

APPEAL NO. 122347
FILED JANUARY 7, 2013

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 October 2, 2012, in [City], Texas, with [hearing officer] presiding as hearing officer. The hearing officer resolved the disputed issues by deciding that: (1) the compensable injury of [date of injury], extends to a high-grade partial thickness undersurface tear of the common extensor origin of the right elbow; and (2) the first certification of maximum medical improvement (MMI) and assigned impairment rating (IR) from [Dr. P] on January 19, 2011, became final under Section 408.123 and 28 TEX. ADMIN. CODE § 130.12 (Rule 130.12). The appellant (claimant) appealed, disputing the hearing officer's determination that the first certification of MMI and IR from Dr. P on January 19, 2011, 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 determination that the compensable injury of [date of injury], extends to a high-grade partial thickness undersurface tear of the common extensor origin of the right elbow was not appealed and has become final pursuant to Section 410.169.

DECISION

Reversed and rendered.

The parties stipulated that on [date of injury], the claimant sustained a compensable injury and that the claimant did not dispute Dr. P's certification of MMI/IR within 90 days after the date the certification was provided. In evidence was an MRI of the claimant's right elbow dated November 23, 2011, which noted in part that there was a high-grade partial thickness undersurface tear of the common extensor origin of the right elbow.

It was undisputed that Dr. P, a referral doctor acting in place of the claimant's treating doctor,¹ provided the first certification of MMI and IR regarding the claimant's compensable injury of [date of injury]. Dr. P examined the claimant on January 19, 2011, and diagnosed right elbow lateral epicondylitis. Dr. P certified that the claimant reached MMI on January 12, 2011, with one percent IR due to loss of range of motion of his right elbow.

¹ We note that the hearing officer incorrectly refers to Dr. P as a designated doctor appointed by the Texas Department of Insurance, Division of Workers' Compensation in the Background Information section of her decision.

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: (A) a significant error by the certifying doctor in applying the appropriate American Medical Association guidelines or in calculating the [IR]; or (B) clearly mistaken diagnosis or a previously undiagnosed medical condition.

The claimant contends in part that the high-grade partial thickness undersurface tear of the common extensor origin of the right elbow is a previously undiagnosed medical condition. It was undisputed that right elbow lateral epicondylitis was accepted as the compensable injury of [date of injury], and the hearing officer's extent-of-injury determination that the compensable injury of [date of injury], extends to a high-grade partial thickness undersurface tear of the common extensor origin of the right elbow was not appealed and has become final.

A high-grade partial thickness undersurface tear of the common extensor origin of the right elbow was not included as a diagnosis in Dr. P's January 19, 2011, MMI and IR narrative report in which Dr. P only diagnosed right elbow lateral epicondylitis. The claimant was not diagnosed with a high-grade partial thickness undersurface tear of the common extensor origin of the right elbow until that finding was revealed in the November 23, 2011, right elbow MRI. There is no medical evidence that a diagnosis of right elbow lateral epicondylitis is the same medical condition as a high-grade partial thickness undersurface tear of the common extensor origin of the right elbow or that the diagnoses are interchangeable. Consequently, the subsequent diagnosis of a high-grade partial thickness undersurface tear of the common extensor origin of the right elbow constituted a previously undiagnosed medical condition and is an exception to finality under Section 408.123(f)(1)(B). Furthermore, Dr. P did not rate the entire compensable injury, which extends to a high-grade partial thickness undersurface tear of the common extensor origin of the right elbow. 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 calculating the IR. See Section 408.123(f)(1)(A), Appeals Panel Decision 111227, decided October 13, 2011.

The hearing officer's determination that the first certification of MMI and assigned IR from Dr. P on January 19, 2011, 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. P on January 19, 2011, did not become final under Section 408.123 and Rule 130.12 because there is compelling medical evidence of a previously undiagnosed medical condition, a high-grade partial thickness undersurface tear of the common extensor origin of the right elbow, and because Dr. P did not rate the entire compensable injury.

The true corporate name of the insurance carrier is **HARTFORD UNDERWRITERS INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**CORPORATION SERVICE COMPANY
211 EAST 7TH STREET, SUITE 620
AUSTIN, TEXAS 78701-3232.**

Cynthia A. Brown
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Margaret L. Turner
Appeals Judge