insurance Association v. Campos*, 666 S.W.2d 286 (Tex.

App.—Houston [14th Dist.] 1984, no writ). As an appellate reviewing tribunal, the Appeals Panel will not disturb challenged factual findings of an ALJ absent legal error, unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. *Cain v. Bain*, 709 S.W.2d 175, 176 (Tex. 1986); *In re King's Estate*, 150 Tex. 662, 244 S.W.2d 660 (1951).

EXTENT OF INJURY

The ALJ's determination the compensable injury of (date of injury), does not extend to right shoulder supraspinatus moderate grade articular surface partial thickness tearing; right shoulder infraspinatus blended fibers tearing; right shoulder glenoid labral derangement, favor type IIB SLAP lesion; left shoulder articular surface supraspinatus critical zone fraying and fibrillation; left shoulder tearing of supraspinatus and infraspinatus tendons at blended insertion; or left shoulder glenoid derangement, SLAP type II lesion is supported by sufficient evidence and is affirmed.

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, 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).

Section 408.123(f) provides, in part:

> 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 evidence reflects that, on March 6, 2020, Dr. G, the claimant's treating doctor, examined the claimant and certified on that same date that the claimant reached MMI on March 6, 2020, with an assigned IR of 9%. The ALJ found that Dr. G's March 6, 2020, certification was the first valid certification that the claimant reached MMI with an assigned IR. That finding is supported by sufficient evidence.

The ALJ also found that there is no compelling medical evidence of any previously undiagnosed condition or any improper or inadequate treatment of the injury before the date of certification. That finding is supported by sufficient evidence. As noted above, the parties stipulated that the claimant first disputed the first certification of MMI and assigned IR from Dr. G by filing a DWC-45 on October 12, 2021. However, the ALJ determined that Dr. G's certification of MMI and assigned IR on March 6, 2020, did not become final because it was not provided to the claimant by verifiable means.

In evidence is a Notice of [MMI] and Permanent Impairment (PLN-3b) from the carrier addressed to the claimant. The claimant verified that the address contained on the PLN-3b was his correct address. The PLN-3b states that the certification of MMI/IR from Dr. G was attached. In evidence is a certified mail/return receipt requested ("green card") that contains a tracking number from the United States Postal Service (USPS) which notes the DWC-69, the PLN-3b, and the report from Dr. G were all included. Further, in evidence is a USPS printout that confirms the same tracking number was delivered on March 31, 2020. Also in evidence is an affidavit from a claims adjuster who is employed by the carrier which states that on March 27, 2020, "[the] [c]arrier mailed the PLN-3 with the attached DWC-69 and [the] report of Dr. [G]" to the claimant at his correct address. The claimant acknowledged that the green card contained his correct address. The green card in evidence contains a signature and the claimant's printed name as a recipient. We note that Dr. G's certification considered bilateral shoulder sprain/strains.

In his discussion of the evidence the ALJ stated: "[t]he ALJ finds that a layman could examine the signature on the green card and that of [the] [c]laimant's on his DWC Form-045 and see that the signatures are not the same. The ALJ examined the documents and finds that the [c]laimant did not sign the green card (CR-F pg. 4). The ALJ finds that the notice with Dr. [G]'s report was not delivered to [the] [c]laimant, rather it was delivered to some unknown person." We disagree.

In Appeals Panel Decision (APD) 042163-s, decided October 21, 2004, the Appeals Panel discussed whether the deemed receipt provision of Rule 102.4 was applicable and what is meant by "verifiable means." APD 041985-s, decided September 28, 2004, and APD 042163-s, *supra*, both reference the preamble to Rule 130.12. The preamble provides that the 90-day period "begins when that party receives verifiable written notice of the MMI/IR certification."

