APPEAL NO. 061569-s
FILED OCTOBER 2, 2006

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 June 22, 2006. The hearing officer resolved the disputed issues by deciding that: (1) the first assigned impairment rating (IR) from the designated doctor, Dr. K, on August 11, 2005, did not become final under Section 408.123 and 28 TEX. ADMIN. CODE § 130.12 (Rule 130.12); (2) the first assigned IR from the required medical examination (RME) doctor, Dr. R, on October 25, 2005, became final under Section 408.123 and Rule 130.12; and (3) the respondent's (claimant) IR is 19% as assessed by Dr. R. The appellant (self-insured) appealed the hearing officer's finality and IR determinations and requested that the Appeals Panel render a new decision that Dr. K's first assigned IR of August 11, 2005, became final under Section 408.123 and that the claimant's IR is 14% as assigned by Dr. K. The appeal file does not contain a response from the claimant.

DECISION

Affirmed in part on other grounds, reversed and rendered in part, and reversed and remanded in part.

BACKGROUND INFORMATION

The hearing officer states in his discussion that the parties made stipulations of facts; however, he failed to include all the stipulations in the Findings of Fact section of the Decision and Order. Review of the record reflects that the parties stipulated that the claimant sustained a compensable injury on _____, that the maximum medical improvement (MMI) date is August 11, 2005, and that Dr. K is the designated doctor. It is undisputed that the claimant slipped and fell at work injuring his left arm and shoulder on _____, and that the claimant had two surgeries on his left upper extremity (UE) on October 14, 2004, and on December 16, 2004, respectively. Additionally, it is undisputed that the Guides to the Evaluation of Permanent Impairment, fourth edition (1st, 2nd, 3rd, or 4th printing, including corrections and changes as issued by the American Medical Association prior to May 16, 2000) (AMA Guides) apply to this case.

The evidence reflects that the designated doctor, Dr. K, examined the claimant on August 11, 2005, and certified that the claimant reached MMI on that date with a 16% IR. On September 6, 2005, a peer review doctor, Dr. B, reviewed the designated doctor's report and opined that the designated doctor misapplied the AMA Guides and incorrectly calculated the IR. The RME doctor, Dr. R, examined the claimant on October 25, 2005, and certified that the claimant reached MMI on August 11, 2005, with a 19% IR. Dr. R noted in his report that Dr. K misapplied the AMA Guides. On February 6, 2006, the Texas Department of Insurance, Division of Workers' Compensation (Division), sent a letter of clarification (LOC) to the designated doctor, Dr.

K, asking him to review Dr. B's report that indicated that Dr. K had misapplied the AMA Guides by incorrectly converting "each aspect of the [IR] to whole person prior to combining" in assessing the claimant's IR.[1] On February 15, 2006, Dr. K responded that he agreed with Dr. B "that the [UE] impairment should be combined prior to converting to [whole person]." Dr. K amended the Report of Medical Evaluation (DWC-69) to reflect a 14% IR.

VALIDITY OF DR. K'S FIRST CERTIFICATION OF MMI/IR

The hearing officer states in his discussion regarding Dr. K's first assigned IR that "this rating is not valid." Although the hearing officer did not make a finding on whether Dr. K's first certification of MMI/IR was valid, it is clear from the hearing officer's discussion that he decided the finality issue because he found that Dr. K's first assigned IR was not valid. The self-insured argued that the hearing officer lacked jurisdiction to rule on the validity of Dr. K's report because that issue was not before him.

A finality determination is contingent on there being a first "valid" certification of MMI and first "valid" assignment of IR as provided in Section 408.123 and Rule 130.12. Section 408.123(e) states that except as otherwise provided, 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(a) provides in pertinent part that the certifications and assignments that may become final are: (1) the first valid certification of MMI and/or IR assigned or determination of no impairment. A hearing officer should first determine whether there is a first valid certification of MMI/IR before determining whether that first valid certification of MM/IR has or has not become final.

In this case, the hearing officer states in his discussion that Dr. K "did not use the correct tables in the [AMA Guides] to rate this injury. [Dr. K's] assessment of [IR] is invalid [on] its face, and not persuasive on the issue of [IR]." It is clear from the hearing officer's discussion that he believed that because the IR was not valid due to errors in the certification, that Dr. K's first assigned IR on August 11, 2005, was "invalid" and therefore it did not become final under Section 408.123 and Rule 130.12. The hearing officer's reason for determining that the first assigned IR from Dr. K was not valid is legally incorrect. 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 that the certification on the [DWC-69] 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. Rule 130.12(c) regarding what constitutes a valid certification is clear and unambiguous. There is no provision in the Act or Rules that a significant error in calculating the IR makes the first

[1] The AMA Guides on page 3/15 states that "As Fig. 1 indicates, the hand, wrist, elbow, and shoulder impairments are *combined* using the Combined Values Chart (p. 322) to determine the total [UE] impairment. The latter is converted to a whole-person impairment using Table 3 (p. 20)."

assigned IR "invalid [on] its face" as discussed by the hearing officer. The fact that an exception under Section 408.123(f) can be established does not make the first certification of MMI/IR invalid for purposes of initially determining whether it is a valid certification under Rule 130.12(c) and subject to Section 408.123(e).

