APPEAL NO. 061493-s
FILED AUGUST 31, 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 June 28, 2006. The hearing officer resolved the disputed issue by deciding that the first certification of maximum medical improvement (MMI) and assigned impairment rating (IR) from Dr. D on September 6, 2005, became final under Section 408.123. The appellant (claimant) appealed, contending that he was misdiagnosed and an exception to finality applies which would prevent the certification of Dr. D on September 6, 2005, from becoming final. The claimant also contends that he received improper and inadequate treatment. The respondent (carrier) responded, urging affirmance. The carrier argues that the claimant did not receive improper or inadequate treatment and knew about his misdiagnosis within 90 days of receipt of Dr. D's certification by verifiable means and therefore the exception does not apply.

DECISION

Reversed and rendered.

The parties stipulated that the claimant sustained a compensable injury on _____. The claimant testified that he sought medical treatment and that his employer sent him to a doctor with (Medical Center). The claimant testified that the doctor, Dr. S examined him, released him to return to work light duty, and told the claimant that he probably had a lumbar sprain. The claimant testified that he underwent a MRI on July 11, 2005. The MRI of that date is in evidence and lists the following impressions: 1. Minimal left neural foraminal stenosis seen at level L4-5. No disc protrusion noted. 2. No herniated disc or spinal canal compromise. The claimant was sent by Dr. S for an EMG/NCV study, which took place on August 24, 2005, and listed lumbosacral root lesion as an impression. The evidence reflected that Dr. D, a designated doctor selected by the Texas Department of Insurance, Division of Workers' Compensation (Division), examined the claimant on September 6, 2005, and certified that the claimant reached MMI on that date with a 0% IR, under 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). Dr. D noted the results of the July 2005, MRI although he mistakenly refers to the date as July 22 rather than July 11. Dr. D, in his summary, listed the claimant's diagnosis as "lumbar strain sprain. The MRI is really non-revealing."

On October 11, 2005, the claimant was seen by a different doctor, Dr. Z. In his initial medical report, Dr. Z noted that his clinical examination showed positive findings in that the straight leg raising on the right is to about 50 degrees and produced left buttock pain and straight leg raising on the left to about 30 degrees produced pain in the left buttock and all the way down the left leg to the heel. Dr. Z requested that the MRI

be sent to him for evaluation and stated he thought the claimant needed to be reinvestigated, starting by looking at the original MRI. Dr. S, the doctor the claimant initially saw for his injury, ordered a myelogram and a postmyelogram CAT scan, which occurred on November 29, 2005. A medical report dated December 1, 2005, from Dr. Z noted that the original MRI was sent for reassessment with another doctor. The doctor who reassessed the July 11, 2005, MRI gave as his impression left foraminal disc protrusion at the last intervertebral disc above a transitional segment with impingement on the ganglion in the neural foramen. Dr. Z noted that the myelogram and postmyelogram CAT scan showed a herniated disc at L5-S1 and stated that this was consistent with the claimant's signs and symptoms. Dr. M examined the claimant on January 12, 2006. He notes that he reviewed the July 11, 2005, MRI and concluded it shows a left foraminal disc protrusion at the L4-5 level. Dr. M discussed treatment options for the claimant to try, in the hope of avoiding surgical intervention.

Section 408.123(e) states that except as otherwise provided, an employee's first valid certification of MMI and 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. Section 408.123(f) provides that an employee's first certification of MMI or assignment of an IR may be disputed after the period described by subsection (e) if there is compelling medical evidence establishing the following: (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. The hearing officer found that "the evidence was insufficient and failed to establish the Claimant received inadequate treatment or that he was misdiagnosed of his medical condition." However, the hearing officer noted in her Background Information the treatment and comments by the various other doctors who saw the claimant in the 90-day period following his receipt of the first valid certification from Dr. D. The hearing officer then noted that given the activity, treatment, and recommendations that took place during the 90-day period, it was not credible or persuasive that the claimant was not aware that his condition was more than just a sprain/strain. Although from her discussion it is evident the hearing officer was persuaded that the claimant was misdiagnosed, she found the certification became final because the claimant was aware that he was misdiagnosed within the 90-day period for disputing the first valid certification. The carrier did not dispute at the CCH that the initial MRI was "read wrong." Further, in its response, the carrier states "the documentary evidence made it clear that the [claimant] knew about his misdiagnosed [herniated nucleus pulposus] soon after he went to see Dr. [Z] on [October 11, 2005]." The carrier contends that because the claimant knew about his misdiagnosed condition within the 90-day period after he received Dr. D's certification by verifiable means that the stated exception does not apply.

28 TEX. ADMIN. CODE § 130.5(e) (Rule 130.5(e)) which was effective January 25, 1991, provided:

The first [IR] assigned to an employee is considered final if the rating is not disputed within 90 days after the rating is assigned.

