APPEAL NO. 080107
FILED MARCH 13, 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 December 11, 2007. With regard to the two issues before her the hearing officer determined that the first certification of maximum medical improvement (MMI) and assigned impairment rating (IR) from Dr. E on March 5, 2007, became final under Section 408.123 and that the appellant (claimant) did not have disability from July 31, 2006, through October 4, 2006.

The claimant appealed both determinations contending, among other things, that the first "certification was invalid" because of improper or inadequate treatment before the date of the certification of MMI or assignment of the IR pursuant to Section 408.123(f)(1)(C) and that the claimant had disability from July 31, 2006, through October 4, 2006, because the claimant had been laid off rather than terminated for cause. Both the claimant in his appeal, and the respondent (carrier) in its response, note that the hearing officer's decision contains a typographical error. Otherwise the carrier urges affirmance.

DECISION

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

CLERICAL CORRECTION

Stipulation No. 6 states that "July 2, 2007, is the 90th day from April 20, 2007" and Finding of Fact No. 4 finds that the claimant's Request for a Benefit Review Conference (BRC) on July 6, 2007, was "more than 90 days from April 20, 2007." The references to April 20, 2007, are clearly clerical errors and should in fact be April 2, 2007. We reform the hearing officer's determinations in Stipulation No. 6 and Finding of Fact No. 4 to read April 2, 2007, rather than April 20, 2007.

DISABILITY

The hearing officer's determination that the claimant did not have disability from July 31, 2006, through October 4, 2006, as a result of the compensable injury of _____, is supported by sufficient evidence and is affirmed.

FINALITY UNDER SECTION 408.123

The claimant, a laborer, sustained an injury to his right shoulder lifting a sign. The parties stipulated that the claimant sustained a compensable injury on _____, and that on April 2, 2007, the claimant received the certification of MMI

and IR assigned by Dr. E.[1] It is undisputed that Dr. E's certification was the first valid certification of MMI and/or IR assigned for the purpose of determining finality under Section 408.123(e). *See* 28 TEX. ADMIN. CODE § 130.12(a)(1) and (c) (Rule 130.12(a)(1) and (c)). The hearing officer found that "the [Texas Department of Insurance, Division of Workers' Compensation] received the [claimant's] Request for a [BRC] on July 6, 2007, which is more than 90 days from [April 2, 2007]." That determination is supported by sufficient evidence. The claimant contends in part that the first certification of MMI and IR from Dr. E did not become final due to improper or inadequate treatment of the injury pursuant to Section 408.123(f)(1)(C).

The claimant was initially diagnosed with a shoulder strain by a nurse practitioner and was subsequently diagnosed with a right partial rupture of the rotator cuff by Dr. K, a referral surgeon. Dr. K in a report dated August 10, 2006, references an August 4, 2006, MRI and states that it:

> demonstrates a type II acromion with hypertrophy at the acromioclavicular joint. There is a joint effusion. There is a partial tear of the supraspinatus tendon on the bursal side.

Dr. K listed a diagnosis of "right shoulder impingement syndrome." The claimant had right shoulder arthroscopic surgery on October 4, 2006.

Dr. E, the designated doctor, examined the claimant on March 5, 2007, certified the claimant at MMI on that same date, and assessed a one percent IR. In his summary, Dr. E writes:

> An MRI scan revealed evidence of a partial rotator cuff tear, however, I have no report available for my review. The examinee underwent a reported arthroscopic subacromial decompression. Again no operative report is available for my review.

Subsequently another right shoulder MRI was performed on October 17, 2007. That MRI had an impression of:

1. FRAYING PARTIAL TEAR, SUPRASPINATUS TENDON, ROTATOR CUFF, BURSAL SIDE.
2. SUBDELTOID BURSITIS.
3. AC JOINT ARTHROPATHY WITH IMPINGEMENT.
4. NO LABRAL TEARS.
5. GLENOHUMERAL JOINT EFFUSION AND FLUID EXTENDING DOWN TO THE BICEPS TENDON, UNCHANGED.

