

APPEAL NO. 080297-s
FILED APRIL 11, 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 (CCH) was held on January 28, 2008. The hearing officer determined that the first certification of maximum medical improvement (MMI) and assigned impairment rating (IR) from Dr. R on August 24, 2005, became final under Section 408.123.

The appellant (claimant) appealed, contending that she had a previously undiagnosed medical condition and that the first certification of MMI and assigned IR from Dr. R did not become final. The respondent (self-insured) responded, urging affirmance.

DECISION

Reversed and a new decision rendered.

The claimant was a school bus driver for the self-insured and injured her right arm while restraining a student. The parties stipulated that the claimant sustained a compensable injury on _____; that Dr. M, the designated doctor "found Claimant to be at MMI on May 3, 2007 with a 7% IR"; and that the "date of statutory MMI occurred on May 3, 2007 per the designated doctor."

The claimant began treatment with Dr. R at (Health Care) on May 5, 2005. Dr. R diagnosed right elbow internal derangement and edema. The claimant was treated with medication and physical therapy. Dr. R recommended an EMG, which was performed on June 23, 2005. The EMG noted no neurophysiologic evidence of cervical radiculopathy or carpal tunnel syndrome (CTS). The interpretation of the report noted the "study may be falsely negative and a repeat EMG study may be considered in 6-12 months if clinically indicated." The claimant continued to receive treatment until August 24, 2005, when she was released to return to work without restrictions. In a Report of Medical Evaluation (DWC-69) and narrative report, both dated August 24, 2005, Dr. R certified the claimant at clinical MMI on August 24, 2005, with no permanent impairment. Dr. R continued to diagnose right elbow internal derangement and edema. It is undisputed that Dr. R's certification is the first valid certification of MMI and assignment of IR for the purpose of applying the finality provision in Section 408.123(e).

It is undisputed on appeal that the claimant received notice of Dr. R's certification on October 18, 2005, by verifiable means, and that the claimant did not timely dispute Dr. R's certification within 90 days after the date she received the certification. The claimant returned to (Health Care) on May 19, 2006, with complaints of right elbow pain. A report of that date notes "no new injuries[,] pt states she may have overused rt elbow." A second EMG was performed on June 28, 2006, and the report of that study concluded that there was electrophysiologic evidence of "right median neuropathy at the

wrist (CTS).” Dr. G, in a report dated July 6, 2006, had an impression of “probable [CTS].” Reports from (Health Care) beginning July 10, 2006, had a diagnosis of CTS. Dr. G recommended carpal tunnel release surgery on August 18, 2006, and another doctor, based on a review of the medical records, stated that “[b]ased on failure of non-operative treatment for these conditions [the CTS], the requested procedures are indicated, medically.” The claimant had right CTS release surgery on November 13, 2006. Subsequently, Dr. M, the designated doctor, certified the claimant at “statutory” MMI on May 3, 2007, with a 7% IR.

Section 408.123(e) states 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 this case, the hearing officer commented that the claimant had returned to work without restrictions after August 24, 2005, until May 19, 2006, and found that compelling medical evidence does not exist to show a clearly mistaken diagnosis or a previously undiagnosed medical condition by Dr. R. The claimant contends that her CTS is a previously undiagnosed medical condition.

The self-insured, and the hearing officer, take the position that the CTS was not in existence at the time of the first certification of MMI and assigned IR by Dr. R and, therefore, Dr. R’s certification of MMI and assignment of no impairment became final. There is no assertion that the subsequently diagnosed right CTS is not part of the compensable injury. There is no disputed issue regarding extent of injury and the self-insured stated at the CCH that it had not raised an extent-of-injury dispute. The CTS was not included as a diagnosis in Dr. R’s MMI and IR report and was not diagnosed until June 2006. We also note that the EMG testing, performed on June 28, 2005, which is cited to rule out CTS, also warned of a possible false negative and suggested re-testing if clinically indicated. There is no requirement in Section 408.123(f)(1)(B) that the previously undiagnosed medical condition must have been present at the time of the first certification. ¹We decline to read such requirement into the statute.

The hearing officer’s determination that the first certification of MMI and assigned IR from Dr. R on August 24, 2005, became final under Section 408.123 is so against the

¹ 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 Appeals Panel Decision (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 expired does not preclude the application of the exception if it is otherwise established. See APD 061493-s, decided August 31, 2006.

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. R on August 24, 2005, did not become final under Section 408.123 because there is compelling medical evidence of a previously undiagnosed medical condition, that being the CTS.

The true corporate name of the insurance carrier is **(a self-insured governmental entity)** and the name and address of its registered agent for service of process is

KL
(ADDRESS)
(CITY), TEXAS (ZIP CODE).

Thomas A. Knapp
Appeals Judge

CONCUR:

Veronica L. Ruberto
Appeals Judge

Margaret L. Turner
Appeals Judge