APPEAL NO. 061599-s
FILED SEPTEMBER 21, 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 21, 2006. The hearing officer resolved the disputed issue by deciding that the first certification of maximum medical improvement (MMI) and impairment rating (IR) did not become final under Section 408.123. The appellant (carrier) appealed, arguing that the basis for the respondent's (claimant) dispute existed long before the 90-day period for disputing the rating expired, so he was obligated to dispute the certification of MMI and IR within the prescribed time period. The carrier additionally contended that there was no compelling medical evidence in the record to show that the designated doctor made a significant error in calculating the claimant's IR. The appeal file does not contain a response from the claimant.

DECISION

Reversed and rendered.

The parties stipulated that the first certification of MMI and IR was by the designated doctor who certified the claimant reached MMI on October 11, 2004, with a 5% IR; that the claimant received the first certification of MMI and IR by at least December 2, 2005 (it is undisputed on appeal that the first certification was received by verifiable means); that a prior CCH was held (October 11, 2004) that determined the compensable injury did not include lumbar radiculopathy and extradural defects at L1-2 and L2-3; that the extent-of-injury determination was timely appealed to district court; that a district court judgment was entered on March 31, 2006, which determined that the compensable injury does extend to include lumbar radiculopathy and extradural defects at L1-2 and L2-3; that the district court judgment has become final; and that the claimant filed a Request for Benefit Review Conference (DWC-45) on May 8, 2006. We note that the designated doctor did not provide multiple certifications of MMI and IR relating to an extent-of-injury dispute. See APD 060170-s, decided March 22, 2006.

The carrier correctly points out that the hearing officer's Finding of Fact No. 9 contains a typographical error regarding the date the DWC-45 was filed. The evidence reflects that the DWC-45 was filed on May 8, 2006, rather than May 8, 2004. We reform the finding to read as follows: Claimant's first potential dispute of the MMI certification or 5% IR was in a DWC-45 filed with the Texas Department of Insurance, Division of Workers' Compensation on May 8, 2006, which requested a benefit review conference to seek temporary income benefits which stated claimant was successful in a district court extent of injury and disability dispute, and would eventually need a new IR; and this dispute was not within 90 days after December 2, 2005, the date the claimant first received written notice by verifiable means. Other than the typographical error in the date the DWC-45 was filed, this finding was not otherwise appealed.

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. Section 408.123(f)(1) 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 there is compelling medical evidence establishing the following: (A) a significant error by the certifying doctor in applying the appropriate American Medical Association guidelines or in calculating the impairment rating; (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.

The carrier appealed the determination that the certification did not become final, arguing that the claimant was obligated to dispute the IR within the statutorily prescribed time because he was fully aware that the diagnosis for his compensable injury included lumbar radiculopathy and extradural defects within the 90-day period to dispute. 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 exception occurs after the 90-day period has expired. *See* APD 061493-s, decided August 31, 2006.

The carrier also contends that the claimant has not presented compelling medical evidence to establish an exception to finality under Section 408.123(f). 28 TEX. ADMIN. CODE § 130.12(b) (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 hearing officer found that the first certification did not consider or rate the claimant's "matter-of-law" radiculopathy or extradural defects so there is compelling medical evidence in the record to establish a significant error (retrospectively) on the part of the certifying doctor in calculating the IR of the claimant. We disagree. The district court judgment which found that the compensable injury extends to include radiculopathy and extradural defects at L1-2 and L2-3 is not compelling medical evidence which establishes an exception to finality under Section 408.123. Rather Rule 130.12(b) specifically provides that a dispute of an IR related to an extent-of-injury dispute must be made within 90 days of delivery of written notice through verifiable means. The fact that the extent-of-injury determination was determined favorably for the claimant in district court does not allow the claimant to now dispute the first certification of MMI/IR because the 90-day period for doing so has expired, unless there is compelling medical evidence of one of the exceptions in Section 408.123(f). The preamble to Rule 130.12 states that "[a] party that wishes to dispute the certification or any of the ratings should not wait until after the extent of injury dispute is resolved as this resolution may occur after the 90-day period expires and the certification may have already become final." 29 Texas Register 2330, March 5, 2004. Our review of the record does not reveal that there is compelling medical evidence which establishes that there was a significant error in applying the AMA Guides or in calculating the IR nor did the parties direct us to any. The hearing officer's determination that the first certification of MMI and IR did not become final and

may be disputed after the 90-day period because there is compelling medical evidence establishing a significant error (retrospectively) on the part of the certifying doctor in calculating the IR of the claimant is reversed and a new decision rendered that the first certification of MMI and IR from the designated doctor, Dr. W dated January 31, 2005, became final.

The true corporate name of the insurance carrier is **THE TRAVELERS INDEMNITY COMPANY OF CONNECTICUT** and the name and address of its registered agent for service of process is

CORPORATION SERVICE COMPANY DBA
CSC—LAWYERS INCORPORATING SERVICE COMPANY
701 BRAZOS STREET #1050
AUSTIN, TEXAS 78701.

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Margaret L. Turner
Appeals Judge

CONCUR:

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Thomas A. Knapp
Appeals Judge

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Veronica L. Ruberto
Appeals Judge