APPEAL NO. 201244-s
FILED OCTOBER 22, 2020

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 July 14, 2020, 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. T) on May 2, 2019, became final under Section 408.123 and 28 TEX. ADMIN. CODE § 130.12 (Rule 130.12); (2) the respondent (claimant) reached MMI on February 26, 2019; and (3) the claimant's IR is 51%. The appellant (carrier) appealed the ALJ's determinations. The claimant responded, urging affirmance of the ALJ's determinations.

DECISION

Reversed and rendered in part and reversed and remanded in part.

The parties stipulated, in part, that the claimant sustained a compensable injury on (date of injury), in the form of a left wrist sprain/strain, right wrist sprain/strain, right elbow sprain/strain, and right shoulder sprain/strain, and that the designated doctor appointed by the Texas Department of Insurance, Division of Workers' Compensation (Division) to determine MMI and IR is Dr. T. The claimant testified she was injured on (date of injury), when a spring popped while she was wringing out a mop, which caused her to be thrown back into a vending machine and then to the ground.

ABUSE OF DISCRETION

The carrier argues on appeal that the ALJ abused his discretion in denying its request for a continuance for the claimant to attend a post-designated doctor required medical examination (RME) scheduled 3 days after the CCH.

Rulings on continuances are reviewed under an abuse-of-discretion standard and the Appeals Panel will not disturb an ALJ's ruling on a continuance absent an abuse of discretion. *Hernandez v. Hernandez*, 611 S.W.2d 732 (Tex. Civ. App.-San Antonio 1981, no writ). In determining whether there has been an abuse of discretion, the Appeals Panel looks to see whether the ALJ acted without reference to any guiding rules or principles. Appeals Panel Decision (APD) 043000, decided January 12, 2005; APD 121647, decided October 24, 2012; *Morrow v. H.E.B., Inc.*, 714 S.W.2d 297 (Tex. 1986). The record reflects that the designated doctor examination upon which the carrier requested an RME occurred on May 2, 2019, and that the carrier requested the RME on January 20, 2020. The ALJ denied the carrier's request for an RME on the

basis of the delay between the designated doctor's examination and the carrier's request for an RME. Under the facts of this case we hold that the ALJ did not abuse his discretion in denying the carrier's request for a continuance to allow a post-designated doctor RME.

The carrier also contends that the ALJ abused his discretion in making a finding of fact that states the record does not show any extent-of-injury (EOI) dispute relating to the EOI conditions determined by Dr. T to be causally related to the compensable injury. The issues in this case are finality of Dr. T's alternate May 2, 2019, certifications, MMI, and IR. Under the facts of this case we hold that the ALJ did not abuse his discretion in making the complained-of finding of fact.

FINALITY PURSUANT TO SECTION 408.123 AND RULE 130.12

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(c) provides that the certification on the Report of Medical Evaluation (DWC-69) is valid if: (1) there is an MMI date that is not prospective; (2) there is an impairment determination of either no impairment or a percentage [IR] assigned; and (3) there is the signature of the certifying doctor who is authorized by the Division under Rule 130.1(a) to make the assigned impairment determination. Rule 130.12(a)(1-3) provide that the certifications and assignments that may become final are: (1) the first valid certification of MMI and/or IR assigned or determination of no impairment; (2) the first valid assignment of IR after the expiration of 104 weeks from the date income benefits begin to accrue or the expiration date of any extension under Section 408.104, if the employee has not been certified as having reached MMI; or (3) the first valid subsequent certification of MMI and/or assignment of an IR or determination of no impairment received after the date a certification of MMI and/or assignment of an IR or determination of no impairment is overturned, modified, or withdrawn by agreement of the parties or by a final decision of the commission or a court. Rule 130.12(a)(4) provides that a designated doctor may provide multiple IRs if there is a dispute over EOI. This rule subsection also provides that whichever rating from the designated doctor applies to the compensable injury once an EOI dispute has been resolved may become final if not disputed. *See also* APD 190180, decided March 28, 2019. We note that in APD 190180, unlike the case on appeal, only one of the designated doctor's multiple certifications based on EOI was valid for purposes of finality and therefore was the only certification subject to finality under Section 408.123 and Rule 130.12.

The evidence established that Dr. T, the designated doctor, examined the claimant on at least four occasions. The first of these examinations occurred on June 24, 2017. Dr. T was appointed by the Division to address in part whether the claimant's injury extended to the claimant's "left shoulder" and "left elbow," and to determine MMI and IR. Dr. T opined that the compensable injury extended to the claimant's "left shoulder" and "left elbow," and certified on August 7, 2017, in alternate certifications that the claimant had not reached MMI.

