

APPEAL NO. 132594-s

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 April 24, 2013, continued on July 25, 2013, and concluded on October 2, 2013, in (city), Texas, with (hearing officer) presiding as hearing officer. The hearing officer resolved the disputed issues by deciding that: (1) the compensable injury of (date of injury), does not extend to right shoulder labrum tear, right shoulder rotator cuff partial tear, right shoulder rotator cuff full tear, right shoulder impingement syndrome, right elbow neuropathy and cubital tunnel syndrome (CuTS), right upper extremity (UE) neuropathy, right carpal tunnel syndrome (CTS), chronic pain syndrome and pain disorder with aggravation of preexisting psychological anxiety/depression, right shoulder tendinitis, C3-4 disc bulge, C4-5 disc bulge, C5-6 disc bulge, C6-7 osteophyte and traction disc, and right shoulder AC joint arthritis; (2) the compensable injury of (date of injury), extends to a right shoulder rotator cuff sprain/strain and right elbow sprain/strain; (3) the first certification of maximum medical improvement (MMI) and assigned impairment rating (IR) from (Dr. RR) on November 12, 2010, did not become final under Section 408.123 and 28 TEX. ADMIN. CODE § 130.12 (Rule 130.12); (4) the respondent (claimant) reached MMI on July 7, 2012, with an IR of 9%; and (5) the claimant had disability beginning on November 13, 2010, and continuing through July 7, 2012.

The appellant (carrier) appealed the hearing officer's extent-of-injury determination adverse to it, as well as the hearing officer's finality, MMI/IR, and disability determinations, contending that those determinations are so contrary to the great weight and preponderance of the evidence as to be manifestly unjust. The claimant responded, urging affirmance of the determinations appealed by the carrier. The hearing officer's determination that the compensable injury does not extend to right shoulder labrum tear, right shoulder rotator cuff partial tear, right shoulder rotator cuff full tear, right shoulder impingement syndrome, right elbow neuropathy and CuTS, right UE neuropathy, right CTS, chronic pain syndrome and pain disorder with aggravation of preexisting psychological anxiety/depression, right shoulder tendinitis, C3-4 disc bulge, C4-5 disc bulge, C5-6 disc bulge, C6-7 osteophyte and traction disc, and right shoulder AC joint arthritis has not been appealed and has become final pursuant to Section 410.169.

DECISION

Affirmed in part and reversed and remanded in part.

The parties stipulated that the claimant sustained a compensable injury on (date of injury), that extends to a cervical sprain/strain, a right shoulder sprain/strain, and a right arm sprain/strain; the Texas Department of Insurance, Division of Workers' Compensation (Division) appointed Dr. RR as designated doctor to determine MMI and IR; Dr. RR evaluated the claimant on November 12, 2010, and certified that the claimant reached MMI on November 12, 2010, with a 12% IR; the first certification of MMI and IR was by Dr. RR on November 12, 2010; and the claimant's date of statutory MMI is July 7, 2012. The claimant testified she injured her right UE and neck on (date of injury), when she prevented a patient from falling in the shower.

EXTENT OF INJURY AND DISABILITY

The hearing officer's determinations that the compensable injury extends to a right shoulder rotator cuff sprain/strain and right elbow sprain/strain, and that the claimant had disability beginning on November 13, 2010, and continuing through July 7, 2012, are supported by sufficient evidence and are affirmed.

FINALITY AND MMI/IR

Section 408.123(e) provides that except as otherwise provided by Section 408.123, 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; that the notice must contain a copy of a valid Report of Medical Evaluation (DWC-69), as described in Rule 130.12(c); and that 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 hearing officer's findings that Dr. RR's November 12, 2010, MMI/IR certification was provided to the claimant by verifiable means on November 29, 2010, and that the claimant did not dispute Dr. RR's November 12, 2010, MMI/IR certification within 90 days after the date the certification was provided to her by verifiable means have not been appealed.

In Finding of Fact No. 8 the hearing officer found that "[Dr. RR] did not rate the entire compensable injury in his November 12, 2010, assignment of [MMI] date and [IR]; therefore, the exception found in [Section] 408.123(f)(1)(A) of the Act applies." The hearing officer determined that the first MMI/IR certification by Dr. RR on November 12, 2010, did not become final under Section 408.123 and Rule 130.12.

Section 408.123 provides:

(f) An employee's first certification of [MMI] or assignment of an [IR] may be disputed after the period described by Subsection (e) if:

(1) compelling medical evidence exists of:

(A) a significant error by the certifying doctor in applying the appropriate American Medical Association guidelines or in calculating the [IR];

(B) 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.