The hearing officer incorrectly determined that Dr. K's certification of MMI/IR on the DWC-69 was invalid. The DWC-69 in evidence reflects that the MMI date is August 11, 2005, which is not a prospective MMI date; that an IR of 16% was assigned; and that Dr. K, as the certifying doctor, signed the DWC-69. There was no contention at the CCH that Dr. K was unauthorized to make the assigned IR determination. We find that the evidence reflects that Dr. K's certification of MMI/IR on the DWC-69 is a valid certification as described under Rule 130.12(c).

FINALITY-DR. K

Given that Dr. K's certification of MMI/IR on the DWC-69 is the first valid certification as explained above, we review whether Dr. K's first assigned IR became final under Section 408.123 and Rule 130.12. The record reflects that Dr. K initially assigned a 16% IR and that he subsequently amended the DWC-69 to reflect a 14% IR because he miscalculated the IR. Dr. K amended the DWC-69 on February 15, 2006, which is after the 90-day period had expired to dispute the first valid certification.[2] Neither party disputed Dr. K's first valid certification of 16% before the 90-day period expired under Rule 130.12(b), therefore that first valid certification would become final under Section 408.123(e) unless an exception to finality existed under Section 408.123(f).[3] In this case, one of the exceptions under Section 408.123(f) applies.

Section 408.123(f)(1)(A) provides that an employee's first certification of MMI or assignment of an IR may be disputed after the period described by subsection (e) if compelling medical evidence exists of a significant error by the certifying doctor in applying the appropriate American Medical Association guidelines or in calculating the impairment rating. In this case, the evidence reflects that there is compelling medical evidence of a significant error in applying the AMA Guides and in calculating the IR, therefore Dr. K's first valid certification of 16% did not become final despite a lack of a dispute within 90 days of receipt of the certification by verifiable means under Section 408.123(e). In Appeals Panel Decision (APD) 061493-s, decided August 31, 2006, the Appeals Panel noted that the exceptions in Section 408.123(f)(1)(A), (B), and (C) do not provide that the exceptions only apply if knowledge of the facts giving rise to an

[2] Claimant's Exhibit 2, shows a DWC-69 and narrative report both dated August 11, 2005, by Dr. K with three date stamped notations that state: received September 9, 2005, by "BRMSI-Grapevine," received September 14, 2005, by "CMI (City)," and received October 24, 2005, by "CMI (City)."

[3] Self-insured argues that it requested a LOC from Dr. K on September 14, 2005, and that "request constituted the [self-insured's] dispute of [Dr. K's IR]" which was within 90 days as required by Section 408.123. Rule 130.12(b)(1) provides that only an insurance carrier, an injured employee, or an injured employee's attorney or employee representative under Rule 150.3(a), may dispute a first certification of MMI or assigned IR under Section 141.1 (related to Requesting and Setting a Benefit Review Conference) or by requesting the appointment of a designated doctor, if one has not been appointed. In APD 042163-s, decided October 21, 2004, the Appeals Panel held that "requesting a [LOC] from the designated doctor is insufficient to constitute a dispute."

exception occurs after the 90-day period has expired, and that the Appeals Panel could not create such an exception to the exceptions. In this case there was a significant error; it was that the designated doctor improperly converted to whole person impairments prior to combining the UE impairments in assessing a 16% IR. The evidence supports the finding that Dr. K's first assigned IR of August 11, 2005, did not become final under Section 408.123(e) because an exception to finality existed under Section 408.123(f)(1)(A).

We affirm, on other grounds, the hearing officer's determination that the first assigned IR from Dr. K on August 11, 200-5, did not become final under Section 408.123 and Rule 130.12.

FINALITY-DR. R

The hearing officer erred in determining that the first assigned IR from Dr. R on October 25, 2005, became final under Section 408.123 and Rule 130.12. The hearing officer's discussion states that "[t]he Act and the Rules provide that if the first certification of impairment is not valid, then the next valid certification takes the place of the first." The hearing officer's determination that the first assigned IR from Dr. R on October 25, 2005, became final under Section 408.123 and Rule 130.12 is legally incorrect. Pursuant to Rule 130.12(a)(3) certifications of MMI and assignments of IR that may become final include the first valid subsequent certification of MMI and/or assignment of an IR or determination of no impairment received after the date a certification of MMI and/or assignment of an IR or determination of no impairment is overturned, modified or withdrawn by agreement of the parties or by final decision of the Division or a court. In APD 052108, decided October 25, 2005, the Appeals Panel stated:

> The preamble to Rule 130.12 provides examples of what does and does not come within the meaning of Rule 130.12(a)(3) stating in part, "[i]n the event the first MMI/IR is the only certification and it is rescinded, or in the event an agreement or [Division] decision and order is entered but another certification on record is not selected, this would fall within the scope of this subsection. In these situations, the next certification received after this event would become the first certification that may become final if not disputed as provided in this section and by statute." For a subsequent MMI/IR certification to become final, it must be made after a decision that modifies, overturns, or withdraws a first MMI/IR certification that became final.

