APPEAL NO. 120857-s
FILED JULY 6, 2012

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 March 29, 2012, in [City], Texas, with [hearing officer] presiding as hearing officer. The hearing officer resolved the sole disputed issue by deciding that the first certification of maximum medical improvement (MMI) and assigned impairment rating (IR) from [Dr. S][1] on June 7, 2011, became final under Section 408.123. The appellant (claimant) appealed the hearing officer's finality determination. The respondent (carrier) responded, urging affirmance.

DECISION

Reversed and rendered.

The parties stipulated that the claimant sustained a compensable injury on [date of injury], and that Dr. S was appointed as a designated doctor to determine MMI and IR. No witnesses were called at the CCH, but documentary evidence was admitted.

Finding of Fact No. 4, which was not appealed, stated that "[t]he [c]laimant disputed the certification of MMI and IR by [Dr. S] before the 91st day after which the certification was served on the [c]laimant by verifiable means." However, a portion of Finding of Fact No. 3 stated that Dr. S's findings constituted the first certification of MMI and IR and "were served on the [c]laimant by verifiable means on March 6, 2008." Because this finding was not appealed, it is apparent that neither party disputed that Dr. S's first certification of MMI and IR was served on the claimant by verifiable means. However, the date of March 6, 2008, cannot be correct because the claimant was not injured until [date of injury], and Dr. S did not examine the claimant until June 7, 2011. Therefore, we strike that portion of Finding of Fact No. 3 "on March 6, 2008," because it is not supported by the evidence.

This is a case of first impression. The parties contend that the resolution of the finality issue is based on whether the cancellation or rescheduling of a benefit review conference (BRC) within 10 days after the notice of the BRC setting is received by the party requesting the BRC is a withdrawal of that party's dispute of the first valid certification of MMI and IR.

It is undisputed that the claimant filed a Request for a [BRC] (DWC-45) to dispute the first certification of MMI and IR by Dr. S within the prescribed 90-day period. It is

[1] We note the hearing officer incorrectly spells the doctor's name as "[Dr. S's name spelled incorrectly]" throughout his decision.

also undisputed that the completed DWC-45 was approved by the Texas Department of Insurance, Division of Workers' Compensation (Division), and a BRC was scheduled. In evidence is the Notice of Setting (DR-1) dated September 15, 2011, informing the parties that a BRC was set for October 4, 2011.

The evidence establishes that on September 27, 2011, the claimant filed a motion entitled "Request to Cancel [BRC]." Within the body of the motion, the claimant noted the October 4, 2011, BRC setting on his finality dispute. The motion recited 28 TEX. ADMIN. CODE § 141.2(b) (Rule 141.2(b)) on requesting a cancellation or rescheduling within 10 days of receipt of the notice of the BRC setting, and requested the BRC be cancelled. The motion does not specifically notify the Division that the claimant is withdrawing his dispute of the first certification of MMI and IR by Dr. S on June 7, 2011. It is undisputed that there was no agreement by the parties to withdraw the issue of finality from dispute.

The evidence establishes that on September 30, 2011, the claimant requested the Division to send a letter of clarification (LOC) to Dr. S to provide him with medical records[2] and for expediency, attached a Request for Designated Doctor (DWC-32). The Division, in an Order dated October 4, 2011, denied the request for LOC.

The evidence reflects that a rescheduled BRC was held on November 29, 2011, on the issue "[d]id the first certification of [MMI] and assigned [IR] from [Dr. S] on June 7, 2011, become final under [Section] 408.123?" The claimant's position at the BRC was "[t]he [c]laimant did dispute the first valid DWC-69 from [Dr. S]. The DWC-45 was filed on July 22, 2011."[3] The carrier's position was "[t]he 90-day Rule does apply in this case. The attorney withdrew his request for a [BRC] therefore he has waived the dispute and the designated doctor's report should stand."

The carrier contends that "to allow [c]laimants or [c]arriers to file DWC-45s disputing the first certification of MMI/IR and then cancelling the scheduled BRC and not having another one scheduled within the 90 days required by rule, is a circumvention of the holding in [Appeals Panel Decision (APD) 111006-s, decided September 15, 2011], and contrary to the purpose of the rule. 'The purpose of requesting a BRC is to resolve a dispute and a party submitting a BRC request should be prepared to move forward with the BRC at the time the request is made.'"

