REVERSE and RENDER; and Opinion Filed February 28, 2018.

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-16-01530-CV

AMERICAN ZURICH INSURANCE CO., Appellant
V.
JESSICA R. DIAZ, Appellee

On Appeal from the 101st Judicial District Court
Dallas County, Texas
Trial Court Cause No. DC-15-013641

MEMORANDUM OPINION

Before Justices Lang, Fillmore, and Schenck
Opinion by Justice Fillmore

Jessica R. Diaz filed this lawsuit seeking judicial review of an administrative order by the Texas Department of Insurance, Division of Workers' Compensation (the Division) that found Diaz's first certification of maximum medical improvement (MMI)[1] and assignment of impairment rating (IR)[2] was final. After considering competing motions for summary judgment, the trial court granted judgment in favor of Diaz and against American Zurich Insurance Co., and determined (1) Diaz timely disputed the first certification of MMI and assignment of IR; (2) the first certification of MMI and assignment of IR did not become final; and (3) Diaz did not reach MMI on August

[1] As relevant to this appeal, maximum medical improvement is "the earliest date after which, based on reasonable medical probability, further material recovery from or lasting improvement to an injury can no longer reasonably be anticipated." TEX. LAB. CODE ANN. § 401.011(30)(A) (West 2015).

[2] An employee's impairment rating is the "percentage of permanent impairment of the whole body resulting from a compensable injury." *Id.* § 401.011(24).

29, 2014, and her IR is not zero percent. American Zurich appeals the trial court's order, arguing it was entitled to judgment as a matter of law. In the alternative, American Zurich asserts there is a genuine issue of material fact that precludes summary judgment. We reverse the trial court's judgment, and render judgment that Diaz take nothing on her claims.

Background

On February 14, 2014, Diaz injured her back while lifting a box in the course and scope of her employment. American Zurich, Diaz's employer's workers' compensation insurance carrier, accepted liability for a strained or sprained lower back. Diaz was treated for her injury, including receiving epidural injections in May and June of 2014. An MRI performed on July 3, 2014, revealed Diaz had disc protrusions at L3-4, L4-5, and L5-S1.

The Division designated Dr. David Bradley to examine Diaz to determine the extent of injury and whether she had achieved MMI, and to assign an IR. Dr. Bradley examined Diaz on August 9, 2014, and requested Diaz undergo additional nerve testing. The results of the nerve test on August 29, 2014, were a "normal study of both lower extremities." On September 22, 2014, Dr. Bradley completed a Report of Medical Evaluation (DWC-69), in which he opined Diaz's injury extended to stenosis and disc protrusions at L3-4, L4-5, and L5-S1; and Diaz had not reached MMI because a medical treatment recommended by Diaz's treating physician was pending, American Zurich had denied treatment until the extent of injury question could be resolved, and Diaz had not received the prescribed level of care for disc herniation. In Dr. Bradley's opinion, Diaz would reach MMI on or about December 20, 2014.

Diaz was referred to Dr. Robert Holladay IV for a Post Designated Doctor's Required Medical Examination. Dr. Holladay examined Diaz on December 3, 2014, and completed a DCW-69 in which he opined Diaz's injury caused a strain or sprain in her lumbar spine, and the "degenerative changes with minimal bulges at multiple levels" seen in the MRI of Diaz's back

were "not related to any of the mechanism of lifting a box." Based on his examination of Diaz and his review of her medical records and clinical history, Dr. Holladay certified that Diaz reached MMI on August 29, 2014, and assessed an IR of zero percent.

On December 17, 2014, Diaz received a DWC PLN-3, "Notification of Maximum Medical Improvement/First Impairment Income Benefit Payment," and Dr. Holladay's DWC-69. The PLN-3 informed Diaz that, based on Dr. Holladay's findings, she was not eligible for additional income payments, but was entitled to necessary medical benefits related to her injury. The PLN-3 also informed Diaz that, if she did not agree with Dr. Holladay's certification of MMI or assignment of IR, she had ninety days from the date she received the notification to file a dispute with the Division "by contacting the Division office handling [her] claim at 1-800-252-7031."

