APPEAL NO. 111496
FILED DECEMBER 19, 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 September 7, 2011. With regard to the two disputed issues before him the hearing officer determined that the compensable injury of (date of injury), includes an L4-5 disc protrusion, but does not include a major depressive disorder and that the first certification of maximum medical improvement (MMI) and assigned impairment rating (IR) from (Dr. P) on July 9, 2010 "is invalid and did not become final under [Section] 408.123."

The appellant (carrier) appealed, contending that the hearing officer's determination had no underlying basis in fact and asserting that there was insufficient expert medical evidence of causation that the L4-5 disc protrusion was caused by the compensable injury. The appeal file does not contain a response from the respondent (claimant). The hearing officer's determination that the compensable injury does not include a major depressive disorder was not appealed and has become final pursuant to Section 410.169.

DECISION

Affirmed in part and reversed and remanded in part.

The parties stipulated that the claimant sustained a compensable injury on (date of injury). The claimant testified that on the date of injury he sustained a low back injury pulling a long heavy tarp. The carrier accepted a lumbar sprain/strain.

EXTENT OF THE COMPENSABLE INJURY

The hearing officer's determination that the compensable injury includes an L4-5 disc protrusion is supported by sufficient evidence and is affirmed.

FINALITY UNDER SECTION 408.123

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.

Initially, a hearing officer should determine whether there is a first valid certification of MMI/IR before determining whether that first valid certification of MMI/IR has or has not become final. *See generally,* Appeals Panel Decision (APD) 061569-s, decided October 2, 2006. A finality determination is contingent on there being a first "valid" certification of MMI and first "valid" assignment of IR as provided in Section 408.123 and 28 TEX. ADMIN. CODE § 130.12 (Rule 130.12). Rule 130.12(c) provides, in part, that a certification of MMI and/or IR assigned as described in subsection (a) must be on a [Report of Medical Evaluation (DWC-69)]. The certification on the [DWC-69] is valid if: (1) there is an MMI date that is not prospective; (2) there is an impairment determination of either no impairment or a percentage [IR] assigned; and (3) there is the signature of the certifying doctor who is authorized by the [Texas Department of Insurance, Division of Workers' Compensation (Division)] under Rule 130.1(a) to make the assigned impairment determination.

The hearing officer, in his Background Information, comments that the claimant received Dr. P's DWC-69 and narrative report on July 22, 2010, and did not dispute the certification of MMI and IR on or before the 91st day from the date he received it. The hearing officer also commented in his Background Information that the exceptions of Section 408.123(f)(1) do not apply. The hearing officer made no specific finding of fact regarding the exceptions in Section 408.123(f)(1) other than to find the conservative treatment for the low back "was neither improper or inadequate."

The hearing officer further comments in his Background Information:

An injured employee's treating doctor is the doctor who is primarily responsible for the employee's health care. [Section 401.011(42)].

> Except in an emergency, all health care must be approved or recommended by the employee's treating doctor. [Section 408.021(c)]. Generally, the treating doctor is the first doctor that the injured employee selects to provide care for the work related injury. [Section 408.022(a) and (c)], Rule 126.9(c). A change in treating doctors must be approved by the Division. [Section 408.022(b)], Rule 126.9(a) *see also* Rule 126.9(f).

We do not disagree with that statement of law.

The hearing officer then found: "[(Dr. TL)] is the first doctor to provide medical care for [the] [c]aimant and sent [the] [c]laimant for an MRI that was done on November 3, 2009." There is no evidence that Dr. TL was the first doctor to provide medical care for the claimant. No medical records or reports from Dr. TL are in evidence. The medical records do show that the claimant was seen by a physician's assistant at (T Clinic) on the date of injury and complained of foot and back pain. Next, the claimant was treated at (CN) on October 21, 2009, and October 28, 2009, by (BW) family nurse practitioner. Also in evidence are Work Status Reports (DWC-73) dated October 21, 2009, and October 28, 2009, which reflect the signature of (Dr. DF). The CN DWC-73 dated October 21, 2009, listed Dr. DF as the treating doctor and a follow-up service to include an evaluation by the treating doctor on "10/28/09." The October 28, 2009, DWC-73, signed by Dr. DF as the treating doctor, stated an evaluation was to be performed by the treating doctor on "11/4/09" and referral to consult with "ortho." The November 4, 2009, CN DWC-73 is signed by (Dr. L) as the treating doctor and reflects a referral to consult with "orthopedist." Nowhere in these records is Dr. TL mentioned.