[2] In his narrative report dated June 7, 2011, attached to his Report of Medical Evaluation (DWC-69), Dr. S noted that he only had the claimant's treating doctor's initial evaluation and progress note (December 12 through December 22, 2010), because the adjuster was noncompliant with his request to obtain additional medical records.

[3] We note that in the Background Information section of his decision, the hearing officer stated the DWC-45 was filed on July 20, 2011, and there is a fax confirmation sheet reflecting that the DWC-45 was sent to the Division on July 20, 2011. Regardless, July 20 or July 22, 2011, was within the prescribed 90-day period.

In the Background Information section of his decision, the hearing officer stated that "[a]fter the dispute was withdrawn (the BRC cancelled), the [90] days from the date of certification ran and the certification [of MMI and IR by Dr. S] became final."

Section 408.123(e) provides in part that 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(b) provides, in part, that the first MMI/IR certification must be disputed within 90 days of delivery of written notice through verifiable means and that:

> (1) 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 [Rule] 141.1 (related to Requesting and Setting a [BRC]) or by requesting the appointment of a designated doctor, if one has not been appointed.
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> * * * *
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> (3) A dispute may not be revoked or withdrawn to allow the first valid certification of MMI and/or the first valid assignment of IR to become final except by agreement of the parties.

Rule 141.1 provides, in part, that:

> (d) Request for [BRC]. A [DWC-45] shall be made in the form and manner required by the [D]ivision.
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> * * * *
>
> (e) Complete Request. A request that meets the requirements of subsection (d) of this section is a complete [DWC-45]. The [D]ivision will schedule a [BRC] if the request is complete and otherwise appropriate for a [BRC].

Rule 141.2(a)(2) provides that the Division may cancel or reschedule a BRC at the request of the party who requested the BRC. Rule 141.2(b) provides that:

A request for cancellation or rescheduling under subsection (a) of this section shall be made by notifying the [D]ivision within 10 days of the date the notice of setting is received. The date the notice of setting is received is deemed to be the fifth day after the date of the notice. Cancellation or rescheduling requests made during this 10-day period are unrestricted unless a pattern of abuse is detected.

In APD 111006-s, *supra*, the Appeals Panel held that the carrier did not timely dispute a first valid certification of MMI and IR because it did not file a DWC-45 in a manner prescribed by the Division. The carrier's DWC-45s contained the ancillary language for the Division to not schedule a BRC. The DWC-45s were not approved and no BRC was scheduled. In that case, the Appeals Panel noted that the preamble to Rule 141.1, in pertinent part, provides that "[a]fter a complete request is submitted, approved, and a BRC scheduled, the party has established a dispute of the first certification of MMI and/or IR in accordance with [Section] 408.123(e), effective as of the date the request was filed." (35 Tex. Reg. 7430, 2010).

Under the facts of this case, the evidence establishes that the claimant, within the 90-day period, filed a DWC-45 in a manner prescribed by the Division and the DWC-45 was approved. A BRC was scheduled on the finality issue. There is no evidence that the claimant withdrew his finality dispute, and his motion to cancel the BRC was nothing more than a request to reschedule the BRC to a later date. There is no evidence that the parties agreed to withdraw the finality issue from dispute as provided in Rule 130.12(b)(3).

Therefore, the hearing officer erred in finding that the claimant withdrew his dispute of the designated doctor's certification of MMI and IR and that the certification became final. Accordingly, we reverse the hearing officer's decision that the first certification of MMI and assigned IR by Dr. S on June 7, 2011, became final under Section 408.123 and render a new decision that the first certification of MMI and assigned IR by Dr. S on June 7, 2011, did not become final under Section 408.123.

The true corporate name of the insurance carrier is **SERVICE LLOYD'S INSURANCE COMPANY** and the name and address of its registered agent for service of process is

JOSEPH KELLY-GRAY, PRESIDENT
6907 CAPITOL OF TEXAS HIGHWAY NORTH
AUSTIN, TEXAS 78755.

Cynthia A. Brown
Appeals Judge

CONCUR:

Carisa Space-Beam
Appeals Judge

Margaret L. Turner
Appeals Judge