Pursuant to Rule 130.12(a)(3), Dr. R's certification of MMI/IR is not the first valid subsequent certification of MMI and/or assignment of an IR.

We reverse the hearing officer's determination that the first assigned IR from Dr. R on October 25, 2005, became final under Section 408.123 and Rule 130.12 and we

render a new decision that the assigned IR from Dr. R on October 25, 2005, did not become final under Section 408.123 and Rule 130.12.

IR

For CCH's which are held on or after September 1, 2005, 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 130.6(i) provides that the designated doctor's response to a Division request for clarification is considered to have presumptive weight as it is part of the doctor's opinion. In this case, there are errors in the designated doctor's certifications as well as in the RME's report.

The designated doctor, Dr. K, assessed a 16% IR based on a 10% UE impairment for left shoulder range of motion (ROM) (converted to whole person 6%), 3% UE impairment for the distal clavicle resection and acromioclavicular joint under Table 18 and Table 27 (converted to whole person 2%)[4], 9% UE impairment for the ulnar nerve (below midforearm) motor deficit under Table 15 and Table 12 (converted to whole person 6%)[5], and 4% UE impairment for the ulnar nerve (below midforearm) sensory deficit under Table 15 and Table 11 (converted to whole person 2%).[6] Dr. K combined the whole person impairments (6%, 2%, 6%, 2%) for a total combined value of 16% IR, and then subsequently amended his IR by using the Combined Values Chart (page 322) for the upper extremities (10%, 3%, 9%, 4%) resulting in a 24% UE impairment, then converting to a 14% whole person impairment using Table 3 (page 20).

The hearing officer determined that Dr. K's 14% IR is incorrect because "[Dr. K] did not use the correct tables in the [AMA Guides] to rate this injury."[7] The hearing

[4] On October 14, 2004, the claimant underwent a distal clavicle resection arthroplasty of the acromioclavicular joint. Table 27 provides for a 10% UE impairment for a distal clavical resection arthroplasty. We note that the 10% UE impairment for a distal clavicle resection arthroplasty listed in Table 27 may be derived by multiplying the 40% impairment value provided in Table 27 for a resection arthroplasty of a specific joint by the 25% UE impairment value listed in Table 18 for the acromioclavicular joint. It appears that Dr. K incorrectly multiplied the 10% UE impairment value for a resection arthroplasty of the distal clavicle listed in Table 27 by the 25% UE impairment value listed in Table 18 for the acromioclavicular joint to arrive at a 3% UE impairment for the distal clavicle resection arthroplasty of the acromioclavicular joint, instead of assigning the 10% UE impairment for the distal clavicle resection arthroplasty listed in Table 27.

[5] For the motor deficit, Dr. K used a 35% maximum UE impairment for the "ulnar (below the midforearm)" under Table 15 and assessed a 25% grade of loss of muscle strength under Table 12. He multiplied 35% with 25%, which resulted in 9% UE impairment. We note that a 9% UE impairment converts to 5% whole person impairment under Table 20, although conversion to whole person impairments is not done until the UE impairments are combined.

[6] For the sensory deficit, Dr. K used a 7% maximum UE impairment for the "ulnar (below the midforearm)" under Table 15 and assessed a 60% grade of sensory deficit under Table 11. He multiplied 7% with 60%, which resulted in 4% UE impairment.

[7] We note that Dr. K used the correct tables (Table 11, 12, 15) to rate the ulnar nerve for motor and sensory deficit, however it appears that he incorrectly used the wrong section within Table 15 to rate the ulnar nerve.

officer states in his discussion that the RME doctor's "report is very detailed and points out one of the errors in [Dr. K's] report." Dr. R's report dated October 25, 2005, states that the claimant was diagnosed with a "left shoulder rotator cuff tear and impingement" and "left cubital tunnel syndrome." Dr. R opined that Dr. K incorrectly assessed an impairment for the ulnar nerve "below" the midforearm (35%), rather than "above" the midforearm (46%) under Table 15. Dr. R states "[r]egarding strength deficit [motor deficit], Table 15 rates the ulnar nerve at 45% because it is the ulnar nerve above mid forearm and not below the mid forearm as used by [Dr. K]."[8] We note that the designated doctor was not given the opportunity to review Dr. R's report in which he disagreed with the ulnar nerve impairment for the motor deficit above or below the midforearm.

