APPEAL NO. 052666-s
FILED FEBRUARY 1, 2006

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 October 20, 2005. With regard to the disputed issues the hearing officer determined that the respondent (claimant) has not reached maximum medical improvement (MMI), that the claimant's impairment rating (IR) cannot be determined until he reached MMI and that the first certification of MMI and the IR assigned by (Dr. D) on February 9, 2005, has not become final under 28 TEX. ADMIN. CODE § 130.12 (Rule 130.12).

The appellant (carrier) appeals, contending that the first certification of Dr. D, the designated doctor, on February 9, 2005, and 10% IR did become final pursuant to Section 408.123(e) and Rule 130.12 and that none of the exceptions of Section 408.123(f) are applicable. The file does not contain a response from the claimant.

DECISION

Reversed and a new decision rendered.

Many of the basic and critical facts were stipulated. The parties stipulated that the claimant sustained a compensable (low back lifting) injury on ___, that the designated doctor is Dr. D, that on February 9, 2005, the designated doctor assigned MMI on that date and an IR of 10%, that Dr. D's IR (report) was the first valid certification of MMI and IR, that the claimant received notice of Dr. D's certification of MMI and IR on March 23, 2005, by verifiable means and that the claimant filed his dispute of Dr. D's MMI and IR certification on August 9, 2005, which was after the 90-day period to dispute the certification had expired.

The medical records indicate that the claimant received active and passive therapy for about five months and received lumbar epidural steroid injections on July 27, August 10, and October 8, 2004, all of which were "tolerated well" (Claimant's Exhibit 2, page 3). The claimant was eventually referred to (Dr. H), a spinal surgeon, who in a report dated January 14, 2005, stated that he and the claimant "discussed surgical options for anterior disc replacement, interbody fusion, interbody fixation at L4-L5 and L5-S1. . . ." The carrier represents that spinal surgery was preauthorized on February 1, 2005. Although Dr. H's report goes on to state that the claimant "definitely wants to pursue his surgical options" other evidence, including the claimant's testimony was that he "didn't want to have surgery before because [he] know[s] an operation can be dangerous." The claimant also told (Ms. S), the carrier's bilingual case manager, that he "did not want to have the surgery" in March of 2005.

Dr. D's report of February 9, 2005, does not indicate one way or the other that spinal surgery was being considered. The hearing officer made a finding (Finding of Fact No. 5) that Dr. D, on February 9, 2005, "was not aware of the surgical consultation

with [Dr. H] on January 14, 2005, nor of [Dr. H's] recommendation of surgery on that date." However the only evidence of what Dr. D knew about the proposed spinal surgery is in the carrier's adjuster's affidavit (Carrier's Exhibit C) which states that "[Dr. D] was provided information regarding the proposed surgery and disagreed that it would be appropriate." The affidavit also states that the preauthorized spinal surgery "did not proceed at that point in time because the claimant decided he did not wish to pursue surgery." Further the affidavit referenced the conversations in March 2005 between the claimant and the bilingual case manager that the claimant "did not wish to proceed with surgery and that he agreed with the designated doctor's finding as to the MMI date and [IR]."

The claimant attempted to return to work in mid-March 2005 but was unable to do so and the claimant had spinal surgery on July 19, 2005. Based on the claimant's testimony the hearing officer found that the July 19, 2005, surgery "improved [the claimant's] physical condition and relieved his radicular symptoms." The claimant's current treating chiropractor, in a letter dated August 9, 2005, notes the July 19, 2005, lumbar surgery and asks "the certifying doctor" (Dr. D) to review that information and reconsider his opinion on MMI and IR or "that a new designated doctor be allowed to examine the patient."

FINALITY UNDER SECTION 408.123 AND RULE 130.12, MMI, AND IR

Section 408.123(d) generally provides that except as otherwise provided the first valid certification of MMI and the first valid assignment of IR to an employee are final if the certification of MMI and/or the assigned IR is not disputed within 90 days after written notification of the MMI and/or assignment of IR is provided to the claimant and the carrier by verifiable means.[1] Rule 130.12(b)(4) provides that the first certification may be disputed after the 90-day period as provided in Section 408.123(e) (now Section 408.123(f)).