The next designated doctor examination occurred on November 6, 2017, and Dr. T was appointed by the Division to determine MMI and IR. Dr. T certified on that date that the claimant had not reached MMI for the conditions of bilateral wrist sprain/strain and right shoulder sprain/strain. Dr. T next examined the claimant on October 26, 2018, and was appointed by the Division to address whether the claimant's compensable injury extended to "aggravated foraminal stenosis," "cervical disc displacement," "left shoulder sprain/strain," and "left elbow sprain/strain," and to determine MMI and IR. Dr. T opined that the compensable injury extended to these conditions, and she certified in alternate certifications that the claimant had not reached MMI.

The last designated doctor examination occurred on May 2, 2019. Dr. T was appointed by the Division to address in part whether the claimant's compensable injury extends to "right carpal tunnel syndrome (CTS)" and "left [CTS]," and to determine MMI and IR. Dr. T opined that the compensable injury extended to "right [CTS]" and "left [CTS]." Dr. T issued alternate certifications, one based upon what she said in her narrative report were "the carrier accepted conditions of left wrist sprain/strain, right wrist sprain/strain, right elbow sprain/strain, right shoulder sprain/strain, aggravated foraminal stenosis, cervical disc displacement, left shoulder sprain/strain, and left elbow sprain/strain." Regarding these conditions, Dr. T certified that the claimant reached MMI statutorily on February 26, 2019, and assigned an IR of 35%. In her second certification Dr. T rated the conditions included in her first certification plus the disputed conditions of left CTS and right CTS, which "meets [Dr. T's] definition of the injury," and certified that the claimant reached MMI statutorily on February 26, 2019, with a 51% IR.

The issue before the ALJ was whether the first certification of MMI and assigned IR from Dr. T on May 2, 2019, became final under Section 408.123 and Rule 130.12. Because Dr. T was appointed by the Division to address EOI, MMI, and IR for this examination, Dr. T properly issued alternate certifications. *See* Rule 127.10(d), (h). The ALJ found that the certifications issued by Dr. T on May 2, 2019, are the first on this claim and each is valid for purposes of Rule 130.12(c). The ALJ also found that the carrier did not dispute Dr. T's May 2, 2019, certifications within 90 days of the date written notice of those certifications were delivered to it by verifiable means. The ALJ's

findings are supported by the evidence. Dr. T made alternate certifications based upon her EOI opinion; therefore, Rule 130.12(a)(4) applies in determining which, if either, of Dr. T's May 2, 2019, alternate certifications are subject to finality under Section 408.123 and Rule 130.12.

The ALJ noted in the discussion portion of his decision that Rule 130.12(a)(4) provides "a designated doctor may provide multiple IRs if there is a dispute over [EOI]. Whichever rating from the designated doctor applies to the compensable injury once an [EOI] dispute has been resolved may become final if not disputed." The ALJ stated that the rule does not identify which of Dr. T's certifications is subject to finality because the evidence does not show an EOI dispute between the parties.

The ALJ found the record does not show any EOI dispute relating to the EOI conditions determined by Dr. T to be causally related to the compensable injury. While Dr. T was appointed to opine on EOI, the record does not show that either party has ever raised an EOI issue to be resolved through the Division's dispute resolution process. The ALJ noted in the discussion portion of his decision that "[Dr. T's] [EOI] opinions have presumptive weight and benefits are paid based on those opinions during the pendency of any dispute," and that "no dispute was raised on those [EOI] conditions." The ALJ concluded that for these reasons, "[Dr. T's] certification that [the] [c]laimant reached MMI on February 26, 2019, with a 51% [IR] is subject to finality." The ALJ therefore determined Dr. T's May 2, 2019, certification that the claimant reached MMI on February 26, 2019, with a 51% IR became final under Section 408.123 and Rule 130.12.

As previously discussed, Rule 130.12(a)(4) provides, in part, that a designated doctor may provide multiple IRs if there is a dispute over EOI, and that whichever rating from the designated doctor applies to the compensable injury once an EOI dispute has been resolved may become final if not disputed. The preamble to Rule 130.12 states that "if the final decision regarding the extent of the injured employee's injuries is not consistent with the injuries of one of the assigned IRs, the designated doctor's MMI/IR certification with multiple impairments cannot become final." 29 Tex. Reg. 2330, March 5, 2004.

The parties stipulated in this case that the claimant sustained a compensable injury on (date of injury), in the form of a left wrist sprain/strain, right wrist sprain/strain, right elbow sprain/strain, and right shoulder sprain/strain. While Dr. T was asked to opine on EOI, neither party has raised an EOI issue to be disputed through the Division's dispute resolution process. Therefore, the compensable injury in this case, at

this time, is a left wrist sprain/strain, right wrist sprain/strain, right elbow sprain/strain, and right shoulder sprain/strain.

