

APPEAL NO. 111968  
FILED APRIL 2, 2012

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 November 29, 2011, in [City], Texas, with [hearing officer] presiding as hearing officer. With regard to the sole issue before him, the hearing officer determined that the first certification of maximum medical improvement (MMI) and assigned impairment rating (IR) from [Dr. W] on April 3, 2010, did not become final under Section 408.123.

The appellant/cross-respondent (carrier) appealed, disputing the hearing officer's determination that the first certification of MMI and assigned IR from Dr. W on April 3, 2010, did not become final under Section 408.123. The carrier argues that there is no evidence of a mistaken diagnosis or previously undiagnosed condition. The respondent/cross-appellant (claimant) responded, urging affirmance of the hearing officer's finality determination. The claimant also argues in her cross-appeal that the hearing officer erred in finding that the claimant received the certification of Dr. W dated April 3, 2010, by verifiable means on April 14, 2010. Insofar as the claimant's response is a cross-appeal, the claimant's cross-appeal was not timely filed and was not considered. The appeal file does not contain a response from the carrier to the claimant's cross-appeal.

DECISION

Reversed and rendered.

**UNTIMELY CROSS-APPEAL**

Although the claimant's response was timely as a response, it was untimely as a cross-appeal. The deemed date of receipt of the hearing officer's decision was December 7, 2011, and a timely appeal must have been filed by December 29, 2011. The claimant's response/cross-appeal was sent by facsimile transmission to the Texas Department of Insurance, Division of Workers' Compensation (Division) on January 13, 2012, and was received by the Division on that date. Accordingly, insofar as the claimant's response is considered a cross-appeal, the cross-appeal, not having been filed or mailed by December 29, 2011, is untimely as a cross-appeal. See 28 TEX. ADMIN. CODE § 143.3(d), 102.5(d), 102.3(a)(3) and 102.3(b) (Rules 143.3(d), 102.5(d), 102.3(a)(3), and 102.3(b)). The claimant's response was timely and was considered.

## FINALITY UNDER SECTION 408.123

The parties stipulated that the claimant sustained a compensable injury on [date of injury]; that the first valid certification of MMI/IR was by Dr. W, the designated doctor, on April 3, 2010; and that the claimant first disputed the certification of MMI/IR by Dr. W on June 1, 2011. The claimant testified that she injured her left shoulder when lifting at work on [date of injury]. The record reflects that the claimant had an arthroscopic repair of a SLAP lesion and arthroscopic subacromial decompression on January 5, 2009, and an arthroscopic decompression with debridement on November 16, 2009.

Dr. W examined the claimant on April 3, 2010, and certified that the claimant reached MMI on that date with a 9% IR, 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) (AMA Guides). Dr. W assessed impairment for loss of range of motion of the claimant's left shoulder. In his narrative report, Dr. W included left SLAP and left adhesive capsulitis as diagnoses of the claimant's left shoulder condition. In evidence is a medical report from Concentra dated November 24, 2009, which contains a diagnosis of left shoulder adhesive capsulitis of the claimant. Subsequent physical therapy notes also document that the claimant had been diagnosed with adhesive capsulitis of the left shoulder.

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.

In his discussion of the evidence, the hearing officer notes that the claimant began treating with [Dr. F] on April 30, 2010, and Dr. F diagnosed postsurgical adhesive capsulitis for which he performed surgery for arthroscopic capsular release and manipulation under anesthesia on June 15, 2010. The hearing officer further noted that “[t]he timing of the diagnosis and treatment indicates that the condition was present on the date of the last visit with [(Dr. M)], March 2, 2010, and on the date of the designated doctor examination, April 3, 2010. Their records indicate that the condition was not suspected by them. Accordingly, the exception to finality of [Section] 408.123(f)(1)(B) applies.”

In evidence was a letter dated April 29, 2011, from Dr. F which stated he believed the claimant had a previously undiagnosed medical condition of shoulder stiffness following her surgery and the postsurgical adhesive capsulitis was a new diagnosis that he gave her upon his clinical evaluation. The hearing officer found that compelling medical evidence in the record shows that, at the time of Dr. W’s certification of MMI/IR on April 3, 2010, the claimant had an undiagnosed condition of frozen shoulder for which she required and underwent surgery on June 15, 2010. We note in Appeals Panel Decision 080297-s, decided April 11, 2008, the Appeals Panel stated that there is no requirement in Section 408.123(f)(1)(B) that the previously undiagnosed medical condition must have been present at the time of the first certification. Although the hearing officer included the term “frozen shoulder” in his finding, it is clear based on the evidence in the record and his discussion that the hearing officer is using the terms “frozen shoulder” and “adhesive capsulitis” interchangeably.

In reviewing a “great weight” challenge, we must examine the entire record to determine if: (1) there is only “slight” evidence to support the finding; (2) the finding is so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust; or (3) the great weight and preponderance of the evidence supports its nonexistence. See Cain v. Bain, 709 S.W.2d 175 (Tex. 1986).

As previously noted, Dr. W’s own records indicate not only that he was aware of the claimant’s adhesive capsulitis but that he included that condition in his assessment of the claimant in performing the examination to certify MMI/IR. Additionally, various other medical records in evidence indicate that the claimant was diagnosed and treated for adhesive capsulitis prior to the examination by Dr. W. Based on the evidence in the record the claimant did not have an undiagnosed or misdiagnosed condition of adhesive capsulitis. The evidence reflects that the claimant was diagnosed and treated for that

condition as early as 2009. The hearing officer's determination that the first certification of MMI and assigned IR from Dr. W on April 3, 2010, did not become final under Section 408.123 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 determination that the first certification of MMI and IR assigned by Dr. W on April 3, 2010, did not become final under Section 408.123 and render a new decision that the first certification of MMI and IR assigned by Dr. W on April 3, 2010, became final pursuant to Section 408.123.

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

**CT CORPORATION  
350 NORTH ST. PAUL STREET  
DALLAS, TEXAS 75201.**

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Margaret L. Turner  
Appeals Judge

CONCUR:

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Cynthia A. Brown  
Appeals Judge

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Thomas A. Knapp  
Appeals Judge