Section 408.123(e) provides that the first certification of MMI and/or IR may be disputed after the 90-day period if there is "compelling medical evidence" establishing, among other exceptions, "improper or inadequate treatment of the injury." Section 408.123(e)(1)(C) effective June 18, 2003, and apparently the version used by the hearing officer, as an exception to finality states, "prior improper or inadequate treatment of the injury which would render the certification of [MMI] or [IR] invalid." The other amended version Section 408.123(e)(1)(D) effective June 20, 2003, states, "improper or inadequate treatment of the injury before the date of the certification or assignment that would render the certification invalid." Both versions require "compelling medical evidence" and are interpreted to mean that the improper or inadequate treatment occurred either "prior" or "before" the certification of MMI or IR in order to render the certification of MMI or IR invalid.

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[1] We note that the 78th Legislature passed two slightly different versions of Section 408.123, one effective June 18, 2003, the other effective June 20, 2003. Section 408.123 was subsequently amended by the 79th Legislature redesignating some of the subsections effective September 1, 2005. The 2003 amendments, in effect at the time of the certification and assignment are proper in this case.

In this case the hearing officer's commentary makes clear that he does not believe that Section 408.123(e) (1) (A) or (B) is applicable. The question then before us is whether there is compelling medical evidence of improper or inadequate treatment of the injury prior to or before the date of certification or assignment that would render the certification or assignment invalid. The hearing officer comments;

> There is no clear misdiagnosis because the surgery confirmed the conditions diagnosed by the surgeon. However, it appears that there was inadequate treatment prior to the time of the surgery. Even though it was claimant's decision to try to avoid surgery, he was shown not to have been able to return to work without surgery, and the surgery has proven to have been successful in resolving his radicular symptoms. Because the treatment was inadequate prior to surgery, the MMI/IR evaluation of the designated doctor did not become final under this section of the Act. (Emphasis added.)

The parties stipulated that the claimant did not dispute Dr. D's certification within the 90-day period to dispute. Regarding the inadequate treatment exception in Section 408.123(e)(1) we first note that there must be compelling medical evidence of prior inadequate treatment before the date of certification or assignment (in this case, February 9, 2005). In this case there was none. All the medical evidence documents the claimant's injury and treatment, but none of the medical evidence suggests that it was inadequate. While surgery had been recommended, and preauthorization approved, the preponderance of the evidence, even as recognized by the hearing officer, was that the surgery did not go forward in February 2005 because the claimant did not want, or refused the surgery at that time. That does not amount to inadequate treatment. Just because there is subsequent surgery or treatment which proves beneficial to the patient does not automatically, or in this case, amount to inadequate treatment. The provision in Section 408.123(e)(1) regarding inadequate treatment prior to the certification or assignment that would render the certification or assignment invalid is not a catch-all phrase to nullify the finality provisions of Section 408.123.

We hold that the hearing officer's finding that there "was inadequate treatment of the injury prior to surgery" to be both factually and legally incorrect. Section 408.123(e)(1) requires "compelling medical evidence" of inadequate treatment whereas in this case there was none. Further the standard is not "inadequate treatment of the injury prior to surgery" but inadequate treatment of the injury prior to the date of the certification or assignment.

Accordingly, we reverse the hearing officer's decision that the first certification of MMI and IR assigned by Dr. D on February 9, 2005, has not become final, that the claimant has not reached MMI and that the claimant's IR may not be determined until he reaches MMI and render a new decision that the first certification of MMI and IR assigned by Dr. D on February 9, 2005, has become final, that the claimant reached MMI on February 9, 2005, and that the IR is 10%.

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

ROBIN M. MOUNTAIN
6600 CAMPUS CIRCLE DRIVE EAST, SUITE 300
IRVING, TEXAS 75063.

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Thomas A. Knapp
Appeals Judge

CONCUR:

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Robert W. Potts
Appeals Judge

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Margaret L. Turner
Appeals Judge