APPEAL NO. 180848-s
FILED MAY 21, 2018

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). An expedited contested case hearing (CCH) was held on March 6, 2018, in (city), Texas, with (administrative law judge) presiding as the administrative law judge (ALJ). The ALJ resolved the disputed issues by deciding that: (1) the first certification of maximum medical improvement (MMI) and assigned impairment rating (IR) from (Dr. DG) on July 24, 2017, that the appellant (claimant) reached MMI on May 18, 2017, with a 13% IR, has become final under Section 408.123 and 28 TEX. ADMIN. CODE § 130.12 (Rule 130.12); and (2) (Dr. M) appointment as the designated doctor to address the date of MMI and IR was not made in accordance with Section 408.0041 and Rule 127.

The claimant appealed, disputing the ALJ's determinations of finality and appointment of a designated doctor. The claimant contends that the evidence established she timely disputed the first certification of MMI and IR in accordance with Section 408.123 and Rule 130.12. Additionally, the claimant contends that the appointment of Dr. M as the designated doctor to address the date of MMI and IR was made in accordance with Section 408.0041 and Rule 127. The respondent (carrier) responded, urging affirmance of the ALJ's determination on the disputed issues of finality and appointment of a designated doctor.

DECISION

Reversed and rendered.

The parties stipulated, in part, that the carrier accepted a compensable injury in the form of a crushing injury to the left middle finger and left hand contracture. The evidence reflects that the claimant was examined by Dr. DG, the referral doctor, on July 24, 2017, and he certified on July 24, 2017, that the claimant reached MMI on that same date, July 24, 2017, with a 13% 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). It is undisputed that Dr. DG's certification dated July 24, 2017, is the first valid certification of MMI and IR, and that the claimant received Dr. DG's certification of MMI and IR on August 10, 2017. Pursuant to Section 408.123 and Rule 130.12, the 90th day after the claimant's receipt of the written notification of Dr. DG's certification of MMI and IR is calculated to be November 8, 2017, rather than November 7, 2017, as indicated by the parties at the CCH.

In evidence is the claimant's Request to Schedule, Reschedule, or Cancel a Benefit Review Conference (BRC) (DWC-45) dated October 31, 2017, and Texas Department of Insurance, Division of Workers' Compensation (Division) notice dated November 14, 2017, setting a BRC for December 8, 2017. We note that the ALJ did not discuss or make any findings regarding the DWC-45 dated October 31, 2017, that was filed by the claimant. Also, in evidence is the claimant's Request for Designated Doctor Examination (DWC-32) dated November 3, 2017, and a Commissioner's Order dated November 7, 2017, denying the claimant's request for a designated doctor because the required information on the DWC-32 was incomplete. The evidence reflects that the claimant resubmitted the DWC-32, and Dr. M was appointed as designated doctor to address the issues of MMI and IR. The carrier requested an expedited CCH and a stay of the scheduled designated doctor's examination asserting that the claimant did not timely dispute Dr. DG's certification of MMI and IR.

FINALITY

Section 408.123(e) provides that except as otherwise provided by this section, an employee's first valid certification of MMI and the 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. Rule 130.12(b)(1) provides, in part, that 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 and 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.

In this case, Dr. DG's certification of MMI and IR dated July 24, 2017, was the first certification of MMI and IR, and a designated doctor had not been appointed to address MMI and IR. Pursuant to Rule 130.12(b)(1), the claimant could dispute Dr. DG's certification of MMI and IR, by either filing a DWC-45 or a DWC-32 prior to the expiration of the 90-day period to file a dispute. The claimant's attorney filed a DWC-45, requesting a BRC to dispute MMI and IR on October 31, 2017, and subsequently filed a DWC-32, requesting a designated doctor examination on November 3, 2017. Both the DWC-45 and the DWC-32 were filed prior to the expiration of the 90-day period, November 8, 2017, disputing the first certification of MMI and IR.

With regard to the DWC-45 filed October 31, 2017, the claimant states on the form that she is disputing the certification of MMI and IR by "the designated doctor." Attached to the DWC-45 was a document entitled "Efforts to Resolve Dispute" stating that the claimant disputes the "treating doctor's" determination of MMI and that the carrier stood by the "[d]esignated [d]octor's" certification. The Division granted the claimant's request for a BRC to dispute the designated doctor's MMI and IR, and scheduled a BRC for December 8, 2017.

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). *See* Appeals Panel Decision (APD) 111006-s, decided September 15, 2011. In this case, the claimant filed a DWC-45 disputing MMI and IR, the Division approved the request, and the Division scheduled a BRC for December 8, 2017. The evidence reflects that the claimant's dispute was effective as of the date the DWC-45 was filed on October 31, 2017, which is a date within the 90-day period to dispute the first certification of MMI and IR. We further note that although the claimant's attorney rescheduled the BRC to January 25, 2018, there is no evidence that the claimant withdrew her finality dispute as provided in Rule 130.12(b)(3). Accordingly, the evidence is sufficient to establish that the first certification of MMI and IR assigned by Dr. DG was disputed within 90 days after the date the certification was provided.