On February 4, 2015, American Zurich filed a Request to Schedule a Benefit Review Conference (DWC-45) with the Division. By checking boxes on the form, American Zurich identified the disputed issues to be mediated at the benefit review conference (BRC) as the extent of the compensable injury, the designated doctor's certification of MMI, and the designated doctor's assessment of IR. American Zurich described the disputed issues as:

> Carrier disputes the September 22, 2014 designated doctor report of David Bradley, D.C. in which he opines the claimant has not yet reached MMI. In his post designated doctor report dated December 3, 2014 Robert Holladay IV, M.D. opined the claimant reached MMI on August 29, 2014 with a 0% IR. Carrier disputes the compensable lumbar sprain/strain injury extends to and includes stenosis or disc protrusions at L3-4, L4-5, or L5-S1.

Attached to American Zurich's DWC-45 was a February 3, 2015 email to Diaz's counsel stating:

> We represent American Zurich in the above-referenced matter. Carrier would like to request a BRC to dispute the designated doctor's certification Ms. Diaz has not reached MMI and his extent opinion. Please accept this email as Carrier's efforts to resolve this matter before requesting a BRC. Would Ms. Diaz be interested in agreeing that her compensable injury does not extend to include stenosis and disc protrusions at L3-4, L4-5, and L5-S1, and that she reached MMI on August 29, 2014 with 0 percent whole person impairment in accordance with Dr. Holladay's certification.

Diaz's counsel responded, "We do not agree with the carrier." Although Diaz filed a DWC-45 on March 4, 2015, requesting the BRC be rescheduled, she did not file a DWC-45 disputing Dr. Holladay's certification of MMI and assignment of IR.

A BRC was held on April 22, 2015, at which a benefit review officer attempted to mediate a resolution of the "disputed issues." The parties were unable to reach an agreement and, on June 23, 2015, a hearing officer conducted a contested case hearing to decide: (1) does Diaz's compensable injury extend to include stenosis and disc protrusions at L3-4, L4-5, and L5-S1; (2) has Diaz reached MMI and, if so, on what date; (3) if Diaz has reached MMI, what is the impairment rating; and (4) did the first certification of MMI and assignment of IR from Dr. Holladay on December 3, 2014, "become final under Texas Labor Code Section 408.123 and Rule 130.12." The hearing officer found Diaz's injury extended to stenosis and disc protrusions at L3-4, L4-5, and L5-S1; Dr. Holladay's December 3, 2014 certification was the first certification of MMI and assignment of IR and was valid for purposes of Rule 130.12(c); Dr. Holladay's December 3, 2014 certification was provided to Diaz by verifiable means on December 17, 2014; and Diaz did not dispute the first valid certification by Dr. Holladay within ninety days after receiving Dr. Holladay's certification and assignment. The hearing officer found unpersuasive Diaz's arguments that (1) American Zurich's DWC-45 was sufficient to constitute a dispute by Diaz of Dr. Holladay's certification of MMI and assignment of IR, or (2) she met an exception to the requirement that she dispute the first certification of MMI or assignment of IR within ninety days of verifiable receipt. The hearing officer concluded the "first certification of MMI and IR assigned by Dr. Holladay on December 3, 2014 became final under Act Section 408.123 and Rule 130.12"; Diaz reached MMI on August 29, 2014; and Diaz's IR is zero percent.

Diaz appealed the decision to the Division's Appeals Panel. Without issuing a substantive decision, the Appeals Panel notified the parties on October 1, 2015, that the hearing officer's

decision was final. Diaz filed suit seeking judicial review of the administrative decision that she reached MMI on August 29, 2014, and had a zero percent IR.

