APPEAL NO. 111227
FILED OCTOBER 13, 2011

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 July 21, 2011. With regard to the only issue before him, the hearing officer determined that the first certification of maximum medical improvement (MMI) and assigned impairment rating (IR) from (Dr. S) on September 3, 2010, became final under Section 408.123.

The appellant (claimant) appealed, contending that he timely disputed Dr. S's IR within the 90-day period and that one or more of the exceptions to finality cited in Section 408.123(f)(1) was applicable. The respondent (carrier) responded, urging affirmance.

DECISION

Reversed and a new decision rendered.

The parties stipulated that the claimant sustained a compensable injury on (date of injury). The claimant testified that he was a cattle handler (cowboy) and was trampled by a bull at a cattle auction on (date of injury). The claimant was taken to a hospital where hospital records indicate the claimant sustained fractures of the transverse processes of T8, L1, L2, posterior rib fractures of the 9th through 11th ribs, a broken right thumb, and a "tiny hemothorax." The claimant was released but was re-admitted to the hospital on March 28, 2010, for delayed hemothorax following rib fractures. A thoracoscopy for drainage of the delayed hemothorax was performed and the claimant was discharged on April 12, 2010.

Dr. S, a designated doctor appointed by the Texas Department of Insurance, Division of Workers' Compensation (Division) to determine MMI, IR and return to work, examined the claimant on September 3, 2010. Dr. S certified that the claimant reached clinical MMI on September 3, 2010, with a five percent IR. Dr. S's diagnoses were: (1) right hemothorax, resolved; (2) transverse process fracture, lumbar spine; (3) multiple contusions, resolved; and (4) fracture, right proximal phalanx, thumb. Dr. S rated a lumbar fracture concerning the posterior element without radiculopathy as Diagnosis-Related Estimate Lumbosacral Category II: Minor Impairment with a five percent IR. Dr. S found no pulmonary rating and full range of motion of the right thumb as well as no evidence of intracranial abnormality or fracture of the pelvis.

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 hearing officer found that Dr. S's September 3, 2010, certification was the first valid certification of MMI and assignment of an IR. That finding is supported by the evidence. The hearing officer also found in an unappealed finding of fact that Dr. S's report was provided to the claimant by verifiable means on September 20, 2010.

28 TEX. ADMIN. CODE § 130.12(b)(1) (Rule 130.12(b)(1)) provides that only an insurance carrier, an injured employee, or an injured employee's attorney or representative under Rule 150.3(a) may dispute a first certification of MMI or assigned IR under Rule 141.1 (related to Requesting and Setting a Benefit Review Conference (BRC)) or by requesting the appointment of a designated doctor, if one has not been appointed. *See* Appeals Panel Decision (APD) 041903-s, decided September 22, 2004. In this case, the first valid certification was provided by Dr. S, a designated doctor, so the only way to dispute the first valid certification of MMI and assignment of an IR was to request a BRC pursuant to Rule 141.1. The evidence establishes that the claimant called a field office of the Division to dispute Dr. S's certification but that the claimant was advised to contact his attorney. The claimant did not dispute Dr. S's rating by requesting a BRC under Rule 141.1 within 90 days after the rating was provided to the claimant by verifiable means. The hearing officer found that the claimant did not dispute Dr. S's IR within 90 days after the rating was provided to the claimant by verifiable means. That finding is supported by the evidence.

On December 9, 2010, a CCH was held to determine the extent of the claimant's compensable injury. The hearing officer in that case determined that the compensable injury includes a "thoracic spine injury." Division records indicate that decision was not appealed.

The claimant appeals the hearing officer's Finding of Fact No. 8, alleging that he received improper or inadequate treatment of his injury before the date of the certification (September 3, 2010), because he had been unable to get medical treatment for his thoracic spine injury and that the hospital cardiothoracic doctor had refused to be his treating doctor. 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 110527, decided June 3, 2011. 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 for his injury before September 3, 2010, the date of Dr. S's certification of MMI/IR.

The claimant, additionally appeals the hearing officer's Finding of Fact No. 9, contending that Dr. S, in his certification of MMI and assignment of an IR, does not mention and does not rate the thoracic spine injury as determined by the December 9, 2010, CCH.

In APD 060170-s, decided March 22, 2006, the Appeals Panel remanded a case back to the hearing officer to determine whether the compensable injury extends to include radiculopathy. The Appeals Panel noted, in that case, if the hearing officer determines that radiculopathy is not part of the compensable injury, an IR given based on radiculopathy would be an exception to the finality rule under Section 408.123(f)(1)(A). In APD 071283-s, decided September 13, 2007, the Appeals Panel, in commenting on finality under Section 408.123, held that a doctor's "failure to originally rate the claimant's right shoulder distal clavicle resection arthroplasty constituted compelling medical evidence of a significant error by the certifying doctor in applying 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) (AMA Guides)] in calculating the IR . . . ."

The cases make clear that the failure to rate the entire compensable injury constitutes compelling medical evidence of a significant error by the certifying doctor in applying the appropriate AMA Guides or in calculating the IR. *See* Section 408.123(f)(1)(A). In this case, Dr. S did not rate the thoracic spine injury, did not mention a thoracic spine injury and his diagnosis did not include a thoracic spine injury. While Dr. S, in listing the records he reviewed, included thoracic spine x-rays, the inclusion of such does not amount to rating a thoracic spine injury. We hold that since

Dr. S did not rate the thoracic spine injury, which had been found to be part of the compensable injury, the failure to do so is an exception to finality under Section 408.123(f)(1)(A).

Accordingly, we reverse the hearing officer's determination that the first certification of MMI and assigned IR by Dr. S on September 3, 2010, became final under Section 408.123. We render a new decision that the first valid certification of MMI and first valid assignment of an IR by Dr. S on September 3, 2010, did not become final under Section 408.123(f)(1)(A).

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

Thomas A. Knapp
Appeals Judge

CONCUR:

Cynthia A. Brown
Appeals Judge

Margaret L. Turner
Appeals Judge