APPEAL NO. 080921-s
FILED AUGUST 22, 2008

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 May 19, 2008. The issues before the hearing officer were:

1. Did the Texas Department of Insurance, Division of Workers' Compensation (Division) abuse its discretion in failing to appoint a second designated doctor because of improper influence and improper communication by the respondent/cross-appellant (claimant), and because of the improper credentials of the designated doctor, Dr. S?

2. Did the first certification of maximum medical improvement (MMI) and assigned impairment rating (IR) from Dr. VH on November 12, 2007, become final under Section 408.123?

3. What is the date of MMI?

4. What is the claimant's IR?

The hearing officer resolved the disputed issues by deciding that: (1) the Division did not abuse its discretion in failing to appoint a second designated doctor because of improper influence and improper communication by the claimant and because of the improper credentials of Dr. S; (2) the first certification of MMI and IR assigned by Dr. VH on November 12, 2007, did become final under Section 408.123; (3) the claimant reached MMI on November 12, 2007; and (4) the claimant's IR is 5%.

The appellant/cross-respondent (carrier) appeals the hearing officer's determinations regarding the appointment of a second designated doctor. The appeal file does not contain a response from the claimant to the carrier's appeal.

The claimant appeals the hearing officer's determinations on finality under Section 408.123(e) and the date of MMI and IR, contending that there was no written notice of the first certification of MMI and IR provided to her by verifiable means and that she has not yet reached MMI therefore an IR cannot be assigned. The carrier, in its response to the claimant's cross-appeal, urges affirmance of the portions of the hearing officer's determinations on finality, MMI, and IR.

DECISION

Affirmed in part and reversed and rendered in part.

The parties stipulated that: the claimant sustained a compensable injury on _____; Dr. VH found the claimant to be at MMI on November 12, 2007, with an IR

of 5%; Dr. VH's assigned IR was a valid rating; and Dr. VH's assigned IR was the first assigned IR. The claimant testified that she injured her low back at work in a lifting incident. The claimant testified to prior low back injuries, which included a 2004 spinal fusion at L5-S1 performed by Dr. T. It is undisputed that Dr. T is her current treating doctor for this work injury and that Dr. S is the Division-appointed designated doctor. Dr. VH, a carrier-required medical examination (RME) doctor, examined the claimant subsequent to her first designated doctor examination. The evidence establishes that the claimant has received physical therapy and epidural steroid injections for this work injury, but recommended aquatic therapy treatments have been denied by the carrier. The evidence establishes that there has been no surgery performed for this compensable injury nor is it recommended at this time. The compensable injury extends to include a herniated disk at L4-5.

DESIGNATED DOCTOR

The hearing officer's decision that the Division did not abuse its discretion in failing to appoint a second designated doctor because of improper influence and improper communication by the claimant and because of the improper credentials of the designated doctor is supported by sufficient evidence and is affirmed.

FINALITY UNDER SECTION 408.123

The claimant was initially examined by Dr. S, the designated doctor, on July 9, 2007, and then on September 24, 2007. Dr. S found the claimant not to be at MMI. The claimant was re-examined by Dr. S on March 3, 2008, and was again found not to be at MMI based on the claimant not receiving recommended aquatic therapy.

On November 12, 2007, the claimant was examined by the carrier-RME doctor, Dr. VH, who found the claimant to be at MMI on that date with a 5% IR for a lumbar sprain/strain under Diagnosis-Related Estimate (DRE) Lumbosacral Category II: Minor Impairment DRE II, applying 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). Dr. VH completed two Reports of Medical Evaluation (DWC-69) with his narrative report. In one DWC-69, Dr. VH assigned a 5% IR for a lumbar sprain/strain and, in the alternative DWC-69, Dr. VH assigned a 5% IR under DRE II of the AMA Guides for both a lumbar sprain/strain and a herniated disc at L4-5. The claimant's attorney argued that no DWC-69s were received by her from the carrier's attorney. However, there is sufficient evidence to support the hearing officer's finding that Dr. VH's DWC-69s and his narrative report were faxed to the claimant's attorney on November 21, 2007, as shown by a facsimile transaction report on that date. Claimant's cross-appeal states that "[c]laimant stated under oath in her testimony that she never received a copy of the DWC 69 from Dr. [VH] until sometime in March 2007 [sic-2008]." The claimant contends in her cross-appeal that even if the claimant's attorney was faxed Dr. VH's DWC-69, the first certification of MMI and assigned IR, the carrier provided "no

evidence of notification by verifiable means to the claimant" as required by Section 408.123(e).

