

APPEAL NO. 062356
FILED JANUARY 25, 2007

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 October 11, 2006. The hearing officer decided that: (1) the compensable injury of _____, includes right carpal tunnel syndrome (CTS); (2) the respondent/cross-appellant (claimant) has disability beginning on June 26, 2005, and continuing through the date of the CCH; (3) appellant/cross-respondent (carrier) has not waived the right to dispute compensability of the right CTS by not timely contesting the injury in accordance with Sections 409.021 and 409.022; (4) the first certification of maximum medical improvement (MMI) and assigned impairment rating (IR) from the claimant's treating doctor, Dr. B on August 10, 2005, became final under Section 408.123; and (5) because the claimant has not reached MMI, the issue of IR is premature. The carrier appealed, disputing the hearing officer's determinations on extent of injury and on disability. Additionally the carrier disputed that there was insufficient evidence to show that the claimant received the first certification of MMI and IR by Dr. B by verifiable means and that the claimant had not reached MMI, and thus the issue of IR was premature. The claimant responded, urging affirmance of those determinations. However, the claimant cross-appealed, disputing the hearing officer's Conclusion of Law No. 6 and decision and asserting that the hearing officer made a clerical, *nunc pro tunc* error in determining that the first certification of MMI and assigned IR by Dr. B on August 10, 2005, became final under Section 408.123. Claimant argues that in the Background Information and Discussion, Finding of Fact Nos. 6, 8 and 9 and Conclusion of Law Nos. 7 and 8, it is clear that the hearing officer did not intend to find against the claimant as to the finality of the first certification of MMI and IR and requests the original decision and order be modified to correct the clerical error. The appeal file does not contain a response from the carrier to the claimant's cross-appeal. The hearing officer's determination that the carrier had not waived the right to dispute compensability of the right CTS was not appealed and has become final pursuant to Section 410.169.

DECISION

Affirmed in part, reversed and rendered in part, and reversed and remanded in part.

The parties stipulated that on _____, the claimant sustained a compensable injury. It was undisputed that the work injury was to her right upper extremity while claimant worked as a stocker for her employer. There was conflicting evidence at the CCH regarding the dates claimant earned wages equivalent to her preinjury wage. Following a full release to work by Dr. B on August 10, 2005, claimant returned to her previous duties as a stocker. Claimant testified that she suffered a worsening of her condition. In February of 2006, the claimant began treating with Dr. Z, who testified that the claimant's work injury included the diagnosis of right CTS, which

was causally related to repetitive motion and trauma while performing work duties. Dr. Z opined that claimant had received inadequate therapy (medications, injections, physical therapy) and testing due to her inability to get appropriate funding to have these things accomplished. Dr. Z opined that further treatment and possible surgical intervention were necessary. The parties further stipulated that on August 10, 2005, Dr. B certified the claimant at MMI with a zero percent IR, and that Dr. B was the first doctor to certify MMI and IR.

EXTENT OF INJURY, VERIFIABLE MEANS, MMI/IR

The evidence supports and we affirm the hearing officer's decision that: (1) the compensable injury of _____, includes right CTS; (2) the evidence is insufficient to show that the claimant received the first certification of MMI/IR by Dr. B on August 10, 2005, by verifiable means; (3) as of the date of the CCH, it has not been shown that further material recovery from or lasting improvement to the compensable injury can no longer reasonably be anticipated; and (4) the claimant has not reached MMI, and thus the issue of IR is premature.

FINALITY

The Appeals Panel has discussed the application of 28 TEX. ADMIN. CODE § 130.12 (Rule 130.12) and Section 408.123 in Appeals Panel Decision 041985-s, decided September 28, 2004. Except as otherwise provided in Section 408.123, an employee's first valid certification of MMI and first valid assignment of IR is final if not disputed within 90 days after the date that written notification of the certification or assignment is provided to the employee and the carrier by verifiable means. Section 408.123(e).

From the hearing officer's background discussion and determination that there was insufficient evidence of delivery of the first certification of MMI/IR by verifiable means and that, as of the date of the CCH, the claimant had not yet reached MMI, it is clear that the hearing officer made a clerical error in her decision and order in Conclusion of Law No. 6 that the first certification of MMI and assigned IR became final under Section 408.123 because the requirements of Section 408.123 and Rule 130.12 were not met. Accordingly, we reverse Conclusion of Law No. 6 and the portion of the decision as to the finality of the first certification of MMI/IR and render a new Conclusion of Law No. 6 and new portion of the decision that the first certification of MMI and assigned IR from Dr. B on August 10, 2005, did not become final under Section 408.123.

DISABILITY

A determination of disability should include specific beginning and ending dates. APD 061390, decided September 6, 2006. Although the evidence supports the hearing officer's determination that the claimant had disability, which continued through the date of the CCH, the finding that disability begins on June 26, 2005, is against the great

weight and preponderance of the evidence. Section 401.011(16) defines “disability” as “the inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage.” The claimant’s testimony and the documentary evidence established that the claimant earned wages equivalent to her preinjury wage while on modified duty after her injury and while on full duty after August 10, 2005. However, there is conflicting evidence on the date that the claimant last worked and earned her preinjury wage. Accordingly, we reverse and remand the issue of disability back to the hearing officer to make a determination supported by the evidence as to a specific beginning date of disability as defined by Section 401.011(16). No additional evidence is required. The hearing officer at her discretion may allow additional oral or written comment on the remanded issue regarding the beginning date of disability. Following her determination of the specific beginning date of disability continuing through the date of the CCH, the hearing officer must make a finding as to whether or not there was disability at any other time, and if so, what were the specific beginning and ending dates of that period of disability.

SUMMARY

We affirm the hearing officer’s determinations that the compensable injury of _____, includes right CTS, that the claimant did not receive the first certification of MMI/IR by Dr. B on August 10, 2005, by verifiable means, that it has not been shown that further material recovery from or lasting improvement to the compensable injury can no longer be reasonably anticipated, and that the claimant has not yet reached MMI and thus the issue of IR is premature. We reverse the determination that the first certification of MMI and assigned IR became final under Section 408.123 and render a new decision that the first certification of MMI and assigned IR from Dr. B on August 10, 2005, did not become final under Section 408.123. We affirm the determination that the claimant had disability, which continued through the date of the CCH, but reverse the determination that disability began on June 26, 2005, and remand back to the hearing officer to determine a specific beginning date of disability as defined by Section 401.011(16) and whether or not there are any other periods of disability.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Texas Department of Insurance, Division of Workers’ Compensation pursuant to Section 410.202, which was amended June 17, 2001, to exclude Saturdays and Sundays and holidays listed in Section 662.003 of the Texas Government Code in the computation of the 15-day appeal and response periods.

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 STREET
AUSTIN, TEXAS 78701.**

Cynthia A. Brown
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Margaret L. Turner
Appeals Judge