APPEAL NO. 050378
FILED APRIL 19, 2005

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing was held on January 31, 2005. The hearing officer determined that the first certification of maximum medical improvement (MMI) and impairment rating (IR) assigned by (Dr. F) on December 30, 2003, did not become final under Section 408.123.

The appellant/cross-respondent (carrier) appealed, contending that the respondent/cross-appellant (claimant) clearly had not timely disputed the first certification and that contrary to the hearing officer's determination none of the exceptions to Section 408.123(e)(1) applied. The claimant cross-appealed, contending that Dr. F's rating did not constitute a proper certification because he had not properly applied 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). The claimant also responded to the carrier's appeal, asserting that the hearing officer is the sole judge of the evidence and that the claimant's treatment had been improper and inadequate (i.e. one or more of the exceptions of Section 408.123(e)(1) applied). The claimant also asserted that Dr. F committed significant error in calculating the IR. The file does not contain a response to the claimant's appeal.

DECISION

Reversed and a new decision rendered.

Although there were no stipulations to the facts it appears undisputed that the claimant, an auto body shop worker, sustained a compensable right knee injury on _____, when he fell and sustained a fracture of the right patella and internal derangement of the right knee. The claimant had surgery, shortly after his injury, apparently in January 2003, for the fractured patella. The claimant had a second surgery on February 6, 2003, for re-displacement of the fixated patella fracture and subsequently a third surgery on August 19, 2003, for medial and lateral meniscal tears. The claimant received extensive physical therapy and in December 2003, physical therapy notes indicate decreased pain. A December 17, 2003, note suggests that removal of hardware in the claimant's knee should be considered. The claimant's treating doctor referred the claimant to Dr. F for MMI evaluation and IR. Dr. F examined the claimant on December 30, 2003, certified MMI on that date and assessed an 11% IR based on 4% impairment for the partial medial and lateral menisectomy (Table 64, page 85 of the AMA Guides), 3% impairment for the patellar fracture (also from Table 64, page 85) and 4% impairment for loss of range of motion (ROM) based on Table 41, page 78 of the Guides. The claimant's treating doctor agreed with Dr. F's assessment.

The claimant returned to work at his preinjury job without restrictions around the middle of January 2004. A physical therapy note of January 28, 2004, states that the claimant "is currently not having anterior knee pain from the hardware" and that he understands the hardware may need to be removed in the future if it becomes symptomatic. Another note dated February 20, 2004, notes that the claimant "has been back to work for approximately four weeks." Although no date was established when the claimant received Dr. F's report, the claimant agrees that he did not dispute it within 90 days of when he had notice of it. The first dispute of Dr. F's rating was in a request for a benefit review conference on July 10, 2004. The claimant testified that he had not disputed the IR earlier because he "was under the impression [he] was good to go back to work." Physical therapy notes indicate that the claimant "did aggravate his knee" sometime in April 2004 and the knee condition began to deteriorate. The claimant had arthroscopic surgery with debridement and removal of the retained hardware on June 22, 2004. The medical records reflect that the claimant's knee condition continued to worsen.

Dr. F, in a report dated August 19, 2004, attempts to "retract" his MMI date and IR stating that in December 2003 he "was not aware that there was pending surgery to remove the hardware from his knee." Dr. F also stated that he was not aware that the claimant was going to return to his preinjury job. The treating doctor referred the claimant for an evaluation to (Dr. A) who in a report dated August 24, 2004, reviewed the records, commented that the claimant's pain was secondary to a Baker's cyst, that the cyst might require surgery and that the claimant "may be facing a total knee replacement in the future." Subsequently another doctor, in a report dated October 20, 2004, noted severe advanced changes in the claimant's knee and commented that "the only option left for this patient now is total knee replacement." The claimant testified that he had a total right knee replacement in January 2005.

The hearing officer in an unappealed finding determined that "there has not been a clear misdiagnosis or a previously undiagnosed condition." The hearing officer did, however, determine:

> There has been a significant error on the part of the certifying doctor or improper or inadequate treatment which would render the certification of [MMI] or [IR] invalid because Claimant now needs aquatic therapy and "more aggressive rehab," according to [Dr. F].

Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.12(b)(4) (Rule 130.12(b)(4)), regarding the finality of the first certification of MMI and IR, states that the first certification may be disputed after the 90-day period as provided in Section 408.123(e), Section 408.123(d) provides that first valid certification of MMI and IR becomes final if not disputed within 90 days after receipt of written notification of the certification. At issue in this case is whether any of the exceptions listed in Section 408.123(e) apply. Section 408.123(e) states:

> The first certification of [MMI] and/or [IR] may be disputed after the 90-day period if:
>
> (1) there is compelling medical evidence establishing the following:
>
> (A) a significant error on the part of the certifying doctor in applying the appropriate [AMA] Guides and/or calculating the [IR];
>
> (B) a clear misdiagnosis or a previously undiagnosed condition; or
>
> (C) prior improper or inadequate treatment of the injury which would render the certification of [MMI] or [IR] invalid;

