

APPEAL NO. 072090  
FILED JANUARY 25, 2008

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 22, 2007. The hearing officer determined that the compensable injury sustained on \_\_\_\_\_, does extend to and include a left full thickness supraspinatus tear and that the first certification of maximum medical improvement (MMI) and assigned impairment rating (IR) from Dr. R on October 4, 2005, became final under Section 408.123. The hearing officer's determination that the compensable injury extends to include a left full thickness supraspinatus tear has not been appealed and has become final pursuant to Section 410.169. The appellant (claimant) appeals the finality issue on the basis that he was misdiagnosed and had not received appropriate treatment for his injury. The respondent (carrier) responds, urging affirmance.

DECISION

Reversed and rendered.

The parties stipulated that the claimant sustained a compensable injury on \_\_\_\_\_. The claimant testified how he fell backward and injured his left shoulder and upper part of his back. The claimant was seen by Dr. R on September 21, 2005, and Dr. R, on that date, noted that shoulder x-rays were negative for fracture or dislocation and diagnosed a left shoulder contusion. In a Report of Medical Evaluation (DWC-69), dated October 4, 2005, Dr. R certified the claimant at clinical MMI on October 4, 2005, with a zero percent IR using 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). It is undisputed this report was the first valid certification of MMI and assignment of an IR. Dr. R only listed a diagnosis of left shoulder contusion in the narrative report of October 4, 2005.

It is undisputed that the claimant continued to work and did not seek further medical attention until he saw Dr. M on July 27, 2006. In a letter report Dr. M states that the claimant had been treated conservatively and referred the claimant for an MRI. The MRI was performed on December 15, 2006, and had an impression of "[f]ull thickness supraspinatus tear, joint effusion noted." Dr. S was appointed as a designated doctor to evaluate on the extent of injury. In a report dated May 31, 2007, Dr. S notes the December 15, 2006, MRI, and lists diagnoses of rotator cuff tear of the left shoulder and a left shoulder strain. Dr. S comments that the full thickness rotator cuff tear is "probably work-related" and that the claimant's clinical symptoms are mild and "do not reflect the extent of injury on MRI." In response to a letter of clarification dated August 17, 2007, Dr. S states the "rotator cuff tear is due to the injury on \_\_\_\_\_."

Section 408.123(e) provides that except as otherwise provided by Section 408.123, 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 compelling medical evidence exists of: (A) a significant error by the certifying doctor in applying the appropriate American Medical Association guidelines or in calculating the IR; (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.

In an unappealed determination the hearing officer found that on January 22, 2007, the claimant received, by verifiable means, the certification of MMI and assigned IR of Dr. R. It is undisputed that the claimant did not dispute Dr. R's certification of MMI and assigned IR within 90 days of the date that he received written notification of the certified MMI date and assigned IR. The claimant contends that the first certification of MMI and assigned IR did not become final because there is compelling medical evidence of a clearly mistaken diagnosis or a previously undiagnosed medical condition (Section 408.123(f)(1)(B)) and of inadequate treatment of the injury (Section 408.123(f)(1)(C)).

The hearing officer, in the Background Information, comments that the "credible evidence established that as early as July of 2006, the Claimant was told that he had a tear to his left shoulder, which was later confirmed in December 2006. . . . The Claimant's contention that his condition was misdiagnosed and that he was unable to receive adequate treatment was not persuasive." The hearing officer then found that the evidence was insufficient, and failed to establish by compelling medical evidence, that the claimant's condition was misdiagnosed.

In Appeals Panel Decision (APD) 061493-s, decided August 31, 2006, the Appeals Panel held that 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.

In the instant case the claimant was clearly initially diagnosed with only a left shoulder contusion by Dr. R and Dr. R's MMI and IR certification of October 4, 2005, was based on only a diagnosis of a left shoulder contusion, whereas later testing and expert medical evidence established that the claimant had a left rotator cuff tear which was determined to be part of his compensable injury. The only reason the hearing officer gives for determining that the claimant failed to establish that his condition was misdiagnosed is that the claimant was told as early as July of 2006 that he had a tear to his left shoulder. We hold here, as we did in APD 061493-s, *supra*, that there is no requirement in the statute that the exceptions in Section 408.123(f) apply only in the event such exceptions are discovered after the 90-day period for disputing has expired,

and we decline to read such a requirement into the statute. The hearing officer's decision that the first certification of MMI and assigned IR from Dr. R became final under Section 408.123 is so against the great weight and preponderance of the evidence as to be clearly wrong and unjust because compelling medical evidence exists of a clearly mistaken diagnosis or previously undiagnosed condition under the exception to finality in Section 408.123(f)(1)(B).

Accordingly, 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 render a new decision that the first certification of MMI and assigned IR from Dr. R did not become final under Section 408.123 because there is compelling medical evidence under Section 408.123(f)(1)(B) of a clearly mistaken diagnosis or previously undiagnosed medical condition (that being the initially diagnosed shoulder contusion at the time of certification of MMI/IR versus the later diagnosed full thickness supraspinatus rotator cuff tear of the left shoulder). In that we are applying the exception in Section 408.123(f)(1)(B) we do not address whether there was compelling medical evidence of improper or inadequate treatment of the injury before the date of the certification under Section 408.123(f)(1)(C).

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, SUITE 1050  
AUSTIN, TEXAS 78701.**

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Thomas A. Knapp  
Appeals Judge

CONCUR:

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Veronica L. Ruberto  
Appeals Judge

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Margaret L. Turner  
Appeals Judge