An MRI was performed on November 3, 2009. The MRI report indicates: "Referrer: [Dr. TL]." Subsequently, the claimant was sent to the [O Center] where claimant was seen by Dr. P. Dr. P, in a report dated November 11, 2009, referenced the claimant and stated: "he is referred by [Dr. TL] for evaluation of low back injury at work." Those are the only two references to Dr. TL in the medical records. There is no evidence what Dr. TL's relationship with CN might be and there is no indication when Dr. TL may have seen the claimant although it would have been on or before November 3, 2009, when the MRI was performed.

The hearing officer, in his Background Information, commented: "There is no indication in the record that [the] [c]laimant ever changed treating doctors from [Dr. TL], the presumptive treating doctor under Rule 126.9(a), to [Dr. P]." Rule 126.9 is the rule involving a choice of treating doctor. Rule 126.9(a) states the "injured employee is entitled to the employee's initial choice of treating doctor . . . ." Rule 126.9(c) provides "[t]he first doctor who provides health care to an injured employee shall be known as the injured employee's initial choice of treating doctor." There is no provision in Rule

126.9(a) for a doctor to be a "presumptive treating doctor." In this case, the evidence reflects that Dr. DF or Dr. L, CN doctors, would be the first doctors who provided health care to the claimant on October 21, 2009, and October 28, 2009, and November 4, 2009. There is no evidence that Dr. TL was associated with CN or the circumstances under which he saw or referred the claimant for either the MRI or to Dr. P before October 28, 2009.

In evidence are 40 pages of medical records and reports from Dr. P who managed the medical care of the claimant from November 11, 2009, through June 11, 2010. In a progress note dated April 16, 2010, (Dr. F), a referral doctor, with regard to further therapy, writes: "I am going to refer him back to his treating doctor, [Dr. P] who can make the next decision." At the conclusion of this CCH, before closing, the hearing officer comments: ". . . as I understand it, Dr. P was the treating doctor in June 2010, is that correct?" The claimant's attorney replies "yes, sir." However, the parties refused to stipulate to that fact. The hearing officer nonetheless found that Dr. TL "is the first doctor to provide medical care for [the] [c]laimant . . . ." That finding is not supported by the evidence.

Rule 130.1 provides in part that only an authorized doctor may certify MMI, determine whether there is permanent impairment, and assign an IR if there is permanent impairment. There was no allegation at the CCH that Dr. P was not authorized to determine whether the claimant has permanent impairment, assign an IR and certify MMI. As noted above, at the CCH, the hearing officer understood that Dr. P was the treating doctor in June 2010, and the claimant's attorney agreed. It was only after the hearing was closed that the hearing officer, *sua sponte*, decided that Dr. TL was the first doctor to provide medical care for the claimant. It appears that the sole reason the hearing officer declined to adopt the IR and MMI certified by Dr. P was that Dr. P was not a doctor authorized by the Division under Rule 130.1(a) to make the assigned impairment determination although no party argued or litigated this position at the CCH.

We remand this case for further consideration and development of the evidence necessary to resolve the issue of whether the first MMI and IR certification, issued by Dr. P, on July 9, 2010, has become final as discussed in this decision. Accordingly, we reverse the hearing officer's determination that the certification of MMI and IR assessed by Dr. P on July 9, 2010, was not valid and that the certification did not become final. Because this matter was not stipulated to nor litigated by the parties at the CCH, the parties may submit additional evidence and argument regarding who the treating doctor was on July 9, 2010. The hearing officer is then to determine whether the first certification of MMI and assigned IR from Dr. P on July 9, 2010, became final under Section 408.123

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Division, pursuant to Section 410.202 which was amended June 17, 2001, to exclude Saturdays and Sundays and holidays listed in Section 662.003 of the Texas Government Code in the computation of the 15-day appeal and response periods. *See* APD 060721, decided June 12, 2006.

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.

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Thomas A. Knapp
Appeals Judge

CONCUR:

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Cynthia A. Brown
Appeals Judge

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Margaret L. Turner
Appeals Judge