American Zurich filed a motion for traditional summary judgment on the ground Dr. Holladay's December 3, 2014 certification that Diaz reached MMI on August 29, 2014, and assignment of an IR of zero percent, was final because Diaz failed to file a dispute of the certification and assignment within ninety days of receiving the PLN-32 and Dr. Holladay's DWC-69. American Zurich also moved for a no-evidence summary judgment on the ground that Diaz could produce no evidence an exception to the ninety-day filing requirement applied. Diaz filed a competing motion for traditional summary judgment, arguing (1) she was not required to file a separate DWC-45 on the same issue raised in American Zurich's DWC-45 that simply requested the opposite result, and (2) her counsel's response to American Zurich's email was sufficient to constitute a dispute of Dr. Holladay's certification of MMI and assignment of IR. Diaz also filed a response to American Zurich's motion for summary judgment in which she argued she could dispute Dr. Holladay's certification of MMI and assignment of IR outside the ninety-day period because there had been a clearly mistaken diagnosis before the date of certification.

The trial court granted Diaz's motion and denied American Zurich's motion. The trial court ordered that Diaz disputed Dr. Holladay's certification of MMI and assignment of IR within ninety days; the first certification of MMI and assignment of IR by Dr. Holladay did not become final; and Diaz did not reach MMI on August 29, 2014, and did not have an IR of zero percent.

American Zurich brought this appeal, and argues in its first two issues that the trial court erred by (1) granting Diaz's motion for summary judgment and denying American Zurich's traditional motion for summary judgment because Dr. Holladay's certification that Diaz reached MMI on August 29, 2014, and assignment of an IR of zero percent became final ninety days after Diaz received the PLN-32 and Dr. Holladay's DWC-69, and (2) denying American Zurich's no-

evidence motion for summary judgment because Diaz failed to produce a scintilla of evidence raising a genuine issue of material fact on the applicability of an exception to the finality rule.

Standard of Review

We review summary judgments de novo. *Starwood Mgmt., LLC v. Swaim*, 530 S.W.3d 673, 678 (Tex. 2017) (per curiam). When both parties move for a traditional summary judgment, each party bears the burden of establishing it is entitled to judgment as a matter of law. TEX. R. CIV. P. 166a(c); *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 356 (Tex. 2000). When, as in this case, the trial court grants one motion and denies the other, we determine all questions presented and render the judgment the trial court should have rendered. *Id.* When the competing motions deal with the application of a statute to undisputed facts, we may determine the question presented as a matter of law. *vRide, Inc. v. Ford Motor Co.*, No. 05-15-01377-CV, 2017 WL 462348, at *3 (Tex. App.—Dallas Feb. 2, 2017, no pet.) (mem. op.).

To defeat a no-evidence summary judgment, the nonmovant is required to produce evidence that raises a genuine issue of material fact on each challenged element of a claim. TEX. R. CIV. P. 166a(i); *Timpte Indus., Inc. v. Gish*, 286 S.W.3d 306, 310 (Tex. 2009). If the nonmovant brings forward more than a scintilla of probative evidence that raises a genuine issue of material fact on each of the challenged elements, then a no-evidence summary judgment is not proper. *Boerjan v. Rodriguez*, 436 S.W.3d 307, 312 (Tex. 2014) (per curiam).

Analysis

Both American Zurich and Diaz sought summary judgment on the issue of the finality of Dr. Holladay's certification of MMI and assignment of IR. It is undisputed that Dr. Holladay's December 3, 2014 DWC-69 was the first certification of MMI and assignment of IR for Diaz, and that Diaz did not file a DWC-45 disputing Dr. Holladay's findings. Diaz, however, argues the DWC-45 filed by American Zurich disputing Dr. Bradley's determinations Diaz's injuries

extended to stenosis and disc protrusion and that Diaz had not reached MMI was sufficient to raise a dispute as to Dr. Holladay's findings. In the alternative, Diaz asserts the email from her counsel, stating Diaz disagreed with American Zurich's dispute of Dr. Bradley's findings, was sufficient to constitute a dispute by Diaz of Dr. Holladay's certification of MMI and assignment of IR.