The hearing officer, in an unappealed finding, determined that as of February 19, 2008, no Request for Setting a Benefit Review Conference (BRC) (DWC-45) had been received by the Division. February 19, 2008, is the 90th day after November 21, 2007. The hearing officer in the Background Information portion of his decision noted that "on February 6, 2008, the [c]arrier disputed the [Dr. VH's] assigned [IR] by filing a [Request for Designated Doctor] DWC-32 with the Division and requesting a new designated doctor, which was an invalid dispute per [28 TEX. ADMIN. CODE § 130.12(b)(1)] Rule 130.12(b)(1)." Therefore, the hearing officer determined that Dr. VH's IR was provided to the claimant and the carrier by verifiable means on November 21, 2007, and that neither the claimant nor carrier disputed Dr. VH's IR within 90 days after the date the rating was provided.

Section 408.123 provides in part:

> (e) Except as otherwise provided by this section, 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 provides in 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 [DWC]-69 . . . . 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 [BRC]) or by requesting the appointment of a designated doctor, if one has not been appointed.

Rule 102.4, relating to General Rules for Non-Commission [Division] Communications, provides in part:

(a) All written communication to a claimant (who is either an employee, an employee's legal beneficiary, or a subclaimant) shall be sent to the most recent address or facsimile number supplied by the claimant. If an address has not been supplied by the claimant, the most recent address provided by the employer shall be used.

(b) After an insurance carrier, employer, or health care provider is notified in writing that a claimant is represented by an attorney or other representative, copies of all written communications related to the claim to the claimant shall thereafter be mailed or delivered to the representative as well as the claimant, unless the claimant requests delivery to the representative only.

In Appeals Panel Decision (APD) 950666, decided June 12, 1995, the Appeals Panel reversed the hearing officer's determination that the first certification of MMI and IR assigned became final under Rule 130.5(e)[1] and rendered a decision that the certification of MMI/IR did not become final. In that case, the claimant testified that he received "a lot of letters" in regard to his claim but that he did not receive the certifying doctor's DWC-69. It was not contended at the hearing nor was there any evidence offered to show that the claimant himself was provided anything but verbal notice of the certifying doctor's MMI and IR. The hearing officer made a finding of fact that the DWC-69 was mailed to the claimant's attorney and that the claimant did not dispute such determination within 90 days; thus the hearing officer based the decision on the issue of finality upon receipt by the claimant's attorney. The Appeals Panel in APD 950666 held that "a reading of the Act, its rules, and prior interpretations by the [Texas Workers' Compensation] Commission [now the Division] compel a finding that conveying this information solely to [the] claimant's attorney, without more, is insufficient to start the 90-day clock." The Appeals Panel noted that in its response to comments on the proposed Rule 102.4,[2] the [Division] specifically rejected the suggestion that information should be sent only to the attorney of a represented claimant, as the proposed rule was redundant and created a potential code of ethics problem; it reiterated instead;

[1] Rule 130.5(e) which was effective January 25, 1991, provided the first [IR] assigned to an employee is considered final if the rating is not disputed within 90 days after the rating is assigned. The amended Rule 130.5(e) effective March 13, 2000, provided that the first certification of MMI and [IR] assigned to an employee is final if the certification of MMI and/or the [IR] is not disputed within 90 days after written notification of the MMI and IR is sent by the [Division] to the parties, as evidenced by the date of the letter, unless based on compelling medical evidence the certification is invalid because of: (1) a significant error on the part of the certifying doctor in applying the appropriate AMA Guides and/or calculating the [IR]; (2) a clear mis-diagnosis or a previously undiagnosed medical condition; or (3) prior improper or inadequate treatment of the injury which would render the certification of MMI or [IR] invalid. The amended Rule 130.5(e) was repealed effective January 2, 2002, and then codified into the Labor Code, Section 408.123, effective June 18, 2003, and amended effective September 1, 2005.

[2] The previous Rule 102.4(b), effective January 11, 1991, then relating to Filing Documents with Claimant's Representative, contained similar language to the current Rule 102.4, relating to General Rules for Non-Commission [Division] Communications, by providing that after the insurance carrier or the Division is notified in writing that a claimant is represented by an attorney or other representative, all copies of notices and reports to the claimant will be thereafter mailed to the representative and the claimant, unless the claimant requests delivery to the representative only.

