APPEAL NO. 043023-s
FILED JANUARY 6, 2005

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 October 19, 2004. The hearing officer determined that the first certification of maximum medical improvement (MMI) and impairment rating (IR) assigned by Dr. A on October 29, 2003, did not become final under Section 408.123 and Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.12 (Rule 130.12); that the appellant (claimant) reached MMI on October 29, 2003; that the claimant's IR is 2% as certified by the designated doctor chosen by the Texas Workers' Compensation Commission (Commission); and that the claimant had good cause for failing to submit to the designated doctor's examination. The hearing officer's determination on the good cause issue and the MMI date have not been appealed and have become final pursuant to Section 410.169.

The claimant appeals the hearing officer's decision on Rule 130.12 issue, contending that the first certification of IR had not been timely disputed. By implication the claimant also disputes the IR issue, contending that the IR should be 26% as assessed by Dr. A. The respondent (carrier) responds, urging affirmance.

DECISION

Affirmed.

The parties stipulated that the claimant sustained a compensable injury on _____, and it is undisputed that the claimant reached MMI on October 29, 2003. In evidence is the Report of Medical Evaluation (TWCC-69) and narrative report of Dr. A certifying MMI with a 26% IR (mostly right shoulder loss of range of motion (ROM)). In an unappealed finding the hearing officer determined that Dr. A was the first doctor to certify MMI and assess an IR. The hearing officer also found that the carrier received notice of Dr. A's certification on November 12, 2003. It is undisputed that on December 3, 2003, the Commission received a Request for Designated Doctor (TWCC-32) from the carrier. The TWCC-32 sent to the Commission was incomplete in that Section III (regarding the name of the certifying doctor, MMI date and IR) was blank. Dispute Resolution Information System (DRIS) notes indicate that the claimant called the Commission on December 3, 2003, indicating he had received Dr. A's report and that "he had received notice that the carrier would be disputing Dr. A's IR." The claimant requested that the Commission contact the carrier's adjuster to see when they will be submitting the TWCC-32. The DRIS note indicates the carrier's adjuster was contacted. Another DRIS note dated December 8, 2003, indicates "that the TWCC-32 was being returned to the carrier because Part III was incomplete." DRIS notes dated January 7 and February 4, 2004, indicate that the claimant called to inquire about the "status of the appointment of a designated doctor." In another DRIS note dated February 13, 2004, the claimant calls about the status of the carrier's TWCC-32 and

was told that it was "not in yet." A completed TWCC-32 was received on February 19, 2004.

The carrier contends that the DRIS notes "clearly indicate" that Dr. A's IR "was disputed by the Carrier and that dispute was communicated to both the Claimant and the TWCC." The carrier further contends that "[n]othing in the Act or the Rules regarding the 90-day rule indicate that the only way to dispute an initial date of MMI and IR is by way of requesting a DD." Applicable to this case is Section 408.123(d). We note that two different versions of Section 408.123(d) were enacted by the 78th Legislature one to be effective June 18, 2003, and the second to be effective June 20, 2003. Upon careful review of the two different versions of subsection (d), we conclude that while the language used is slightly different in each, the meaning is the same. Both versions provide that an employee's first valid certification of MMI and first valid assignment of IR is final if not disputed within the 90 days after the date that written notification of the certification MMI and assignment of IR is provided to the employee and the carrier by verifiable means. Texas Workers' Compensation Commission Appeal No. 041241-s, decided July 19, 2004. Rule 130.12 was adopted by the Commission to be effective on March 14, 2004, to implement Section 408.123(d). Although it was not in effect at the time the carrier received the first certification of MMI and assignment of IR we find it instructive as to the Commission's interpretation of how both versions of Section 408.123(d) can be read together. *See also* Texas Workers' Compensation Commission Appeal No. 041985, decided September 28, 2004. Rule 130.12(b) provides in pertinent part:

> (b) A first MMI/IR certification must be disputed within 90 days of delivery of written notice through verifiable means, including IRs related to EOI disputes. The notice must contain a copy of a valid Form TWCC-69, Report of Medical Evaluation, as described in subsection (c). 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 90-day period may not be extended.
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> (1) Only an insurance carrier, an injured employee, or an injured employee's attorney or employee representative under 150.3(a) may dispute a first certification of MMI or assigned IR under §141.1 (related to Requesting and Setting a Benefit Review Conference [BRC]) or by requesting the appointment of a designated doctor, if one has not been appointed.

Rule 130.12(b) goes on to state that a TWCC-69 non-concurrence is insufficient to dispute the first certification of MMI and IR. Rule 130.12(c) is very specific what must be included in the first certification.

One way the first certification of MMI and IR may be disputed is to request a BRC pursuant to Rule 141.1. The other way a party may dispute the first certification of MMI

and IR under Rule 130.12(b)(1) is "by requesting the appointment of a designated doctor." Rule 130.5(a) which deals with the procedure for requesting a designated doctor states that the "request shall be made in the form and manner prescribed by the Commission." The TWCC-32 form is the form prescribed by the Commission to request a designated doctor. Consequently, we hold that Section 408.123(d), Rule 130.12(b)(1) and Rule 130.5(a) do prescribe how to dispute the first certification of MMI/IR.

The question then becomes whether the TWCC-32 with Part III incomplete, filed by the carrier on December 3, 2003, is sufficient to dispute Dr. A's first certification of an IR. We note that irrespective of Rule 130.12 the carrier was entitled to request a designated doctor pursuant to Rule 130.5. Further, we note that on the TWCC-32 filed by the carrier on December 3, 2003, the reason given in Part II for the request for a designated doctor the carrier had checked "To dispute an assigned date of [MMI] and [IR]." At that point the only certification of MMI and IR was Dr. A's assessment of October 29, 2003. Consequently, we hold, in this case, that the TWCC-32 filed by the carrier with the Commission on December 3, 2003, was sufficient to dispute the first (certification of MMI) assigned IR pursuant to Rule 130.12(b)(1) and that the first certification of MMI and IR assigned by Dr. A did not become final.

A designated doctor chosen by the Commission was asked to examine the claimant and assign an IR. In a report dated August 5, 2004, the designated doctor certified MMI and assessed a 2% IR based on right shoulder loss of ROM. Section 408.125(c) provides that the report of the designated doctor has presumptive weight, and the Commission shall base the IR on that report unless the great weight of the other medical evidence is to the contrary. The hearing officer considered the evidence and determined that there was not a great weight of medical evidence contrary to the IR report of the designated doctor. The hearing officer's decision on this issue is supported by sufficient evidence.

The hearing officer's decision and order are affirmed.

The true corporate name of the insurance carrier is **TEXAS MUTUAL INSURANCE COMPANY** and the name and address of its registered agent for service of process is

MR. RUSSELL RAY OLIVER, PRESIDENT
221 WEST 6TH STREET, SUITE 300
AUSTIN, TEXAS 78701-3403.

_____
Thomas A. Knapp
Appeals Judge

CONCUR:

_____
Robert W. Potts
Appeals Judge

_____
Margaret L. Turner
Appeals Judge