Dr. T's May 2, 2019, certification that the claimant reached MMI on February 26, 2019, with a 35% IR rates what Dr. T states to be the carrier accepted conditions of left wrist sprain/strain, right wrist sprain/strain, right elbow sprain/strain, right shoulder sprain/strain, aggravated foraminal stenosis, cervical disc displacement, left shoulder sprain/strain, and left elbow sprain/strain. The carrier's attorney stated at the CCH that Dr. T's "carrier accepted conditions" include conditions that the carrier has not accepted. We note that the conditions of aggravated foraminal stenosis, cervical disc displacement, left shoulder sprain/strain, and left elbow sprain/strain are conditions Dr. T opined to be part of the compensable injury in previous examinations. None of these conditions have been accepted by the carrier or determined to be part of the compensable injury through the Division's dispute resolution process. The compensable injury in this case, at this time, is a left wrist sprain/strain, right wrist sprain/strain, right elbow sprain/strain, and right shoulder sprain/strain. Dr. T's May 2, 2019, alternate certification that the claimant reached MMI on February 26, 2019, with a 35% IR is not consistent with the compensable injury in this case. Pursuant to Rule 130.12(a)(4), this May 2, 2019, alternate certification by Dr. T based upon her EOI opinion cannot become final.

Dr. T's May 2, 2019, certification that the claimant reached MMI on February 26, 2019, with a 51% IR rates what Dr. T states to be the carrier accepted conditions of left wrist sprain/strain, right wrist sprain/strain, right elbow sprain/strain, right shoulder sprain/strain, aggravated foraminal stenosis, cervical disc displacement, left shoulder sprain/strain, and left elbow sprain/strain, plus the disputed conditions of right CTS and left CTS, which she determined to be part of the compensable injury. Dr. T's May 2, 2019, alternate certification that the claimant reached MMI on February 26, 2019, with a 51% IR is not consistent with the compensable injury in this case. Pursuant to Rule 130.12(a)(4), this May 2, 2019, alternate certification by Dr. T based upon her EOI opinion cannot become final.

Since there has been no final decision regarding the extent of the claimant's injuries that is consistent with one of Dr. T's alternate assigned IRs, we reverse the ALJ's determination that the first certification of MMI and assigned IR from Dr. T on May 2, 2019, certifying that the claimant reached MMI on February 26, 2019, with a 51% IR became final under Section 408.123 and Rule 130.12, and we render a new decision that neither of Dr. T's May 2, 2019, certifications became final under Section 408.123 and Rule 130.12.

MMI/IR

The ALJ determined that the claimant reached MMI on February 26, 2019, with a 51% IR based upon his determination that this certification became final under Section 408.123 and Rule 130.12. However, we have reversed the ALJ's finality determination and rendered a new decision that neither of Dr. T's May 2, 2019, alternate certifications became final under Section 408.123 and Rule 130.12. Additionally, both of Dr. T's May 2, 2019, alternate certifications consider and rate conditions that have not yet been determined to be compensable. We reverse the ALJ's determinations that the claimant reached MMI on February 26, 2019, with a 51% IR, and we remand the issues of MMI and IR to the ALJ for further action consistent with this decision.

SUMMARY

We reverse the ALJ's determination that the first certification of MMI and assigned IR from Dr. T on May 2, 2019, became final under Section 408.123 and Rule 130.12, and we render a new decision that neither of Dr. T's May 2, 2019, certifications became final under Section 408.123 and Rule 130.12.

We reverse the ALJ's determination that the claimant reached MMI on February 26, 2019, and we remand the issue of MMI to the ALJ for further action consistent with this decision.

We reverse the ALJ's determination that the claimant's IR is 51%, and we remand the issue of IR to the ALJ for further action consistent with this decision.

REMAND INSTRUCTIONS

Dr. T is the designated doctor in this case. The ALJ is to determine whether Dr. T is still qualified and available to be the designated doctor. If Dr. T is no longer qualified or available to serve as the designated doctor, then another designated doctor is to be appointed to opine on the issues of the claimant's MMI and IR for the (date of injury), compensable injury.

On remand the ALJ is to inform the designated doctor what conditions comprise the compensable injury of (date of injury). The ALJ is to request that the designated doctor certify a date of MMI, which cannot be after the statutory date of MMI, and assign an IR for the compensable injury considering the medical record and the certifying examination.

The parties are to be provided with the ALJ's letter to the designated doctor, the designated doctor's response, and are to be allowed an opportunity to respond. If another designated doctor is appointed, the parties are to be provided with the Presiding Officer's Directive to Order Designated Doctor Examination, the designated doctor's report, and are to be allowed an opportunity to respond. The ALJ is to make determinations which are supported by the evidence on the issues of MMI and IR consistent with this decision.

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 ALJ, 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 **XL SPECIALTY INSURANCE COMPANY** and the name and address of its registered agent for service of process is

CT CORPORATION SYSTEM
1999 BRYAN STREET, SUITE 900
DALLAS, TEXAS 75201-3136.

Carisa Space-Beam
Appeals Judge

CONCUR:

Cristina Beceiro
Appeals Judge

Margaret L. Turner
Appeals Judge