The carrier contends that the hearing officer's determination that Dr. F's report was invalid because of "significant error" or "prior improper or inadequate treatment" (Section 408.123(e)(1)(A) and (C) is not supported by the evidence. As the carrier notes, the "significant error" and/or "prior improper or inadequate treatment" requires "compelling medical evidence." The claimant argues that the need for additional surgery and the knee replacement after the certification of MMI shows inadequate or improper treatment. We disagree. Just because a surgery did not result in the best, or hoped for, outcome does not mean that it is automatically, in and of itself, inadequate or improper. In this case, the claimant had a serious knee injury which required several surgeries. Nowhere in the medical records is there a suggestion that one of the surgeries, prior to the December 30, 2003, certification was improper or inadequate. In fact the medical records would suggest that the claimant, at the time of the certification, was progressing nicely, that the claimant returned to work at his preinjury job in January 2004 and that it was not until sometime in April 2004 that something caused the claimant's knee to become symptomatic and his condition to deteriorate. There is no compelling medical evidence to establish any prior improper or inadequate treatment of the injury. The hearing officer's determination that the claimant "now needs aquatic therapy and 'more aggressive rehab,' according to [Dr. F]" does not establish, by compelling medical evidence, that there was any prior improper or inadequate treatment.

Regarding the significant error exception of Section 408.123(e)(1)(A) the statute requires "compelling medical evidence" of any such error. No doctor has indicated there was an error in applying the appropriate AMA Guides or in the calculation of the IR. The claimant's attorney makes his own argument that the IR was improperly calculated citing Texas Workers' Compensation Commission Appeal No. 040183, decided March 1, 2004. We would first distinguish Appeal No. 040183, *supra*, by noting the injured worker in Appeal No. 040183 had injuries to her right hand, both knees and low back. The designated doctor (as well as the carrier doctor) found ROM for both knees greater than 110 and assessed a 0% IR (for the knees). The treating doctor in that case assessed an impairment (for the knees) for both the meniscectomy and "4% whole person impairment as a result of these knee cartilage injuries." The treating doctor's report was sent to the designated doctor who said he had reviewed the additional records had calculated the 0% on ROM and cited language from page 3/84 of

the AMA Guides. The hearing officer accorded presumptive weight to the designated doctor's report (as required by then Section 408.125(c)) and found the designated doctor's opinion had not been overcome by the great weight of contrary evidence. The Appeals Panel then affirmed the hearing officer's determination as not being so against the great weight and preponderance of the evidence as to be clearly wrong. This is a far cry from saying that the Appeals Panel has mandated that only the diagnostic or examination criteria could be used. While the AMA Guides do say in general "only one approach [should be used] for each anatomic part," the following paragraph also states that there "may be instances in which elements from both diagnostic and examination approaches will apply to a specific situation."

The preamble to Rule 130.12 provides:

> The amended § 408.123 also provides for exceptions to the 90-day time period. The exceptions provide a means for allowing a dispute beyond the 90-day period in the event of "significant error," "clear misdiagnosis," and "substantial change of condition." These exceptions are the same exceptions noted in the March 2000 changes to § 130.5(e) as previously established by the Commission's Appeals Panel on an ad hoc basis over the years. These exceptions are noted to be a basis for dispute of an MMI/IR certification after the 90-day period in subsection (b)(4). 29 Tex Reg 2331 March 2004.

Although we were unable to find where the Appeals Panel has defined a "significant error" under the current Section 408.123(e), in Texas Workers' Compensation Commission Appeal No. 950033, decided February 16, 1995, we addressed "significant error" under Rule 130.5(e), holding that "an allegation that the certifying doctor failed to comply with the Guides had to be raised within 90 days or the rating become final" citing Texas Workers' Compensation Commission Appeal No. 931170, decided February 3, 1994. Similarly, we hold in this case that the challenge to the doctor's methodology in calculating the rating must be made within the 90 days unless there is compelling medical evidence challenging the calculation of the rating.

Lastly, the claimant alleges that Dr. A's mention of the Baker's cyst which might require surgery was a reason for invalidating Dr. F's first certification. We note that the hearing officer determined that there was no previously undiagnosed condition. We also note that Dr. A is the only doctor to attribute the cyst to the claimant's injury and he only did so in his report of August 23, 2004. This does not constitute compelling medical evidence of a significant error or improper treatment.

We reverse the hearing officer's decision that the first certification of MMI and IR assigned by Dr. F did not become final and render a new decision that the first certification of MMI and IR assigned by Dr. F on December 30, 2003, did become final pursuant to Section 408.123(d).

The true corporate name of the insurance carrier is **FIDELITY AND GUARANTY INSURANCE COMPANY** and the name and address of its registered agent for service of process is

CORPORATION SERVICE COMPANY
800 BRAZOS
AUSTIN, TEXAS 78701.

_____
Thomas A. Knapp
Appeals Judge

CONCUR:

_____
Robert W. Potts
Appeals Judge

_____
Margaret L. Turner
Appeals Judge