APPEAL NO. 230779
FILED JULY 21, 2023

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 April 11, 2023, in (city), Texas, with (administrative law judge) presiding as the administrative law judge (ALJ). The ALJ resolved the disputed issues by determining that: (1) the compensable injury of (date of injury), does not extend to an L3-4 annular tear, L3-4 right paracentral annular protrusion, or L5-S1 right paracentral disc herniation; (2) the appellant/cross-respondent (claimant) reached maximum medical improvement (MMI) on December 20, 2016; (3) the claimant's impairment rating (IR) is zero percent; and (4) the first certification of MMI and assigned IR from (Dr. M) on December 22, 2016, did not become final under Section 408.123 and 28 Tex. Admin. Code § 130.12 (Rule 130.12). The claimant appealed, disputing the ALJ's determinations of extent of injury, MMI, and IR. The respondent/cross-appellant (carrier) cross-appealed, disputing the ALJ's determination that Dr. M's December 22, 2016, certification did not become final under Section 408.123 and Rule 130.12. The appeal file does not contain a response from the carrier to the claimant's appeal or 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 the claimant sustained a compensable injury on (date of injury), that extends to at least a lumbar strain, and that (Dr. G) is the designated doctor appointed by the Texas Department of Insurance, Division of Workers' Compensation (Division) to determine MMI, IR, and extent of injury. The claimant was injured on (date of injury), while using an approximately five foot long pry bar which slipped and caused the claimant to jerk and hurt his low back.

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 that the compensable injury of (date of injury), does not extend to an L3-4 annular tear, L3-4 right paracentral annular protrusion, or L5-S1 right paracentral disc herniation is supported by sufficient evidence and is affirmed.

FINALITY AND MMI/IR

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(b) provides, in part, that the first MMI/IR certification must be disputed within 90 days of delivery of written notice through verifiable means and that the notice must contain a copy of a valid Report of Medical Evaluation (DWC-69), as described in Rule 130.12(c). Rule 130.12(c) provides that a certification of MMI and/or IR assigned as described in subsection (a) must be on a DWC-69, and the certification 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.

The ALJ found that Dr. M's December 22, 2016, certification is valid for the purposes of Section 408.123 and Rule 130.12, and was the first valid certification in this claim. This finding was not appealed. The ALJ also found that there was insufficient evidence to determine when Dr. M's DWC-69 was provided to the claimant by verifiable means, which was appealed by the carrier. In the Discussion portion of the decision the ALJ noted the evidence showed the carrier sent Dr. M's DWC-69 to the claimant by registered mail with a postmark date of January 5, 2017, and that the United States Postal Service (USPS) returned the unclaimed registered mail to the carrier on January 26, 2017. The ALJ further noted that the registered mail had the claimant's correct address at that time but "there was no persuasive evidence to establish the date of any attempted delivery of the registered mail." The ALJ concluded by stating "[i]t cannot be determined if and when delivery was attempted; therefore, the date written notification of the certification or assignment was provided to the claimant by verifiable means cannot be determined." On that basis the ALJ found the claimant's November 16, 2022, Request to Schedule, Reschedule, or Cancel a Benefit Review Conference (DWC-45) and the claimant's July 25, 2022, Request for Designated Doctor Examination (DWC-32) to dispute Dr. M's certification cannot be deemed untimely.

The Appeals Panel has previously noted that the preamble to Rule 130.12 discusses how written notice is verifiable and goes on to state at 29 Tex. Reg. 2331, March 5, 2004:

> . . . a party may not prevent verifiable delivery. For example, a party who refuses to take personal delivery or certified mail has still been given verifiable written notice.

The evidence in this case established that the carrier sent Dr. M's certification to the claimant at his correct address at that time by certified mail with a postmark date of January 5, 2017, and that the USPS returned the unclaimed certified mail to the carrier on January 26, 2017. Under the facts of this case, we hold the carrier did provide Dr. M's certification to the claimant by verifiable means.

The parties did not litigate an exception to finality under Section 408.123(f). Therefore, we reverse the ALJ's determination that the first certification of MMI and assigned IR from Dr. M on December 22, 2016, did not become final under Section 408.123 and Rule 130.12. We render a new decision that the first certification of MMI and assigned IR from Dr. M on December 22, 2016, became final under Section 408.123 and Rule 130.12.

The ALJ determined the claimant reached MMI on December 20, 2016, with a zero percent IR as certified by Dr. G, the designated doctor. However, we have reversed the ALJ's finality determination and rendered a new decision that Dr. M's December 20, 2016, certification became final under Section 408.123 and Rule 130.12. Dr. M's December 20, 2016, certification in evidence reflects Dr. M certified the claimant reached MMI on December 20, 2016, and that the claimant does not have any permanent impairment as a result of the compensable injury. We affirm on other grounds the ALJ's determination that the claimant reached MMI on December 20, 2016, as certified by Dr. M. We reverse the ALJ's determination that the claimant's IR is zero percent, and we render a new decision that the claimant does not have any permanent impairment as a result of the compensable injury as certified by Dr. M.

SUMMARY

We affirm the ALJ's determination that the compensable injury of (date of injury), does not extend to an L3-4 annular tear, L3-4 right paracentral annular protrusion, or L5-S1 right paracentral disc herniation.

We reverse the ALJ's determination that the first certification of MMI and assigned IR from Dr. M on December 22, 2016, did not become final under Section 408.123 and Rule 130.12, and we render a new decision that the first certification of MMI and assigned IR from Dr. M on December 22, 2016, became final under Section 408.123 and Rule 130.12.

We affirm on other grounds the ALJ's determination that the claimant reached MMI on December 20, 2016, as certified by Dr. M.

We reverse the ALJ's determination that the claimant's IR is zero percent, and we render a new decision that the claimant does not have any permanent impairment as a result of the compensable injury as certified by Dr. M.

The true corporate name of the insurance carrier is **ZURICH AMERICAN 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.

Carisa Space-Beam
Appeals Judge

CONCUR:

Cristina Beceiro
Appeals Judge

Margaret L. Turner
Appeals Judge