The evidence indicates that Dr. K assessed a 9% UE impairment for the ulnar nerve under Table 12 and Table 15 using a maximum UE impairment of 35% due to motor deficits of the ulnar nerve (below midforearm) under Table 15 rather than using a maximum UE impairment of 46% due to motor deficits of the ulnar nerve (above midforearm) under Table 15. Dr. R's report indicates that the claimant had an EMG on September 16, 2004, which showed "ulnar compressive neuropathy across the medial elbow, mild, left," that on December 16, 2004, the claimant underwent a "left elbow ulnar nerve decompression with transposition" and that there was a "1 cm scar on the left elbow where an ulnar nerve transposition has been done with some decreased sensation around the scar." The medical evidence in the record supports a rating for the ulnar nerve at the elbow, which is above the midforearm, rather than below the midforearm, as provided in the AMA Guides, Table 15.

With regard to the RME doctor's report, his IR cannot be adopted because he incorrectly calculated an UE impairment for the ulnar nerve (above midforearm) motor deficit using a 45% maximum UE impairment, rather than a 46% maximum UE impairment, as provided under Table 15. Dr. R assessed a 19% IR based on 10% UE impairment for left shoulder ROM, 10% UE impairment for the distal clavicle resection under Table 27, 1% UE impairment for the elbow loss of flexion, 11% UE impairment for the motor deficit under Table 15 and Table 12,[9] and 4% UE impairment for the sensory deficit under Table 15 and Table 11. Dr. R combined the UE impairments (10%, 10%, 1%, **11%** and 4%) (emphasis added) resulting in 32% UE impairment, then converting to 19% whole person impairment using Table 3 (page 20). Using the maximum rating of 46% UE impairment for the ulnar nerve (above the midforearm) motor deficits under Table 15 would result in a 12% UE impairment.[10] Combining the UE impairments (10%,

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[8] We note that the RME incorrectly states that the (maximum) impairment for the ulnar nerve (above the midforearm) due to motor deficit is 45%, rather than 46%, under Table 15 (page 3/54).

[9] For the motor deficit, Dr. R used a 45% maximum UE impairment for the "ulnar (above the midforearm)" under Table 15 and assessed a 25% grade of loss of muscle strength under Table 12. He multiplied 45% with 25%, which resulted in 11% UE impairment.

[10] For the motor deficit, Table 15 reflects that the maximum UE impairment for the "ulnar (above the midforearm)" is 46%; therefore a 46% maximum UE impairment for the "ulnar (above the midforearm)" under Table 15 and a 25%

10%, 1%, **12%**, and 4%) (emphasis added) would result in a 33% UE impairment, then converting to 20% whole person impairment using Table 3 (page 20). The evidence indicates that the RME doctor, Dr. R, miscalculated the UE impairment for the ulnar nerve as explained above.

Since there is no other certification of MMI/IR that rates the entire compensable injury based on the claimant's condition at MMI that is in accordance with the AMA Guides this case is remanded back to the hearing officer. Dr. K is the current designated doctor for this case. If on remand, Dr. K is no longer qualified or is unwilling to serve as designated doctor, another designated doctor will have to be appointed. On remand the hearing officer shall: (1) send a LOC to the designated doctor, Dr. K, and ask that he explain why he rated the ulnar nerve below the midforearm for motor and sensory deficit under Table 15 and ask that he explain why he assigned a 3% UE impairment instead of a 10% UE impairment for the distal clavicle resection arthroplasty as shown in Table 27 (as referred in footnote no. 4), and ask whether his explanation would change the claimant's IR, if so, Dr. K is to submit an amended DWC-69 and narrative report certifying MMI and IR; (2) inform the designated doctor, Dr. K, that the amended IR be based on claimant's condition as of the date of MMI, August 11, 2005, as stipulated by the parties; (3) after the designated doctor, Dr. K, has submitted his response which may include another DWC-69 and narrative report certifying MMI and IR, the hearing officer shall provide the response to the parties, and allow the parties an opportunity to respond to Dr. K's response; and (4) make a determination of IR.

We reverse the hearing officer's determination that the claimant's IR is 19% per Dr. R, the RME doctor, and remand back to the hearing officer for actions consistent with 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 hearing officer, 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 92642, decided January 20, 1993.

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grade of loss of muscle strength under Table 12 results in an 11.5% UE impairment, which is rounded up to a 12% UE impairment.

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

(SELF-INSURED)
(ADDRESS)
(CITY), TEXAS (ZIP CODE).

_____
Veronica L. Ruberto
Appeals Judge

CONCUR:

_____
Thomas A. Knapp
Appeals Judge

_____
Margaret L. Turner
Appeals Judge