

APPEAL NO. 100369
FILED MAY 28, 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 March 2, 2010. The hearing officer resolved the disputed issues by deciding that the first certification of maximum medical improvement (MMI) and assigned impairment rating (IR) from (Dr. L) on July 2, 2009, became final under Section 408.123 and 28 TEX. ADMIN. CODE § 130.12 (Rule 130.12); the Texas Department of Insurance, Division of Workers' Compensation (Division) did not abuse its discretion in appointing (Dr. H) as a designated doctor; and the appellant (claimant) sustained disability as a result of the compensable injury of _____, beginning on November 17, 2009, and continuing through January 21, 2010. The claimant appealed, disputing the hearing officer's determination that the first certification of MMI and IR from Dr. L on July 2, 2009, became final under Section 408.123 and Rule 130.12. The respondent (carrier) responded, urging affirmance of the disputed finality determination.

The hearing officer's determinations that the Division did not abuse its discretion in appointing Dr. H as a designated doctor and that the claimant sustained disability as a result of the compensable injury of _____, beginning on November 17, 2009, and continuing through January 21, 2010, were not appealed and have become final pursuant to Section 410.169.

DECISION

Reversed and rendered.

The parties stipulated that on _____, the claimant sustained a compensable injury in the form of right shoulder impingement and right shoulder glenoid labral tear. In evidence was an MRI of the claimant's right shoulder dated May 8, 2009, which noted in part that there was moderate degenerative narrowing of the glenohumeral joint along with some degeneration of the glenoid labrum but that no displaced labral tear was seen. Subsequently, the claimant had right shoulder surgery on November 17, 2009. Although the preoperative diagnosis was right shoulder internal derangement with impingement syndrome, the postoperative diagnosis was right shoulder impingement syndrome and right shoulder type I glenoid labral tear. The operative report dated November 17, 2009, described the surgery performed as a right shoulder arthroscopic subacromial decompression and right shoulder arthroscopic debridement of SLAP tear glenoid labrum.

It was undisputed that the claimant's treating doctor, Dr. L provided the first certification of MMI and IR regarding the claimant's compensable injury of _____. Dr. L examined the claimant on July 2, 2009, and diagnosed a right shoulder sprain with impingement. Dr. L certified that the claimant reached MMI on July 2, 2009, with a one percent IR due to loss of range of motion of his right shoulder. The

hearing officer's findings that Dr. L's certification of MMI and assigned IR were provided to the claimant by verifiable means on July 24, 2009, and that the claimant did not dispute Dr. L's IR within 90 days of receipt were 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.

The claimant contends in part that the right shoulder glenoid labral tear is a previously undiagnosed medical condition. As previously noted, the parties stipulated that the right shoulder glenoid labral tear is part of the compensable injury. The right shoulder glenoid labral tear was not included as a diagnosis in Dr. L's July 2, 2009, MMI and IR narrative report in which Dr. L only diagnosed a right shoulder sprain with impingement. The claimant was not diagnosed with a displaced labral tear until November 2009. Although the MRI of May 8, 2009, noted degenerative changes of the right shoulder glenohumeral joint, it stated that no displaced labral tear was seen. Consequently, the subsequent diagnosis of a right shoulder displaced labral tear constituted a previously undiagnosed medical condition and is an exception to finality under Section 408.123(f)(1)(B).

The hearing officer's determination that the first certification of MMI and assigned IR from Dr. L on July 2, 2009, became final under Section 408.123 and Rule 130.12 is so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust. We reverse the hearing officer's decision and render a new decision that the first certification of MMI and assigned IR by Dr. L on July 2, 2009, did not become final under Section 408.123 because there is compelling medical evidence of a previously undiagnosed medication condition, the right shoulder glenoid labral tear.

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

**RON O. WRIGHT, PRESIDENT
6210 EAST HIGHWAY 290
AUSTIN, TEXAS 78723.**

Margaret L. Turner
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Veronica L. Ruberto
Appeals Judge