

APPEAL NO. 221291
FILED SEPTEMBER 21, 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 was held on June 29, 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 first certification of maximum medical improvement (MMI) and assigned impairment rating (IR) from (Dr. A) on November 7, 2018, did not become final under Section 408.123 and 28 Tex. Admin. Code § 130.12 (Rule 130.12); (2) the respondent (claimant) reached MMI on August 16, 2019; and (3) the claimant's IR is 30%. The appellant (self-insured) appealed the ALJ's determinations of finality, MMI, and IR. The claimant responded to the self-insured's appeal, urging affirmance of the ALJ's determinations.

DECISION

Reversed and remanded.

The parties stipulated, in part, that: (1) on (date of injury), the claimant sustained a compensable injury; (2) the claimant's compensable injury extends to right foot calcaneal fracture and right ankle calcaneofibular ligament sprain; (3) the Texas Department of Insurance, Division of Workers' Compensation (Division) appointed Dr. A as designated doctor to address MMI and IR; and (4) Dr. A evaluated the claimant on November 7, 2018, and certified that she reached MMI on November 7, 2018, with an IR of 6%. The claimant testified that she was injured on (date of injury), while working as a bus attendant for the employer. The claimant further testified that she was participating in a training exercise on the bus when she accidentally fell out of the back of the bus and landed on her right foot, resulting in a right foot injury.

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:

(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.

In her discussion of the evidence, the ALJ noted that Dr. A's certification was the first valid certification of MMI and IR. This is supported by sufficient evidence. She further noted that the self-insured provided evidence of the tracking history of a package, but there was a lack of evidence that established a connection between the tracked package and the DWC-69 from Dr. A. The ALJ then found that the self-insured did not provide evidence that established the claimant received Dr. A's DWC-69 on a certain date.

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.

A review of the record indicates that the claimant testified she did not receive Dr. A's report from the self-insured with a notice that she has the right to dispute it. However, she did testify that she received Dr. A's certification from Dr. A directly on November 18, 2018. Therefore, we find that the claimant did receive Dr. A's certification by verifiable means on November 18, 2018. Accordingly, the ALJ's determination that the first certification of MMI and assigned IR from Dr. A on November 7, 2018, did not become final under Section 408.123 and Rule 130.12 is reversed.

Because the ALJ found that there was insufficient evidence to establish delivery to the claimant by verifiable means, the ALJ 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(f). We remand the issue of whether the first certification of MMI and assigned IR from Dr. A on November 7, 2018, became final under Section 408.123 and Rule 130.12 for further consideration consistent with this decision.

MMI AND IR

As we have reversed and remanded the issue of whether the first certification of MMI and assigned IR from Dr. A on November 7, 2018, became final under Section 408.123 and Rule 130.12, we also reverse the ALJ's determinations that the claimant reached MMI on August 16, 2019, with a 30% IR and remand the issues of MMI and IR to the ALJ for further action consistent with this decision.

SUMMARY

We reverse the ALJ's determination that the first certification of MMI and assigned IR from Dr. A on November 7, 2018, did not become final under Section 408.123 and Rule 130.12, and we remand the issue of finality to the ALJ for further action consistent with this decision.

We reverse the ALJ's determinations that the claimant reached MMI on August 16, 2019, with a 30% IR and remand the issues of MMI and IR to the ALJ for further action consistent with this decision.

REMAND INSTRUCTIONS

On remand, the ALJ 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 ALJ is to then make a determination of whether

the first certification of MMI and assigned IR from Dr. A on November 7, 2018, became final under Section 408.123 and Rule 130.12 consistent with the evidence and this decision.

The ALJ is to then to make a determination of MMI and IR consistent with the evidence and this decision.

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 **(a self-insured governmental entity)** and the name and address of its registered agent for service of process is

(NAME)
(ADDRESS)
(CITY), TEXAS (ZIP CODE).

Cristina Beceiro
Appeals Judge

CONCUR:

Carisa Space-Beam
Appeals Judge

Margaret L. Turner
Appeals Judge