With regard to the DWC-32 filed on November 3, 2017, the ALJ found that the claimant filed a DWC-32 requesting the appointment of a designated doctor on November 7, 2017, and that the Division acted within its administrative regularity in denying the claimant's request for a designated doctor examination on November 7, 2017. The ALJ states in her discussion of the Division determination that it was necessary, at the very least, to provide correct information on the DWC-32 and that the claimant failed to do so. The ALJ concluded that the DWC-32 was not timely and the first certification of MMI and IR became final.

As previously mentioned, Rule 130.12(b)(1) provides, in part, that a party may dispute a first certification of MMI and IR by requesting the appointment of a designated doctor, if one has not been appointed. As previously mentioned, a designated doctor had not been appointed to address the issues of MMI and IR. The Appeals Panel has held that "[u]nder the provisions of Section 408.125, no determination can be made regarding the claimant's IR because there is no report from a designated doctor." *See* APD 020385, decided March 18, 2002. In evidence is the Division's Commissioner Order dated November 7, 2017, that states the request for a designated doctor examination was reviewed and considered and it determined that all the required

information on the DWC-32 was not complete as required by Rule 127.1(b). Specifically, the Commissioner's Order dated November 7, 2017, denying the request states the DWC-32 was incomplete and missing the following information: "CITY, STATE & ZIP CODE," "[(date of injury)]," and Notice of Representation (DWC-150)."

In APD 043023-s, decided January 6, 2005, the carrier filed a DWC-32 requesting the appointment of a designated doctor to "dispute an assigned date of [MMI] and [IR];" however, the DWC-32 was returned to the carrier by the Division as incomplete because it did not complete Section III of the form. In that case, the Appeals Panel affirmed the ALJ's determination that the filing of the DWC-32 requesting a designated doctor was sufficient to dispute the first valid certification of MMI and IR pursuant to Rule 130.12(b)(1). In this case, as in APD 043023-s, the claimant filed a DWC-32 requesting the appointment of a designated doctor to address MMI and IR on November 3, 2017, which was timely and sufficient to dispute the first certification of MMI and IR.

Under the facts of this case, the evidence establishes that the claimant timely disputed the first certification of MMI and assigned IR by Dr. DG dated July 24, 2017, by filing a DWC-45 on October 31, 2017. Also, the evidence establishes that the claimant timely disputed the first certification of MMI and IR assigned by Dr. DG on July 24, 2017, by filing a DWC-32 on November 3, 2017. The ALJ found that no exceptions to 90-day finality per Section 408.123(f) apply. That finding is supported by sufficient evidence.

Accordingly, we reverse the ALJ's decision that the first certification of MMI and IR from Dr. DG on July 24, 2017, that the claimant reached MMI on May 18, 2017, with a 13% IR, has become final under Section 408.123 and Rule 130.12, and we render a new decision that the first certification of MMI and assigned IR by Dr. DG on July 24, 2017, did not become final under Section 408.123 and Rule 130.12.

APPOINTMENT OF DESIGNATED DOCTOR

The ALJ found that because the issues of MMI and assigned IR have become final, the appointment of Dr. M to address the date of MMI and IR was not necessary and was not made in accordance with Section 408.0041 and Rule 127. Given that we have reversed the ALJ's finality determination, we reverse the ALJ's determination on the designated doctor appointment issue.

As previously mentioned, the Appeals Panel has held that "[u]nder the provisions of Section 408.125, no determination can be made regarding the claimant's IR because there is no report from a designated doctor." *See* APD 020385, *supra*. *See* also APD 142008, decided November 5, 2014, and APD 132423, decided December 19, 2013, in

which the issues of MMI and IR were in dispute, and a designated doctor had not been appointed to opine on the issues of MMI and IR. In both APD 142008 and APD 132423, the Appeals Panel reversed the ALJ's decision and remanded for a designated doctor to be appointed on the issues of MMI and IR.

The evidence reflects that the Division appointed Dr. M as designated doctor to address the issues of MMI and IR. Accordingly, we reverse the ALJ's determination that Dr. M's appointment as the designated doctor to address the date of MMI and IR was not made in accordance with Section 408.0041 and Rule 127, and we render a new decision that Dr. M's appointment as the designated doctor to address the date of MMI and IR was made in accordance with Section 408.0041 and Rule 127.

SUMMARY

We reverse the ALJ's decision that the first certification of MMI and IR from Dr. DG on July 24, 2017, that the claimant reached MMI on May 18, 2017, with a 13% IR, has become final under Section 408.123 and Rule 130.12, and we render a new decision that the first certification of MMI and assigned IR by Dr. DG on July 24, 2017, did not become final under Section 408.123 and Rule 130.12.

We reverse the ALJ's determination that Dr. M's appointment as the designated doctor to address the date of MMI and IR was not made in accordance with Section 408.0041 and Rule 127, and we render a new decision that Dr. M's appointment as the designated doctor to address the date of MMI and IR was made in accordance with Section 408.0041 and Rule 127.

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 GERGASKO, PRESIDENT
6210 EAST HIGHWAY 290
AUSTIN, TEXAS 78723.

Veronica L. Ruberto
Appeals Judge

CONCUR:

Carisa Space-Beam
Appeals Judge

Margaret L. Turner
Appeals Judge