We note that 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." See 29 Texas Register 2330, March 5, 2004.

In this case the hearing officer based her finality determination on her determination that the compensable injury extends to a right shoulder rotator cuff sprain/strain and right elbow sprain/strain. As previously mentioned, the hearing officer found in an unappealed finding of fact that Dr. RR's November 12, 2010, MMI/IR certification was provided to the claimant by verifiable means on November 29, 2010. The hearing officer's resolution of the extent-of-injury dispute in the claimant's favor occurred well after the 90-day period to dispute the first MMI/IR certification.

While a subsequent resolution of the extent of the compensable injury may be an element of one of the three exceptions contained in Section 408.123(f), we hold that such resolution in and of itself is not an exception to finality. Under the facts of this case the hearing officer's resolution of the extent-of-injury dispute in favor of the claimant alone would not allow the claimant to now dispute the first MMI/IR certification because the 90-day period to do so has expired.

In APD 132117, decided November 4, 2013, the hearing officer determined that the first assigned IR did not become final because there was compelling medical evidence of a significant error by the certifying doctor in calculating the claimant's IR because the certifying doctor included a condition that was not determined to be a part of the compensable injury. The Appeals Panel noted that "[t]here is no provision in

either Section 408.123 or Rule 130.12 that states that the mere inclusion of a condition in an assignment of IR constitutes an exception for finality.” The Appeals Panel declined to read that interpretation in those provisions and declined to follow any prior cases that may have read such an interpretation.

The case on appeal addresses the opposite situation; that is, whether or not the exclusion of a condition subsequently determined to be compensable constitutes an exception under Section 408.123(f)(1)(A). The hearing officer found that a certifying doctor’s failure to rate the entire compensable injury constituted an exception under Section 408.123(f)(1)(A). However, there is no provision in either Section 408.123 or Rule 130.12 that provides that the exclusion of a condition in an assignment of IR constitutes an exception to finality. As in APD 132117, *supra*, we decline to read any such interpretation in those provisions, and we decline to follow any prior cases that may have read such an interpretation.

However, unlike APD 132117, *supra*, where neither of the parties litigated an exception to finality under Section 408.123(f), the claimant in this case contended at the CCH that there was improper or inadequate treatment of the claimant’s injury before the date of Dr. RR’s MMI/IR certification, and therefore argued that the exception contained in Section 408.123(f)(1)(C) applies in this case. The hearing officer did not make any findings of fact or conclusions of law regarding this exception, which was litigated at the CCH. Therefore, we remand the issue of finality to the hearing officer to make findings of fact and conclusions of law as whether the exception in Section 408.123(f)(1)(C) applies in this case.

The hearing officer determined that the claimant reached MMI on July 7, 2012, with a 9% IR per (Dr. S), the second designated doctor appointed by the Division to determine the claimant’s MMI and IR. Because we have remanded the issue of finality to the hearing officer, we also reverse the hearing officer’s determination that the claimant reached MMI on July 7, 2012, with a 9% IR, and we remand the issues of MMI and IR to the hearing officer for further action consistent with this decision.

SUMMARY

We affirm the hearing officer’s determination that the compensable injury of (date of injury), extends to a right shoulder rotator cuff sprain/strain and right elbow sprain/strain.

We affirm the hearing officer’s determination that the claimant had disability beginning on November 13, 2010, and continuing through July 7, 2012.

We reverse the hearing officer's determination that the first MMI/IR certification from Dr. RR on November 12, 2010, did not become final under Section 408.123 and Rule 130.12, and we remand this issue to the hearing officer for further action consistent with this decision.

We reverse the hearing officer's determination that the claimant reached MMI on July 7, 2012, with an IR of 9%, and we remand the issues of MMI and IR to the hearing officer for further action consistent with this decision.

REMAND INSTRUCTIONS

The hearing officer is to determine whether or not the exception in Section 408.123(f)(1)(C) applies in this case, and then the hearing officer is to determine whether or not Dr. RR's November 12, 2010, MMI/IR certification became final under Section 408.123 and Rule 130.12. The hearing officer is then to determine the claimant's MMI and IR.

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 060721, decided June 12, 2006.

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

**RICHARD J. GERGASKO
6210 EAST HIGHWAY 290
AUSTIN, TEXAS 78723.**

Carisa Space-Beam
Appeals Judge

CONCUR:

Cristina Beceiro
Appeals Judge

Margaret L. Turner
Appeals Judge