> . . . if a claimant is represented notices should go to that individual and his or her representative, unless the claimant requests delivery to the representative only. 16 TEX. REG. 114 (January 8, 1991). It thus appears that the rule contemplates that certain safeguards be provided to claimants who may gain or lose legal representation in the course of processing a single claim. We note also that Rule 130.1, concerning reports of medical evaluation, contemplates that these reports be filed with the [Division], the carrier, and the employee.

In APD 950969, decided July 27, 1995, the Appeals Panel reversed and rendered a decision that the first IR did not become final. In that case, the hearing officer found that the certifying doctor sent his reports (including the certification of MMI and IR) to the claimant's attorney. The record contained some evidence from which an inference could be made of knowledge, at the time, by the claimant of the first certification of MMI and IR; however, there was no evidence that the claimant was provided with any written notice. The Appeals Panel noted that at most, the evidence only established some type of oral notice to the claimant of the MMI and IR certification and that the claimant's attorney did not dispute the MMI and IR. The Appeals Panel recognized that there were prior decisions that held that "a party's attorney is his agent and by his actions on behalf of a party binds that party." *See* APD 950370, decided April 19, 1995; Texas Employers Insurance Association v. Wermske,[3] 349 S.W.2d 90 (Tex. 1961). However, "[the Appeals Panel] have also held that a written notice that is required to be sent to a claimant is not satisfied by only conveying it to his attorney," citing APD 950666. The Appeals Panel followed the precedent in APD 950666 and the cases cited therein (rather than the conflicting line of cases) and held that because the evidence did not establish that the claimant received notice of the first certification of MMI and IR, the 90-day dispute period of Rule 130.5(e) accordingly did not run and the MMI date and IR have not become final.

APD 042163-s, decided October 21, 2004, is distinguishable from the line of cases cited above because in that case, while the notification was provided/delivered to the claimant's attorney (and not the claimant) by verifiable means, the claimant acknowledged the receipt of the first certification of MMI and assigned IR on a date certain from her attorney, thus meeting the requirements of verifiable means under Section 408.123 and Rule 130.12.

In the present case, the evidence establishes that (like the factual situation in APD 950666, *supra*, and APD 950969, *supra*) the first certification of MMI and assigned IR was delivered by verifiable means solely to the claimant's attorney, but there was no evidence of delivery of the written notification of the first certification of MMI and assigned IR to the claimant as required by Rule 102.4(b). Additionally, there is no evidence that the claimant requested delivery of all written communications to her

[3] *See also* APD 93644, decided September 8, 1993, and APD 950069, decided February 17, 1995, in which the Appeals Panel held that notice of the first certification of MMI and IR delivered solely to the claimant's attorney, without more, was sufficient to start the 90-day clock.

attorney only. Therefore, the hearing officer erred in finding that Dr. VH's IR was provided to the claimant by verifiable means on November 21, 2007, and that the claimant did not dispute Dr. VH's IR within 90 days after November 21, 2007, the date that the hearing officer found that the rating was provided to the claimant's attorney. Accordingly, we reverse the hearing officer's decision that the first certification of MMI and IR assigned by Dr. VH on November 12, 2007, became final under Section 408.123 and render a new decision that the first certification of MMI and IR assigned by Dr. VH on November 12, 2007, did not become final under Section 408.123.

MMI AND IR

The hearing officer's decision that the claimant reached MMI on November 12, 2007, with a 5% IR is supported by sufficient evidence and is affirmed. The affirmance is not based on the finality issue but rather is based on the hearing officer's finding that the RME doctor's certification of MMI and IR, rather than the designated doctor's certification, is supported by the preponderance of the evidence.

SUMMARY

We affirm that portion of the hearing officer's decision that the Division did not abuse its discretion in failing to appoint a second designated doctor because of improper influence and improper communication by the claimant and because of the improper credentials of the designated doctor. We affirm that portion of the hearing officer's decision that the claimant reached MMI on November 12, 2007, and the claimant's IR is 5%.

We reverse that portion of the hearing officer's decision that the first certification of MMI and IR assigned by Dr. VH on November 12, 2007, became final under Section 408.123 and render a new decision that the first certification of MMI and IR assigned by Dr. VH on November 12, 2007, did not become final under Section 408.123.

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

CORPORATION SERVICE COMPANY
701 BRAZOS STREET, SUITE 1050
AUSTIN, TEXAS 78701-3232.

Cynthia A. Brown
Appeals Judge

CONCUR:

Veronica L. Ruberto
Appeals Judge

Margaret L. Turner
Appeals Judge