APPEAL NO. 081467
FILED DECEMBER 2, 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 August 27, 2008. The hearing officer resolved the disputed issues by deciding that the first certification of maximum medical improvement (MMI) and impairment rating (IR) assigned by Dr. G on September 27, 2007, did not become final under Section 408.123 and that the appellant (carrier) is not entitled to reduce the respondent's (claimant) impairment income benefits (IIBs) to recoup the previous overpayment of $272.58.

The carrier appealed, disputing the hearing officer's determination that the first certification of MMI and assigned IR by Dr. G on September 27, 2007, did not become final. The claimant responded, urging affirmance. The hearing officer's determination that the carrier is not entitled to reduce the claimant's IIBs to recoup the previous overpayment of $272.58 was not appealed and has become final pursuant to Section 410.169.

DECISION

Reversed and rendered.

The parties stipulated that the claimant sustained a compensable injury on _____, in the form of injury to his bilateral wrists and a right shoulder rotator cuff tear. It was undisputed that Dr. G was the first doctor to certify MMI and assign an IR and that his certification was valid according to 28 TEX. ADMIN. CODE § 130.12(c) (Rule 130.12(c)). The hearing officer's finding that Dr. G's IR was provided to the claimant by verifiable means on November 21, 2007, was not appealed.

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. Rule 130.12(b) provides, in part, that the first MMI/IR certification must be disputed within 90 days of delivery of written notice through verifiable means; that the notice must contain a copy of a valid Report of Medical Evaluation (DWC-69), as described in Rule 130.12(c); and that the 90-day period begins on the day after the written notice is delivered to the party wishing to dispute a certification of MMI or an IR assignment, or both. Section 408.123(f) provides in part that an employee's first certification of MMI or assignment of an IR may be disputed after the period described in Subsection (e) if: (1) compelling medical evidence exists of: (B) a clearly mistaken diagnosis or a previously undiagnosed medical condition.

It is undisputed that the claimant did not dispute the first certification of MMI and assigned IR within 90 days of its receipt by verifiable means. The claimant argued that

the first certification of MMI and assigned IR should not become final because there is compelling medical evidence of a clearly mistaken diagnosis or a previously undiagnosed medical condition. The evidence reflects that the claimant underwent surgery for a right rotator cuff tear on November 3, 2006. The operative report reflects one of the indications for the procedure was an MRI "which showed a tear with retraction." Dr. G examined the claimant on September 27, 2007, and certified on a DWC-69 that the claimant had reached MMI on that date and assigned an IR of eight percent based on loss of range of motion of the right shoulder and no impairment for the bilateral wrists. Dr. G diagnosed a rotator cuff tear and noted that the claimant had surgery. The claimant was examined by a referral doctor on January 11, 2008, who noted the claimant had chronic postoperative right shoulder pain with severe mobility deficits and weakness. The referral doctor noted that the claimant had major surgery for a full thickness tear, which failed after initial reconditioning. The referral doctor recommended a subacromial injection. The same referral doctor in correspondence dated February 28, 2008, noted that he had been informed that an MRI, performed January 28, 2008, demonstrated a large full thickness rotator cuff tear, presenting the necessity for reoperation. The claimant's treating doctor performed a second operation to the right rotator cuff on April 30, 2008. In a report dated July 17, 2008, the treating doctor noted that he tried to do "a salvage operation" and was prepared to use a graft, however, there was no tendon available to even graft to "the tuberosity." He noted that the resulting surgery was a debridement of the rotator cuff tear and reattachment of his deltoid.

The hearing officer found that compelling medical evidence exists of a clearly mistaken diagnosis or a previously undiagnosed medical condition that would render the certification or assignment invalid. In her discussion of the evidence, the hearing officer notes that the claimant's treating doctor found that the first rotator cuff repair failed and aborted the second repair because there was no cuff present for reattachment. The record clearly indicates that the claimant was diagnosed with a right rotator cuff tear in 2006. His treating doctor noted that an MRI of his right shoulder was performed on August 10, 2006, which showed a full thickness rotator cuff tear with 2 cm of retraction and, as previously noted, surgery to repair the right rotator cuff tear was performed on November 3, 2006. Although the records indicate the claimant had ongoing problems with his shoulder and underwent a subsequent surgery for his right rotator cuff tear, it does not indicate that the claimant was misdiagnosed or had a medical condition that was undiagnosed. The hearing officer's decision that the first certification of MMI and assigned IR from Dr. G did not become 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 does not exist of a clearly mistaken diagnosis or previously undiagnosed medical 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. G did not become final under Section 408.123 and render a new decision that the first certification of MMI and assigned IR from Dr. G did become final under Section 408.123 because there is no compelling

medical evidence under Section 408.123(f)(1)(B) of a clearly mistaken diagnosis or previously undiagnosed medical condition.

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

MR. RUSSELL RAY OLIVER, PRESIDENT
6210 EAST HIGHWAY 290
AUSTIN, TEXAS 78723.

_____
Margaret L. Turner
Appeals Judge

CONCUR:

_____
Thomas A. Knapp
Appeals Judge

_____
Veronica L. Ruberto
Appeals Judge