

APPEAL NO. 080474  
FILED MAY 30, 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 February 26, 2008. 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. T on May 23, 2007, did not become final. The appellant (carrier) appealed, arguing that the respondent (claimant) failed to establish by a preponderance of the evidence that an exception to Section 408.123 applies, allowing her to dispute the certification. The appeal file does not contain a response from the claimant.

DECISION

Reversed and rendered.

The parties stipulated that the claimant sustained a compensable injury on \_\_\_\_\_. The claimant testified she injured her left knee, right elbow, right hand and right wrist, when she fell from a ladder. Dr. T was appointed as a designated doctor and examined the claimant on May 23, 2007. Dr. T reviewed a MRI of the claimant's left knee which was performed on November 20, 2006. He noted that the claimant's treatment history included conservative care including approximately three months of physical therapy and a month and a half of TENS unit usage. He further noted that at the time of his examination, the claimant had not had surgery for this injury but there was a possibility of a left knee surgery. Dr. T noted that in his opinion the claimant was able to return to work with restrictions and had reached MMI on the date of the examination. He assessed a 6% 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) for the left knee and 0% for the right elbow, right hand and right wrist.

The evidence reflects that the claimant had arthroscopic surgery for her left knee on December 3, 2007. The operative report noted that the anterior cruciate ligament was intact and the entire lateral meniscus was found to be free of any pathology. A synovial resection was accomplished in the patellofemoral joint to remove the plica. In his recommendation for surgery, the surgeon noted that the claimant has had very good conservative therapy including anti-inflammatories and physical therapy. The surgeon further stated in his surgical recommendation that the claimant's knee problems have been going on for over a year, and therefore, she would be a candidate for diagnostic arthroscopy on the left knee, although there is no guarantee that anything would be found to fix that would give her permanent relief. A peer review report from a doctor dated March 9, 2007, concluded that the medical records do not support recommendations for surgery and noted the MRI findings in the knee are equivocal. The claimant testified that the surgery did not improve her knee condition and that her knee condition has continually worsened. The claimant testified that no other treatment

has been recommended for her knee injury. In evidence is a report from the treating doctor in which he contends that the claimant had inadequate treatment due to denials by the carrier, causing delays for treatment.

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 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." It is undisputed that the claimant did not timely dispute Dr. T's certification of MMI and assigned IR under Section 408.123(e). The hearing officer found that when the first certification of MMI and assigned IR from Dr. T was issued on May 23, 2007, the claimant had received improper or inadequate treatment for the compensable injury in that she had not received a requested arthrogram and surgery for the left knee. The hearing officer concluded that the first certification of MMI and assigned IR from Dr. T on May 23, 2007, did not become final.

In order to apply the exception to finality in Section 408.123(f)(1)(C), there must be compelling medical evidence of improper or inadequate treatment before the date of certification or assignment. See Appeals Panel Decision 052666-s, decided February 1, 2006. The medical evidence documents the claimant's injury and treatment. The only medical evidence that suggests treatment was inadequate comes from the claimant's treating doctor, who contends the delay in surgery amounts to inadequate treatment. The surgical recommendation noted that the surgery may not improve the claimant's condition and the claimant's testimony was that the surgery did not improve her condition. The hearing officer's determination that the first certification of MMI and assigned IR from Dr. T did not become final under Section 408.123 is not supported by the evidence, and is against the great weight and preponderance of the evidence. Accordingly, we reverse the hearing officer's determination that the first certification of MMI and assigned IR from Dr. T did not become final under Section 408.123 and render a new decision that the first certification of MMI and assigned IR from Dr. T became final under Section 408.123 because there was no compelling medical evidence that there was improper or inadequate treatment of the injury before the date of Dr. T's certification that would render the certification or assignment invalid, pursuant to Section 408.123(f)(1)(C).

The true corporate name of the insurance carrier is **LIBERTY INSURANCE CORPORATION** 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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Margaret L. Turner  
Appeals Judge

CONCUR:

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Thomas A. Knapp  
Appeals Judge

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Veronica L. Ruberto  
Appeals Judge