The preamble goes on to state:

> Written notice is verifiable when it is provided from any source in a manner that reasonably confirms delivery to the party. 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, or some other confirmed delivery to the home or business address. The goal of this requirement is not to regulate how a system participant makes delivery of a report or other information to another system participant, but to ensure that the system participant filing the report or providing the information has verifiable proof that it was delivered. 29 Tex. Reg. 2331, March 5, 2004.

The preamble further states that a party may not prevent verifiable delivery and specifically provides that a party who refuses to take personal delivery or certified mail has still been given verifiable written notice.

According to the facts presented in this case, Dr. G's certification of MMI and assignment of IR was delivered to the claimant on March 31, 2020, as evidenced by the PLN-3b addressed to the claimant's correct address and the green card stating that the PLN-3b, DWC-69, and the narrative from Dr. G are enclosed with a tracking number and the printout from USPS bearing the same tracking number confirming delivery to (city), Texas. The affidavit from the claims adjuster additionally confirms the carrier mailed the PLN-3b, with the attached DWC-69, and report of Dr. G to the address the claimant confirmed at the CCH was his correct address. We reverse the ALJ's finding that the first certification of MMI and assignment of IR from Dr. G was not delivered to the claimant through verifiable means as being against the great weight and preponderance of the evidence. We hold that the first certification of MMI and assignment of IR from Dr. G was delivered to the claimant through verifiable means on March 31, 2020, a date more than 90 days prior to the claimant filing his dispute of such certification of MMI and assignment of IR on October 12, 2021, as stipulated by the parties. We reverse the ALJ's determination that the first certification of MMI and assigned IR from Dr. G on March 6, 2020, did not become final under Section 408.123 and Rule 130.12 as being against the great weight and preponderance of the evidence.

We render a new decision that the first certification of MMI and assigned IR from Dr. G on March 6, 2020, did become final pursuant to Section 408.123 and Rule 130.12.

MMI/IR

Given that we have reversed the ALJ's decision that the first certification of MMI and IR assigned by Dr. G did not become final and rendered a new decision that it became final pursuant to Section 408.123, we reverse the ALJ's determinations of MMI and IR. The ALJ determined that the claimant's MMI date was September 18, 2019, and that the claimant's IR was 10% as certified by the Division-appointed designated doctor, Dr. T. We reverse the ALJ's decision that the claimant reached MMI on September 18, 2019, and render a new decision that the claimant reached MMI on March 6, 2020. We reverse the ALJ's decision that the claimant's IR is 10% and render a new decision that the claimant's IR is 9%.

SUMMARY

We affirm the ALJ's determination the compensable injury of (date of injury), does not extend to right shoulder supraspinatus moderate grade articular surface partial thickness tearing; right shoulder infraspinatus blended fibers tearing; right shoulder glenoid labral derangement, favor type IIB SLAP lesion; left shoulder articular surface supraspinatus critical zone fraying and fibrillation; left shoulder tearing of supraspinatus and infraspinatus tendons at blended insertion; or left shoulder glenoid derangement, SLAP type II lesion.

We reverse the ALJ's determination that the first certification of MMI and assigned IR from Dr. G on March 6, 2020, did not become final under Section 408.123 and Rule 130.12 and render a new decision that the first certification of MMI and assigned IR from Dr. G on March 6, 2020, did become final pursuant to Section 408.123 and Rule 130.12.

We reverse the ALJ's decision that the claimant reached MMI on September 18, 2019, and render a new decision that the claimant reached MMI on March 6, 2020.

We reverse the ALJ's decision that the claimant's IR is 10% and render a new decision that the claimant's IR is 9%.

The true corporate name of the insurance carrier is **INDEMNITY INSURANCE COMPANY OF NORTH AMERICA** and the name and address of its registered agent for service of process is

CT CORPORATION SYSTEM
1999 BRYAN STREET, SUITE 900
DALLAS, TEXAS 75201-3136.

Margaret L. Turner
Appeals Judge

CONCUR:

Cristina Beceiro
Appeals Judge

Carisa Space-Beam
Appeals Judge