

APPEAL NO. 092051  
FILED FEBRUARY 23, 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 (CCH) was held on November 16, 2009. The disputed issues before the hearing officer were:

- (1) Does the compensable injury extend to include disc protrusion at L5-S1 and lumbar radiculopathy? (amended issue)
- (2) Did the first certification of maximum medical improvement (MMI) and assigned impairment rating (IR) from (Dr. G) on March 18, 2008, become final under Section 408.123?

The hearing officer determined that: (1) the compensable injury extends to a disc protrusion at L5-S1 and lumbar radiculopathy; and (2) the first certification of MMI and IR from Dr. G on March 18, 2008, did not become final.

The appellant (carrier) appealed the hearing officer's extent of injury and finality determinations. Additionally, the carrier contends that the extent-of-injury issue was not amended by agreement of the parties. The respondent (claimant) responded, urging affirmance.

#### DECISION

Affirmed in part and reversed and rendered in part.

The parties stipulated that: (1) the claimant sustained a compensable injury on \_\_\_\_\_; (2) (Dr. D) was appointed as a designated doctor to determine the extent of the compensable injury; (3) Dr. G certified that the claimant reached MMI on March 18, 2008, with a five percent IR; (4) the claimant received Dr. G's certification of MMI/IR on May 16, 2008, by verifiable means; and (5) the claimant failed to dispute the certification by Dr. G within 90 days of receipt. We note that the 90th day after the claimant received Dr. G's certification of MMI/IR was August 14, 2008.

#### **ABUSE OF DISCRETION IN AMENDING ISSUE**

The hearing officer did not abuse her discretion in amending the extent-of-injury issue to state whether the compensable injury of \_\_\_\_\_, includes a disc protrusion at L5-S1 and lumbar radiculopathy. See Morrow v. H.E.B., Inc., 714 S.W.2d 297 (Tex. 1986).

## **EXTENT OF INJURY**

The hearing officer's decision that the compensable injury extends to a disc protrusion at L5-S1 and lumbar radiculopathy is supported by sufficient evidence and is affirmed.

## **FINALITY UNDER SECTION 408.123**

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."

The claimant sustained a lumbar injury while lifting a rack in the course and scope of employment on \_\_\_\_\_. In evidence is a progress note dated November 14, 2007, from (Dr. R) in which he diagnosed the claimant with lumbar strain and lumbar radiculopathy. An MRI of the lumbar spine dated November 26, 2007, showed L5-S1 disc degeneration and a disc protrusion with an annular tear. Dr. R released the claimant to return to work without restrictions on January 25, 2008. A medical report dated February 15, 2008, from (Dr. L), an orthopedic surgeon, states that the claimant had been lifting approximately 50 pounds at work and seemed to tolerate this. Dr. L released the claimant from his care on February 29, 2008.

Dr. G, a doctor selected by the treating doctor acting in place of the treating doctor, examined the claimant on March 18, 2008, and certified that the claimant reached MMI on that date with a five percent IR for the lumbar spine based on Diagnosis-Related Estimate Lumbosacral Category II: Minor Impairment, 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). Dr. G in her narrative report dated March 18, 2008, diagnosed the claimant with a lumbosacral sprain/strain and lumbar disc herniation. Dr. G noted in her report the findings of the MRI of the lumbar spine dated November 26, 2007, and stated that Dr. L had reviewed the MRI of lumbar spine and opined that the claimant would improve with continued duty restrictions and physical therapy and that the claimant was released to return to work full duty. Also, Dr. G's narrative report showed that there were no objective findings of significant signs of radiculopathy. As previously mentioned, the parties stipulated that the claimant received Dr. G's certification on May 16, 2008, by verifiable means and the claimant failed to dispute the certification by Dr. G within 90 days of receipt.

Subsequent to the expiration of the 90 days, an EMG was performed on September 8, 2008, which showed “[a]cute L5 radiculopathy on the left.” A medical report dated December 30, 2008, from Dr. L, an orthopedic surgeon, states that the claimant underwent a “left L5-S1 transforaminal epidural steroid injection.” In a medical report dated January 20, 2009, Dr. L states that the claimant “failed conservative treatment including epidural steroid injection and now presents with left lower extremity radiculopathy.” Dr. L recommended that the claimant undergo spinal surgery at L5-S1. On March 4, 2009, the claimant underwent a “bilateral hemilaminotomy,” “bilateral medial facetectomies,” “bilateral foraminotomies” and “discectomy” at L5-S1.

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. At the CCH, the claimant contended that the fact that he had spinal surgery at L5-S1 after Dr. G’s certification of MMI/IR on March 18, 2008, was compelling medical evidence that he had inadequate and improper treatment for the compensable injury prior to Dr. G’s certification of MMI/IR on March 18, 2008. The hearing officer found that compelling medical evidence established improper or inadequate treatment of the injury before the date of the certification or assignment that would render the certification or assignment invalid.

In APD 052666-s, *supra*, the claimant failed to dispute the first certification of MMI and IR within the 90-day period to dispute. In that case, the hearing officer noted that “[e]ven though it was claimant’s decision to try to avoid surgery, he was shown not to have been able to return to work without surgery, and the surgery has proven to have been successful in resolving his radicular symptoms. Because the treatment was inadequate prior to surgery, the MMI/IR evaluation of the designated doctor did not become final under” Section 408.123. The Appeals Panel reversed the hearing officer’s finality determination and held in that case that there was no compelling medical evidence of inadequate treatment and that “[j]ust because there is subsequent surgery or treatment which proves beneficial to the patient does not automatically, or in this case, amount to inadequate treatment.”

In this case, there is no compelling medical evidence that any of the claimant’s treatment prior to Dr. G’s certification on March 18, 2008, was improper or inadequate. Dr. G’s certification of MMI/IR dated March 18, 2008, indicates that the claimant’s disc protrusion at L5-S1 was considered and there was no significant signs of radiculopathy based on objective clinical findings. 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 APD 080474, decided May 30, 2008. In the instant case, no doctor opined that the claimant received improper or inadequate treatment for his injury. There is no compelling medical evidence that the claimant received improper or inadequate treatment of his injury before March 18, 2008, the date of Dr. G’s certification. Further, there is no medical

evidence that suggests that the failure to do spinal surgery earlier amounts to improper or inadequate treatment of the injury.

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 became final under Section 408.123.

### **SUMMARY**

We affirm the hearing officer's determination that the compensable injury extends to a disc protrusion at L5-S1 and lumbar radiculopathy. 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 became final under Section 408.123.

The true corporate name of the insurance carrier is **TRAVELERS INDEMNITY COMPANY** and the name and address of its registered agent for service of process is

**CORPORATION SERVICE COMPANY  
D/B/A CSC - LAWYERS INCORPORATING SERVICE COMPANY  
701 BRAZOS STREET, SUITE 1050  
AUSTIN, TEXAS 78701.**

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Veronica L. Ruberto  
Appeals Judge

CONCUR:

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Thomas A. Knapp  
Appeals Judge

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Margaret L. Turner  
Appeals Judge