The rule as initially written did not contain any exceptions. *See* Appeals Panel Decision (APD) 92670, decided February 1, 1993. The Appeals Panel noted in APD 93489, decided July 29, 1993, that the application of Rule 130.5(e) is not absolute and opined that compelling medical evidence of a new, previously undiagnosed medical condition or improper or inadequate treatment of an injury could render an initial certification of MMI invalid. In APD 941748, decided February 13, 1995, the Appeals Panel analyzed various cases and summarized that, the common thread in APD 93501, decided August 2, 1993, APD 931115, decided January 20, 1994, and APD 941069, decided September 20, 1994, is that the element of the compensable injury that was not included in the initial IR was diagnosed or arose after the expiration of the 90-day period. The case went on to explain that therefore, the claimant was unaware of its existence, and, more significantly, the attendant impairment associated with that non-rated portion of the compensable injury during the relevant period. Accordingly, the claimant could not have disputed the rating on the basis of its failure to include a rating for all of the permanent impairment related to the compensable injury within 90 days.[1]

Exceptions to finality under the 90-day rule were subsequently put into Rule 130.5(e), effective March 13, 2000, which was repealed effective January 2, 2002,[2] and then codified into the Labor Code, effective June 18, 2003.[3] The carrier in its response to the claimant's appeal points to language contained in the preamble to Rule 130.12 stating, "[t]hese 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." 29 Tex.Reg. 2331 March 2004. The carrier contends that the reasoning from the Appeals Panel decisions prior to the statutory and rule changes should still apply and that therefore, "if you knew about the grounds to dispute within the 90 days, that it must be done within 90 days." We disagree.

The exceptions in Section 408.123(f)(1)(A), (B), and (C) do not provide that the exceptions only apply if knowledge of the facts giving rise to an exception occurs after the 90-day period has expired.[4] Further, in the preamble to Rule 130.12, a response to a comment noted that Section 408.123 allows for the disputing of a rating beyond the 90-day period if there is a significant error on the part of the certifying doctor in applying

[1] In Rodriguez v Service Lloyds Insurance Company, 997 S.W.2d 248 (Tex. 1999), the court held that the 90-day period for disputing an initial IR that was contained in Rule 130.5(e) had no exceptions and that the Division's Appeals Panel could not create ad hoc exceptions to that rule. In Fulton v. Associated Indemnity Corporation, 46 S.W.3d 364 (Tex.App.-Austin 2001, pet. denied), the court held that Rule 130.5(e), which provided that the first IR assigned to an employee is considered final if the rating is not disputed within 90 days after the rating is assigned, was invalid because it impermissibly shortened the statutory time period allotted to an injured worker to achieve MMI.
[2] *See also* APD 020014-s, decided February 26, 2002.
[3] 408.123 effective June 18, 2003, and amended effective September 1, 2005.
[4] We note that Section 408.123(f)(1)(C) provides by its express terms that improper or inadequate treatment giving rise to the exception must take place before the date of the certification or assignment that would render the certification or assignment invalid. See APD 052666-s, decided February 1, 2006. However, whether the claimant became aware of such improper or inadequate treatment before or after the 90-day dispute period does not preclude the application of the exception if it is otherwise established.

the AMA guidelines and then specifically states that using the wrong edition of the AMA guides would be such an error. The edition of the AMA guides used to make the certification is reflected on the certification itself. Rule 130.1(c)(2)(B) establishes what version of the AMA Guides should be used to determine the claimant's IR. Although not true in every instance, because the edition of the AMA guides used to assign the IR is specified in the certification itself, it may be possible to determine at the time of the certification whether the appropriate edition of the AMA guides was used. However, the preamble did not specify that the exception would apply only if using the wrong edition of the AMA guides was discovered after the 90-day period for disputing the first valid certification has expired.

The carrier correctly noted that the Appeals Panel decisions written prior to the codification of exceptions to the 90-day rule in Section 408.123 required that if the grounds to dispute were known within 90 days of the first valid certification it had to be disputed within that 90-day period. However, the exceptions to the 90-day rule are now provided by statute and we must look to the language of the applicable statutory provision to determine its meaning. There have been Appeals Panel decisions since the exceptions have been codified. In APD 050729-s, decided May 23, 2005, the hearing officer's determination that an assignment of IR did not become final because there was a significant error in calculating the 19% IR, as established by compelling medical evidence was affirmed. In that case the Report of Medical Evaluation (DWC-69) showed the IR as 19%, although the accompanying narrative report showed the correct IR calculation to be 28%. The possibility of a significant error in calculating the IR became apparent upon receipt of the certification, given the discrepancy between the DWC-69 and the accompanying narrative report. However, the stated exception was found to apply and the assignment of IR did not become final. As previously stated, there is no requirement in the statute that the exceptions apply only in the event such exceptions are discovered after the 90-day period for disputing has expired. We decline to read such requirement into the statute. If we were to do so we would be making an exception to the exceptions and in effect amending Rule 130.12[5]. We are mindful that the Appeals Panel may not informally amend a rule through an Appeals Panel decision to provide for an exception to a rule. *See* Rodriguez, *supra*.

The hearing officer's determination that the first certification of MMI and assigned IR from Dr. D on September 6, 2005, became final under Section 408.123 is so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. We reverse the hearing officer's decision and render a new decision that the first certification of MMI and assigned IR from Dr. D on September 6, 2005, did not become final under Section 408.123 because there is compelling medical evidence of a clearly mistaken diagnosis, (that being the lumbar sprain vs. the herniated disc) and it is of no legal significance that the claimant may have been aware of the misdiagnosis during the 90-day dispute period.

[5] Rule 130.12(b)(4) provides that the first certification of MMI and/or IR may be disputed after the 90-day period as provided in Section 408.123(e) of the Texas Labor Code (now Section 408.123(f)).

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

MR. RUSSELL OLIVER, PRESIDENT
6210 EAST HIGHWAY 290
AUSTIN, TEXAS 78723.

_____
Margaret L. Turner
Appeals Judge

CONCUR:

_____
Thomas A. Knapp
Appeals Judge

_____
Veronica L. Ruberto
Appeals Judge