APPEAL NO. 091827
FILED JANUARY 15, 2010

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, 2009. With regard to the only issue before her the hearing officer determined that the first certification of maximum medical improvement (MMI) and impairment rating (IR) assigned by (Dr. G) on January 3, 2008, became final pursuant to Section 408.123.

The appellant (claimant) appealed, contending that Dr. G's certification of MMI and assigned IR did not become final. The respondent (carrier) responded, urging affirmance.

DECISION

Reversed and a new decision rendered.

The parties stipulated that the claimant sustained a compensable injury on _____. The claimant testified that he injured his left elbow, left shoulder and back in a fall while pumping cement. The claimant received some conservative treatment and MRIs of the left elbow on July 19 and August 10, 2007, and upper extremity electrodiagnostic testing on July 19, 2007. Dr. G was subsequently appointed as the Texas Department of Insurance, Division of Workers' Compensation-selected designated doctor. In a Report of Medical Evaluation (DWC-69) and narrative both dated September 10, 2007, Dr. G certified that the claimant was not at MMI.

FINALITY UNDER SECTION 408.123

Dr. G re-examined the claimant on January 3, 2008, and certified the claimant at MMI on that date with an eight percent IR which was based on three percent impairment for left elbow loss of range of motion and five percent for Diagnosis-Related Estimate Lumbosacral Category II: Minor Impairment. The hearing officer in an appealed finding of fact found that Dr. G's certification of MMI and assigned IR were provided to the claimant by verifiable means on February 6, 2008, and the claimant did not dispute Dr. G's IR within 90 days of receipt.

Section 408.123 provides in pertinent part:

> (e) 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.

(f) 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:

(A) a significant error by the certifying doctor in applying the appropriate American Medical Association guidelines or in calculating the [IR];

(B) 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.

The claimant contends that Dr. G's certification of MMI and assigned IR was not provided to the claimant by verifiable means. However, the hearing officer's finding on this point is supported by the evidence and is affirmed.

The hearing officer, in the Background Information, comments:

> Although [c]laimant argued that the exceptions to § 408.123 applied, namely (B) 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, the exceptions clearly did not apply in this case.

The claimant, on appeal, contends among other matters, that there was compelling medical evidence of improper or inadequate treatment before Dr. G's certification that would render the certification or assignment invalid. Section 408.123(f)(1)(C).

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. Appeals Panel Decision 052666-s, decided February 1, 2006. (Dr. EG), the treating doctor, in a report dated January 30, 2008, commenting on Dr. G's IR, writes that the claimant "has not been worked up for his lumbosacral injury," has not had an MRI or orthopedic evaluation for his lumbar conditions and "has not had adequate diagnostics and/or treatment of his lumbosacral body injury." The claimant was also examined by (Dr. S), a post-designated doctor required medical examination (RME) doctor, who in a report dated January 31, 2008, discussed the claimant's left elbow injury, noted that the claimant, "despite excellent conservative care," needed an upper extremity specialist with expertise in the area of care of the elbow and recommended repeat MRI scans and upper extremity nerve conduction testing. Dr. S

concludes that the claimant "has been inadequately treated for this traumatic injury" and that for reasons explained in his report the claimant has not achieved MMI. (Dr. C), a referral doctor, in a report dated August 14, 2008, commented that the claimant has had difficulty finding an elbow specialist that speaks Spanish and "has not seen an upper extremity orthopedic specialist to address his continuing symptoms." Dr. C agrees with Dr. S that the claimant needs to have his left elbow evaluated by an upper extremity specialist and the claimant is not at MMI. Dr. C further concludes that the claimant "has not had the opportunity for proper treatment in regards to his lower back symptoms" and that while the "lower back complaints have been documented" they have not been addressed.

We regard these reports from three different doctors, including a carrier RME doctor, to be compelling medical evidence that the claimant has received inadequate treatment of his left elbow and low back injuries therefore, Dr. G's certification of MMI and assigned IR did not become final pursuant to Section 408.123(f)(1)(C). The hearing officer's determination that the first certification of MMI and assigned IR from Dr. G on January 3, 2008, became final under Section 408.123 is so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Although the claimant makes other arguments that Dr. G's certification of MMI and assignment of IR is incorrect, because we are reversing the hearing officer on the basis of Section 408.123(f)(1)(C) we need not address those other arguments.

We reverse the hearing officer's determination that the first certification of MMI and IR assigned by Dr. G on January 3, 2008, became final pursuant to Section 408.123 and render a new decision that the first certification of MMI and IR assigned by Dr. G on January 3, 2008, did not become final.

The true corporate name of the insurance carrier is **AMERICAN GUARANTEE AND LIABILITY INSURANCE COMPANY** and the name and address of its registered agent for service of process is

LEO F. MALO
12222 MERIT DRIVE, SUITE 700
DALLAS, TEXAS 75251.

_____
Thomas A. Knapp
Appeals Judge

CONCUR:

_____
Veronica L. Ruberto
Appeals Judge

_____
Margaret L. Turner
Appeals Judge