On October 12, 2007, the claimant was examined by Dr. H, a carrier required medical examination physician, whose signature block indicates that he is a board

[1] It is undisputed that the claimant received Dr. E's Report of Medical Evaluation by verifiable means.

certified orthopedic surgeon. In a report dated October 19, 2007, Dr. H describes the August 4, 2006, MRI as indicating: "Arthropathy and hypertrophy involving the acromioclavicular joint. There is a curved type II acromion . . . fraying and partial tear involving the supraspinatus tendon on his bursal side . . . ." Dr. H notes that the claimant underwent arthroscopy of the right shoulder on October 4, 2006; that Dr. H has "reviewed carefully the operative note;" that "no rotator cuff pathology was found;" and that the claimant "underwent an arthroscopic acromioplasty but no debridement or removal of the distal clavicle." In the report, and in response to certain questions, Dr. H writes that the claimant is status post subacromial decompression, and that the claimant can transition to over-the-counter anti-inflammatory medication and a home exercise program. In regards to further treatment, Dr. H expresses "some minor concerns" in that the claimant's "main finding on the original MRI was acromioclavicular arthrosis producing downward impingement on the bursal side of the superior rotator cuff. This unfortunately was not addressed at the time of the surgical procedure." Another doctor, in a report dated November 8, 2007, recommended additional right shoulder surgery to include arthroscopic debridement. A second right shoulder surgery for arthroscopic debridement and distal clavicle resection was performed on November 19, 2007.

Section 408.123(e) provides that, except as otherwise provided by this Section, 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 in pertinent part that an employee's first certification of MMI or assignment of an IR may be disputed after the period described by subsection (e) if: (1) compelling medical evidence exists of: "(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, by compelling medical evidence, that the [c]laimant received inadequate medical treatment."

In this case, the claimant had his first right shoulder surgery on October 4, 2006. Neither the August 4, 2006, MRI report nor the October 4, 2006, operative report are in evidence (and Dr. E comments in his March 5, 2007, report that they were not available to him). Nonetheless, Dr. E certified the March 5, 2007, MMI date and assessed a one percent IR. Subsequently, Dr. H, a board certified orthopedic surgeon, who stated that he had reviewed the original August 4, 2006, MRI report and the October 4, 2006, operative report, in a report dated October 19, 2007, expressed concern that the "main finding on the original MRI was . . . not addressed at the time of the [October 4, 2006] surgical procedure." Dr. H also notes that the October 4, 2006, surgery did not include debridement or removal of the distal clavicle (debridement and a distal clavical resection were done at the second surgery on November 19, 2007). There was no medical evidence contradicting Dr. H's opinion that the main finding of the original MRI was not addressed at the time of the first surgery. We also note that Dr. H stated he had actually reviewed the October 4, 2006, operative report. We hold that Dr. H's report of October 19, 2007, expressing the opinion that there was a failure to address the main finding of acromioclavicular arthrosis producing downward impingement on the bursal

side of the superior rotator cuff at the time of the October 4, 2006, surgical procedure constitutes compelling medical evidence of improper or inadequate treatment of the claimant's right shoulder injury before the date of Dr. E's March 5, 2007, certification. The hearing officer's determination that the first certification of MMI and assigned IR from Dr. E became final under Section 408.123 is so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust. Accordingly, we reverse the hearing officer's determination that the first certification of MMI and assigned IR from Dr. E became final under Section 408.123 and render a new decision that the first certification of MMI and assigned IR from Dr. E did not become final under Section 408.123 because there was compelling medical evidence that there was improper or inadequate treatment of the injury before the date of Dr. E's certification that would render the certification or assignment invalid, pursuant to Section 408.123(f)(1)(C).

SUMMARY

We reform the hearing officer's decision by correcting clerical errors in Stipulation No. 6 and Finding of Fact No. 4 by substituting April 2, 2007, for April 20, 2007. We affirm the hearing officer's determination that the claimant did not have disability from July 31, 2006, through October 4, 2006. We reverse the hearing officer's determination that the first certification of MMI and assigned IR from Dr. E on March 5, 2007, became final and render a new decision that the first certification of MMI and assigned IR from Dr. E on March 5, 2007, did not become final under Section 408.123 because of the exception under Section 408.123(f)(1)(C).

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

CT CORPORATION SYSTEM
350 NORTH ST. PAUL STREET
DALLAS, TEXAS 75201.

_____
Thomas A. Knapp
Appeals Judge

CONCUR:

_____
Veronica L. Ruberto
Appeals Judge

_____
Margaret L. Turner
Appeals Judge