APPEAL NO. 231438
FILED NOVEMBER 30, 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 August 21, 2023, 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. T) on September 14, 2022, became final pursuant to Section 408.123 and 28 Tex. Admin. Code § 130.12 (Rule 130.12); (2) the respondent (claimant) reached MMI on September 14, 2022; and (3) the claimant's IR is 16%. The appellant (carrier) appeals the ALJ's determinations of finality, MMI, and IR. The appeal file does not contain a response from the claimant.

DECISION

Reversed and rendered in part, and reversed and remanded in part.

The parties stipulated, in part, that: the claimant sustained a compensable injury on (date of injury); the compensable injury for the purpose of determining MMI and IR is a lumbar strain and intervertebral disc disorder at L4-5 with radiculopathy; the Texas Department of Insurance, Division of Workers' Compensation (Division) appointed Dr. T as the designated doctor for the issues of MMI, IR, and extent of the compensable injury; and Dr. T's September 14, 2022, certification is the first certification of MMI and assigned IR in the claim. The evidence reflects that the claimant was injured while putting a heavy pump motor into its housing on (date of 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; that the notice must contain a copy of a valid Report of Medical Evaluation (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.

The ALJ found that Dr. T's September 14, 2022, certification was delivered to the insurance carrier through verifiable means on September 23, 2022, and that Dr. T's

September 14, 2022, certification was not disputed within 90 days after September 23, 2022. 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 (fax), 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 ALJ in his discussion references claimant's Exhibit No. 3, pages 1 and 16, stating the claimant established delivery to the insurance carrier through verifiable means (by fax) on September 23, 2022. Claimant's Exhibit No. 3, page 1 is a transmittal sheet that lists the fax number of the claimant's attorney. At the top of the page is a header indicating that the document was sent to the fax number of the claimant's attorney. Claimant's Exhibit No. 3, page 16 is a page of the narrative of Dr. T from the September 14, 2022, exam. At the top of page 16 is a header indicating a fax to the same fax number which is identified in other evidence as the fax number of the claimant's attorney. We note that carrier's Exhibit F, page 1 is the DWC-69 from Dr. T and shows the document was faxed to a number identified in other evidence as the fax number of the carrier's adjuster. However, no evidence was introduced that confirmed delivery by fax. Simply sending the certification by fax to a correct fax number without verification of delivery does not establish delivery by verifiable means. *See* APD 172534, decided December 19, 2017. The ALJ's finding that Dr. T's September 14, 2022, certification was delivered to the carrier through verifiable means on September 23, 2022, is so against the great weight and preponderance of the evidence as to be manifestly unjust. Accordingly, we reverse the ALJ's determination that the first certification of MMI and assigned IR from Dr. T on September 14, 2022, became 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. T on September 14, 2022, did not become final under Section 408.123 and Rule 130.12.

MMI/IR

Section 401.011(30)(A) defines MMI as "the earliest date after which, based on reasonable medical probability, further material recovery from or lasting improvement to an injury can no longer reasonably be anticipated." Section 408.1225(c) provides that the report of the designated doctor has presumptive weight, and the Division shall base its determination of whether the employee has reached MMI on the report of the designated doctor unless the preponderance of the other medical evidence is to the contrary.

Section 408.125(c) provides that the report of the designated doctor shall have presumptive weight, and the Division shall base the IR on that report unless the preponderance of the other medical evidence is to the contrary, and that, if the preponderance of the medical evidence contradicts the IR contained in the report of the designated doctor chosen by the Division, the Division shall adopt the IR of one of the other doctors. Rule 130.1(c)(3) provides, in part, that the assignment of an IR for the current compensable injury shall be based on the injured employee's condition as of the MMI date considering the medical record and the certifying examination.

The ALJ determined that the claimant reached MMI on September 14, 2022, and the claimant's IR is 16%. The ALJ based his determination of MMI and IR on his determination that the first certification from Dr. T on September 14, 2022, became final under Section 408.123 and Rule 130.12. The ALJ's determination that the first certification from Dr. T on September 14, 2022, became final under Section 408.123 and Rule 130.12 has been reversed.

The first certification from Dr. T, based on the examination of September 14, 2022, considered and rated a lumbar spine injury and umbilical hernia. The parties stipulated that the compensable injury for the purpose of determining MMI and IR is a lumbar strain and intervertebral disc disorder at L4-5 with radiculopathy. In evidence was a prior Decision and Order that determined that the claimant's compensable injury of (date of injury), did not extend to an umbilical hernia. Therefore, the certification from Dr. T that certified that the claimant reached MMI on September 14, 2022, and assigned a 16% IR cannot be adopted because it considers and rates a condition that has been previously determined not to be part of the compensable injury. We reverse the ALJ's determination that the claimant reached MMI on September 14, 2022, and that the claimant's IR is 16%.

The ALJ based his determination of MMI and IR on his finality determination, so he made no independent findings of fact on the issues of MMI and IR. Consequently, we remand the issues of MMI and IR to the ALJ for further consideration.

SUMMARY

We reverse the ALJ's determination that the first certification of MMI and assigned IR from Dr. T on September 14, 2022, became 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. T on September 14, 2022, did not become final under Section 408.123 and Rule 130.12.

We reverse the ALJ's determination that the claimant reached MMI on September 14, 2022, and remand the MMI issue to the ALJ for further consideration based on the evidence.

We reverse the ALJ's determination that the claimant's IR is 16% and remand the IR issue to the ALJ for further consideration based on the evidence.

REMAND INSTRUCTIONS

On remand, the ALJ is to make findings of fact, conclusions of law, and a decision regarding the issues of MMI and IR that is consistent with Section 408.1225(c), Section 408.125(c), and this decision. The ALJ is to make a determination of MMI and IR based on the evidence.

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 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 **ACE AMERICAN INSURANCE COMPANY** 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