APPEAL NO. 071283-s
FILED SEPTEMBER 13, 2007

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 June 6, 2007. The hearing officer determined that: (1) the first certification of maximum medical improvement (MMI) "(attained September 12, 2006)" assigned by (Dr. K) on September 20, 2006, became final under 28 TEX. ADMIN. CODE § 130.12 (Rule 130.12); (2) the first assessment of the respondent's (claimant) impairment rating (IR) (12%) that was assigned by Dr. K on September 20, 2006, did not become final under Rule 130.12; (3) the "first certification of [MMI] and/or assessment of whole body impairment can be amended by the certifying doctor, if he or she made a significant error in his original report that constituted compelling medical evidence;" (4) the claimant attained MMI on September 12, 2006; and (5) the claimant's IR is 16% (as assigned by Dr. K in an amended report). The determination that the claimant reached MMI on September 12, 2006, has not been appealed.

The appellant (carrier) appeals, contending that Dr. K's initial certification of a 12% IR was a valid certification and should be the proper IR. The carrier also asserts that Dr. K erred in his amended report in assessing that part of the IR pertaining to the right shoulder by combining a 10% upper extremity impairment for distal clavicle resection arthroplasty with the upper extremity loss of range of motion (ROM) for the right shoulder to arrive at an upper extremity impairment of 21% which converts to a whole body impairment of 13% for the right upper extremity. The appeal file does not contain a response from the claimant.

DECISION

Affirmed in part and reversed and remanded in part.

It is undisputed that the claimant sustained a compensable injury to his right shoulder, left knee, and left great toe on _____. The claimant had right shoulder surgery in the form of right shoulder rotator cuff repair and partial distal clavicle removal on September 13, 2005.

The claimant was evaluated by Dr. S, a designated doctor selected by the Texas Department of Insurance, Division of Workers' Compensation (Division) on January 13, 2006. In a Report of Medical Evaluation (DWC-69) of that date Dr. S certified that the claimant was not at MMI. Dr. S again evaluated the claimant on July 18, 2006, and in a DWC-69 of that date again certified that the claimant was not at MMI and gave an estimated date of MMI of August 18, 2006.

Subsequently, Dr. K, a doctor acting in place of the treating doctor, certified the unappealed September 12, 2006, MMI date and assessed a 12% IR using 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). The IR was calculated based on loss of ROM of the right shoulder, left knee, and left great toe combined for the 12% IR. In an amended DWC-69 and amended narrative dated September 28, 2006, Dr. K stated that pursuant to requested clarification he had failed to include the right shoulder distal clavicle resection arthroplasty required by the AMA Guides in rating the claimant's right shoulder (upper extremity). In the amended DWC-69 and an amended report, Dr. K again certified the unappealed MMI date of September 12, 2006, but assessed a 16% whole person IR which included a rating for the right shoulder distal clavicle resection arthroplasty (Table 27, page 61 of the AMA Guides).[1] In assessing impairment for the right shoulder in his amended report, Dr. K combined the upper extremity impairment for loss of ROM of the right shoulder with the upper extremity impairment for the right shoulder distal clavicle resection arthroplasty and converted the upper extremity impairment to whole person impairment. Page 3/62 of the AMA Guides provides that "In the presence of decreased motion, motion impairments are derived separately (Section 3.1f through 3.1j) and *combined* with arthroplasty impairments using the Combined Values Chart (p. 322)," which is what Dr. K did in the amended report, but failed to do in his initial report in assessing the 12% whole person IR.

The carrier asserts that Dr. K's first certification of a 12% IR was "valid" and disputes the hearing officer's determination that the claimant's whole body IR is 16%. The carrier contends that there was no compelling medical evidence of a significant error in applying the appropriate AMA Guides or in calculating the IR in Dr. K's initial assessment of a 12% IR.

FINALITY UNDER SECTION 408.123

The hearing officer's determination that Dr. K's failure to originally rate the claimant's right shoulder distal clavicle resection arthroplasty constituted compelling medical evidence of a significant error by the certifying doctor in applying the AMA Guides in calculating the IR is supported by the evidence and is affirmed. Likewise, we affirm the hearing officer's determination that the first assessment of the claimant's 12% IR did not become final pursuant to Section 408.123(e) because an exception to finality existed under Section 408.123(f)(1)(A). *See al*so APD 060170-s, decided March 22, 2006.

THE IR

Section 408.125(a) provides that if an IR is disputed, the Division shall direct the employee to the next available doctor on the Division's list of designated doctors, as provided by Section 408.0041. Rule 126.7(h) provides that if the Division has previously assigned a designated doctor to the claim, the Division shall use that doctor

[1] We note that using Dr. K figures and following the sequence of calculations in the Combined Values Chart of the AMA Guides, page 322, the 13% whole body IR for the right shoulder combined with the 5% whole body IR for the left lower extremity results in a 17% IR, rather than 16%. *See* Appeals Panel Decision (APD) 041424, decided July 21, 2004; Old Republic Insurance Company v. Rodriguez, 966 S.W.2d 208 (Tex. App.-El Paso 1998, no pet).

again, if the doctor is still qualified and available. In this case the IR is clearly in dispute and a designated doctor (Dr. S) has previously been assigned to the claim. We have affirmed the hearing officer's determination that the first assessment of the claimant's 12% IR did not become final and the carrier is disputing the 16% IR assessed in Dr. K's amended rating. We reverse the hearing officer's determination that the claimant's IR is 16%. We remand the case to the hearing officer to determine if Dr. S, the designated doctor, is still qualified and available to be the designated doctor, and if so, for the designated doctor to assign an IR for the compensable injury based on the claimant's condition as of September 12, 2006, the unappealed date of MMI, in accordance with the AMA Guides considering the medical record and certifying examination. The parties are to be given an opportunity to present evidence and comment on the designated doctor's report. The hearing officer is then to determine the IR. If Dr. S is no longer qualified and available to serve as the designated doctor, then another designated doctor is to be appointed pursuant to Rule 126.7(h).

SUMMARY

We affirm the hearing officer's determinations that Dr. K's failure to originally rate the right shoulder distal clavicle arthroplasty constituted compelling medical evidence of a significant error in applying the AMA Guides and that the first assessment of the claimant's 12% IR did not become final pursuant to Section 408.123(e). We reverse the hearing officer's determination that the claimant's IR is 16% and remand the case for the claimant to be examined by a designated doctor as set out above.

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.

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

RUSSELL OLIVER, PRESIDENT
6210 EAST HIGHWAY 290
AUSTIN, TEXAS 78723.

_____
Thomas A. Knapp
Appeals Judge

CONCUR:

_____
Veronica L. Ruberto
Appeals Judge

_____
Margaret L. Turner
Appeals Judge