

APPEAL NO. 060091
FILED MARCH 8, 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 (CCH) was held on December 21, 2005. The disputed issues at the CCH were: (1) whether the appellant (claimant) sustained a compensable repetitive trauma injury, with a date of injury of ____; (2) whether the compensable injury sustained on ____, extends to and includes left shoulder MRI findings dated September 7, 2005; (3) whether the claimant has had disability from September 8, 2005, through the present as a result of an injury sustained on ____; and (4) whether the first certification of maximum medical improvement (MMI) and assigned impairment rating (IR) from Dr. R on April 8, 2005, became final under Section 408.123. The hearing officer resolved the disputed issues by deciding that: (1) the claimant sustained a compensable repetitive trauma injury, with a date of injury of ____; (2) the compensable injury sustained on ____, extends to and includes the left shoulder MRI findings dated September 7, 2005; (3) the claimant had disability from September 8, 2005, through the present as a result of an injury sustained on ____; and (4) the first certification of MMI and assigned IR from Dr. R on April 8, 2005, became final under Section 408.123. The claimant appeals the hearing officer's determination that the first certification of MMI and assigned IR from Dr. R on April 8, 2005, became final under Section 408.123, contending that there was a clearly mistaken diagnosis or previously undiagnosed medical condition and that he did not remember receiving notice of the first certification of MMI and assigned IR. The respondent (carrier) requests affirmance. There is no appeal of the hearing officer's determinations that the claimant sustained a compensable repetitive trauma injury; that the compensable injury extends to and includes the left shoulder MRI findings dated September 7, 2005, and that the claimant has had disability from September 8, 2005, through the present and those determinations have become final under Section 410.169.

DECISION

Reversed and rendered.

The claimant claimed he injured his left shoulder lifting 50-pound pots at work. Dr. R examined him on ____, and diagnosed a left shoulder sprain. Dr. R prescribed therapy and released the claimant to modified duty. An EMG done on March 1, 2005, noted left sensory motor median neuropathy consistent with left carpal tunnel syndrome. Dr. R injected the claimant's left shoulder with Lidocaine and Kenalog. On March 23, 2005, Dr. R diagnosed left shoulder impingement syndrome and noted that the claimant would be reevaluated for a possible MRI if the pain did not improve. On April 8, 2005, Dr. R noted that the claimant's pain was significantly reduced, that the claimant had full range of motion of the left shoulder, that sensation was intact, and that motor strength was 5/5. In addition, on April 8, 2005, Dr. R diagnosed a left shoulder sprain; released the claimant to full duty; and completed and signed a Report of Medical Evaluation

(TWCC-69) certifying that the claimant reached MMI on April 8, 2005, with a zero percent IR.

The claimant changed treating doctors, first to Dr. G, and then to Dr. O. Dr. O referred the claimant for an MRI of the left shoulder, which was done on September 7, 2005. In the section of the MRI report above the impression section, it was noted that the claimant has, among other things, arthrosis of the AC joint with impingement. The following is stated in the impression section of the MRI report:

1. Full thickness rotator cuff tear wide gap approximately 3 cm with muscle retraction.
2. Arthrosis of the AC joint with indentation.
3. Macerated tear superior labrum, subchondral cyst lesser tuberosity of humeri.
4. Suggestion of intrasubstance tear of coracohumeral ligament.

Dr. O provided a written opinion that the MRI findings were a direct result of the claimant's "occupational obligations" for the employer, and that the MRI findings require continued care of the claimant and consultation with an orthopedic physician for possible surgery.

There is no appeal of the hearing officer's determinations that the claimant sustained a compensable repetitive trauma injury, that the compensable injury extends to and includes the left shoulder MRI findings dated September 7, 2005, and that the claimant had disability from September 8, 2005, through the present. The claimant appeals the hearing officer's determination that the first certification of MMI and assigned IR from Dr. R on April 8, 2005, became final under Section 408.123.

Section 408.123(d) provides that except as provided in Subsections (e), (f), and (g), 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. Section 408.123(e) (redesignated as Section 408.123(f) effective September 1, 2005) provides in pertinent part that the first certification of MMI and/or IR may be disputed after the 90-day period if compelling medical evidence exists of: (B) a clearly mistaken diagnosis or a previously undiagnosed medical condition.

The claimant testified that he did not remember when he received notice of Dr. R's evaluation of MMI and IR. The carrier provided evidence that written notice of Dr. R's certification of MMI and assignment of IR, along with a copy of Dr. R's TWCC-69, was provided to the claimant by verifiable means on May 11, 2005, and the hearing officer found that the claimant failed to dispute Dr. R's certification of MMI and IR within

90 days after May 11, 2005. Sufficient evidence supports the hearing officer's determination that the claimant failed to dispute Dr. R's certification of MMI and assignment of IR within the 90-day period.

The claimant appeals the hearing officer's finding that the evidence was insufficient to establish a misdiagnosis of the claimant's condition and the hearing officer's determination that the first certification of MMI and assigned IR from Dr. R on April 8, 2005, became final under Section 408.123. In assisting the claimant at the CCH, the ombudsman asserted that Dr. R had misdiagnosed the claimant and pointed to the MRI findings to support that assertion. The hearing officer noted in her decision that the claimant had been diagnosed with impingement syndrome, that he continued to experience pain to his left shoulder, and that he received injections. The hearing officer also noted that the fact that the claimant did not undergo an MRI until September 7, 2005, does not mean that he was misdiagnosed. The evidence reflects that prior to certifying that the claimant reached MMI on April 8, 2005, and assigning the claimant a zero percent IR, Dr. R had diagnosed the claimant with a left shoulder sprain and left shoulder impingement syndrome. The hearing officer found that the claimant's compensable injury extends to and includes the MRI findings of September 7, 2005, which include among other things, a full thickness rotator cuff tear. We believe that compelling medical evidence exists of a clearly mistaken diagnosis or a previously undiagnosed medical condition and that the hearing officer's determination that the first certification of MMI and assigned IR by Dr. R became final is so against the great weight and preponderance of the evidence as to be clearly wrong and unjust.

We reverse the hearing officer's determination that the first certification of MMI and assigned IR from Dr. R became final under Section 408.123 and we render a decision that the first certification of MMI and assigned IR from Dr. R did not become final under Section 408.123.

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

**CORPORATION SERVICE COMPANY
701 BRAZOS, SUITE 1050
AUSTIN, TEXAS 78701.**

Robert W. Potts
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Margaret L. Turner
Appeals Judge