As relevant to this appeal, the first valid certification of MMI or first valid assignment of an IR becomes final if the employee does not dispute the certification or assignment before the ninety-first day after the date written notification of the certification or assignment is provided to the employee by verifiable means. TEX. LAB. CODE ANN. § 408.123(e) (West 2015); *see also* 28 TEX. ADMIN. CODE § 130.12(a)(1), (b) (Tex. Dep't of Ins., Div. of Workers' Comp., Finality of the First Certification of Maximum Medical Improvement and/or First Assignment of Impairment Rating) (identifying first certification of MMI or assignment of IR as determination that may become final and stating injured employee who does not agree with first certification of MMI or assignment of IR must dispute MMI or IR within ninety days of delivery of written notice through verifiable means). The ninety day period begins on the day after the notice is delivered to the employee, and may not be extended. 28 TEX. ADMIN. CODE § 130.12(b).

The employee may dispute the first certification of MMI or assignment of IR pursuant to rule 141.1 or by requesting the appointment of a designated doctor, if one has not been appointed. *Id.* § 130.12(b)(1). Rule 141.1 sets out the procedure for requesting a BRC. 28 TEX. ADMIN. CODE. § 141.1 (Tex. Dep't of Ins., Div. of Workers' Comp., Requesting and Setting a Benefit Review Conference). Rule 141.1(a) requires that, prior to requesting a BRC, a "disputing party" must notify the other party "of the nature of the dispute and attempt to resolve the dispute. *Id.* § 141.1(a). A request for a BRC must be in the form and manner required by the Division, and must:

(1) identify and describe the disputed issue or issues;

(2) provide details and supporting documentation of efforts made by the requesting party to resolve the disputed issues, including but not limited to, copies of the notification [to the other party of the nature of the dispute required by section 141.4(a)], correspondence, e-mails, facsimiles, records of telephone contacts, or summaries of meetings or telephone conversations . . .;

(3) contain a signature by the requesting party attesting that reasonable efforts have been made to resolve the disputed issue(s) prior to requesting a benefit review conference, and that any pertinent information in [the party's] possession has been provided to the other parties . . .; and

(4) be sent to the division and the opposing party or parties.

Id. § 141.1(d). Accordingly, rule 141.1 indicates a "disputing party" must file a request for a BRC "in the form and manner required" by the Division, and does not provide that a "disputing party" may rely on a request for a BRC filed by another party.

The only relevant exception to the requirement a disputing party file a request for a BRC applies when the first valid certification of MMI or assignment of IR has already been disputed. *See id.* § 130.12(b)(3).[3] A dispute of the first valid certification of MMI or assignment of IR may not be revoked to allow the certification or assignment to become final except by agreement of the parties. *Id.* Therefore, once one party files a request for a BRC disputing the first valid certification of MMI or assignment of IR, the BRC addressing that dispute will occur unless all parties agree the dispute may be withdrawn. *Id.*

Diaz did not file a DWC-45 disputing Dr. Holladay's certification of MMI and assignment of IR. American Zurich filed a DWC-45 requesting a BRC concerning Dr. Bradley's determinations of the extent of Diaz's injuries and that Diaz had not reached MMI. American Zurich indicated it intended to rely on Dr. Holladay's opinion, and did not dispute Dr. Holladay's first valid certification of MMI and assignment of IR. Because the DWC-45 filed by American Zurich did not dispute of the first valid certification of MMI or assignment of IR, Diaz could not

[3] In this case, a designated doctor had already been appointed. Accordingly, Diaz was required to dispute Dr. Holladay's certification of MMI and assignment of IR pursuant to rule 141.1.

rely on American Zurich's DWC-45 to constitute a dispute by Diaz of Dr. Holladay's first certification of MMI and assignment of IR. *See id.* § 141.1.

We next consider Diaz's argument that the email from her counsel, which was attached to American Zurich's DWC-45, was sufficient to constitute a dispute by Diaz of Dr. Holladay's certification of MMI and assignment of IR. The parties have cited no case authority, and we have located none, addressing whether an email response to the opposing party's attempt to resolve a dispute is sufficient to constitute a timely dispute under rules 130.12 and 141.1. However, the Appeals Panel of the Division has considered whether a DWC-45 filed by the insurance carrier that requested a BRC not be set is sufficient to prevent a first certification of MMI and assignment of IR from becoming final. *See* Division Appeal No. 111006-S, 2011 WL 4440769 (Sept. 15, 2011). The Appeals Panel noted that, under rule 130.12, "parties may only dispute the first valid certification of MMI/IR under either Rule 141.1 or by requesting the appointment of a designated doctor if one has not been appointed." *Id.* at *4. The submission of a DWC-45 "is only one element of, not synonymous with, establishing a dispute under Rule 141.1." *Id.* Rather, a dispute of the first valid certification of MMI or assignment of IR is established "only after a complete request is submitted, approved, and a BRC scheduled." *Id.*; *see also* 28 TEX. ADMIN. CODE § 141.1(f) (request for BRC that does not meet requirements of rule is an incomplete request, will be denied, and does not constitute a dispute proceeding); Division Appeal No. 111238, 2011 WL 4795063, at *3 (Sept. 28, 2011) ("Rule 141.1 and the preamble to Rule 141.1 (35 Tex. Reg. 7430, 2010) make clear that all the requirements of Rule 141.1(d) must be met and if the requirements of subsection (d) are not met, the request is an incomplete request which will be denied. Rule 141.1(f)(1) makes clear that a denied request for a BRC does not constitute a dispute proceeding.").

The email from Diaz's counsel was not in the form and manner required by the Division, and did not identify and describe any dispute about Dr. Holladay's certification of MMI and

assignment of IR. *See In re Liberty Ins. Corp.*, 321 S.W.3d 630, 633 n.5 (Tex. App.—Houston [14th Dist.] 2010, orig. proceeding [mand. denied]) ("The request for a benefit review conference must be made on a specified form and must identify and described the disputed issues."). The email also failed to provide details and supporting documentation of efforts made by Diaz to resolve any dispute over Dr. Holladay's certification of MMI and assignment of IR, and did not contain a signature by Diaz or her counsel attesting that reasonable efforts had been made to resolve the disputed issues prior to requesting a BRC and that any pertinent information in Diaz's possession had been provided to American Zurich. *See* 28 TEX. ADMIN. CODE § 141.1(d); *see also* 28 TEX. ADMIN. CODE § 141.4(a), (c) (Tex. Dep't of Ins., Div. of Workers' Comp., Sending and Exchanging Pertinent Information) (setting out information in possession of party requesting BRC that must be sent to opposing party before request for BRC is sent to Division). Finally, the email did not request the Division set a BRC on any dispute about Dr. Holladay's findings, and was not sent by Diaz or her counsel to the Division. Accordingly, Diaz's counsel's email did not constitute a complete DWC-45 under rule 141.1. *See id.* § 141.1(f). Further, the Division did not approve a request for a BRC on any dispute by Diaz of Dr. Holladay's certification of MMI and assignment of IR, and a BRC was not scheduled on any such dispute. Therefore, Diaz's counsel's email did not constitute a timely dispute of the first valid certification of MMI and assignment of IR. *See id.*

Diaz admits she did not file a DWC-45 disputing Dr. Holladay's certification of MMI and assignment of IR within ninety days of receiving the PLN-32 and Dr. Holladay's DWC-69. Further, neither the DWC-45 filed by American Zurich nor the email from Diaz's counsel constituted a dispute of Dr. Holladay's certification of MMI and assignment of IR. *See id.* Because Diaz did not file a timely dispute, Dr. Holladay's certification of MMI and assignment of IR

became final. Accordingly, the trial court erred by granting Diaz's motion for traditional summary judgment.[4]

Further, unless an exception to the ninety-day filing requirement applied, American Zurich was entitled to traditional summary judgment that Dr. Holladay's certification of MMI and assignment of IR was final. American Zurich moved for a no-evidence motion for summary judgment on the ground that Diaz could produce no evidence an exception applied in this case. As the party appealing the Division's decision, Diaz had the burden of establishing an exception to finality, *see Mendoza v. Indem. Ins. Co. of N. Am.*; No. 07-14-00244-CV, 2015 WL 9474161, at *3 (Tex. App.—Amarillo Dec. 22, 2015, pet. denied) (mem. op.); *see also Univ. of Tex. Sys. v. Menjivar*, No. 04-16-00663-CV, 2017 WL 5162272, at *4 (Tex. App.—San Antonio Nov. 8, 2017, no pet.) (mem. op.), and was required to produce more than a scintilla of evidence that an exception applied.

A first certification of MMI or assignment of an IR may be disputed after the ninety-day period 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 impairment rating;
>
> (B) a 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; or
>
> (2) other compelling circumstances exist as prescribed by commissioner rule.

TEX. LAB. CODE ANN. § 408.123(f)(1). Diaz argues the summary judgment evidence established there was a clearly mistaken diagnosis before the date of certification because Dr. Holladay

[4] As noted above, Diaz did not move for traditional summary judgment on the ground an exception to the ninety-day filing period applied.

incorrectly determined her injury did not extend to stenosis and disc protrusions at L3-4, L4-5, and L5-S1.

In *Mendoza*, the employee sustained a compensable injury on March 21, 2011. 2015 WL 9474161, at *1. The injury was initially diagnosed as a thoracic strain, but an April 2011 lumbar MRI indicated there was a large disc extrusion at L5-S1. *Id.* Additional testing conducted approximately six weeks later showed lumbar radiculopathy of L5-S1 nerves. *Id.* The employee received conservative treatment for the lumbar disc herniation, including three epidural steroid injections. *Id.* In August 2011, a neurosurgeon examined the employee, and concluded conservative treatment had failed. *Id.* The neurosurgeon diagnosed the employee with lumbar radiculopathy, herniated nucleus pulposus at L5-S1, and lumbago, and recommended a lumbar laminectomy, discectomy, foraminotomy, and partial facetectomy at L5-S1. *Id.*

The Division appointed a designated doctor, who examined the employee on August 24, 2011. *Id.* The designated doctor recognized there was an extent of injury issue because the carrier had accepted the thoracic strain diagnosis, but there was evidence of lumbar injury. *Id.* For the compensable thoracic strain, the designated doctor certified MMI was reached on August 24, 2011, and assigned an IR of zero percent. *Id.* Alternatively, the designated doctor assigned an IR of ten percent for the non-compensable herniated disc with radiculopathy. *Id.* As to MMI, the designated doctor stated it was his opinion the employee needed surgical intervention, but certified the employee had reached MMI because the surgery had not been scheduled or approved. *Id.* The insurance carrier accepted the IR of zero percent and, after reviewing additional records, the IR of ten percent. *Id*. at *2 & n.3. The employee did not timely dispute either IR. *Id.* at *2, 3.

At a contested case hearing, the hearing officer determined that, once the extent of injury dispute was resolved by the carrier accepting the assignment of an IR of ten percent, the ninety-day period applied for contesting the alternate rating. *Id.* at *2. Because the employee failed to

timely dispute the alternate IR of ten percent, it had become final. *Id.* After the hearing officer's decision became final before an appeals panel, the employee sought judicial review. *Id.*

As relevant here, the employee argued she was not required to dispute the certification of MMI and assignment of IR within ninety days because there had been a clearly mistaken diagnosis. *Id.* at *3. The Amarillo Court of Appeals concluded the "record is devoid of evidence" of a clearly mistaken diagnosis, explaining:

> From the stipulated facts, it is undisputed that the conditions for which the neurosurgeon recommended surgery were recognized from the time of [the employee's] MRI in April, and the EMG in May, 2011. The designated doctor agreed with the neurosurgeon's recommendation, and assigned the ten-percent impairment rating based on his finding of a lumbar spine DRE category III. If, as [the employee] contends, the designated doctor should not have determined her to be at MMI in the face of her need for surgery, his error was not one of mistaken diagnosis.

Id. at *4 (internal footnote omitted); *see also* Division Appeal No. 171530, 2017 WL 4368865, at *3 (Sept. 6, 2017) (concluding there was no compelling evidence of clearly mistaken diagnosis when disc protrusion had been diagnosed at time designated doctor certified employee had reached MMI and assigned an IR, but was of the opinion the compensable injury suffered by claimant did not extend to disc protrusion); Division Appeal No. 151590, 2015 WL 6855575, at *3 (Oct. 8, 2015) (concluding there was no compelling evidence of misdiagnosis when condition was diagnosed prior to expiration of ninety day period to dispute first certification of MMI/IR); Division Appeal No. 980392, 1998 WL 198909, at *3 (Apr. 17, 1998) ("In this case, there was no misdiagnosis; whatever condition claimant now has was diagnosed, present, documented and considered when the first certification was made.").

Similarly, Diaz was diagnosed with stenosis and disc protrusions prior to Dr. Holladay's certification of MMI and assignment of IR. Dr. Holladay considered those conditions in certifying Diaz reached MMI on August 29, 2014, and assigning an IR of zero percent. Any error by Dr. Holladay in determining Diaz's compensable injury did not extend to stenosis and disc protrusion,

Diaz reached MMI on August 29, 2014, or Diaz had an IR of zero percent was not one of mistaken diagnosis. *See Mendoza*, 2015 WL 9474161, at *4; Division Appeal No. 171530, 2017 WL 4368865, at *3.

Because Diaz failed to dispute Dr. Holladay's certification of MMI and assignment of IR within ninety days of receiving the PLN-32 and Dr. Holladay's DCW-69, and failed to produce more than a scintilla of evidence that an exception to the ninety-day filing requirement applied, the trial court erred by denying American Zurich's combined traditional and no-evidence motion for summary judgment. We resolve American Zurich's first two issues in its favor.[5] We reverse the trial court's order granting Diaz's motion for summary judgment and denying American Zurich's motion for summary judgment, and render judgment that Diaz take nothing on her claims against American Zurich.

/Robert M. Fillmore/
ROBERT M. FILLMORE
JUSTICE

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[5] In its third issue, American Zurich argues, in the alternative, that there is a genuine issue of material fact regarding whether Diaz could rely on American Zurich's DWC-45. Based on our resolution of American Zurich's first two issues, we need not address this issue. *See* TEX. R. APP. P. 47.1.

Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

AMERICAN ZURICH INSURANCE CO., Appellant

No. 05-16-01530-CV V.

JESSICA R. DIAZ, Appellee

On Appeal from the 101st Judicial District Court, Dallas County, Texas, Trial Court Cause No. DC-15-013641. Opinion delivered by Justice Fillmore, Justices Lang and Schenck participating.

In accordance with this Court's opinion of this date, the judgment of the trial court is **REVERSED** and judgment is **RENDERED** that appellee Jessica R. Diaz take nothing on her claims against appellant American Zurich Insurance Company.

It is **ORDERED** that appellant American Zurich Insurance Company recover its costs of this appeal from appellee Jessica R. Diaz.

Judgment entered this 28th day of February, 2018.