

APPEAL NO. 043105-s
FILED JANUARY 19, 2005

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 November 15, 2004. The hearing officer resolved the disputed issues by deciding: (1) the appellant/cross-respondent (claimant) did not sustain a compensable injury on _____; (2) the claimant did not have disability because she did not sustain a compensable injury; and (3) the first certification of maximum medical improvement (MMI) and impairment rating (IR) from (Dr. O) on March 10, 2004, did not become final under Section 408.123 because there was no basis for either since the claimant did not sustain a compensable injury. The claimant appeals the hearing officer's determinations on the three disputed issues. The respondent/cross-appellant (carrier) appeals two findings of fact. The carrier filed a response. The claimant did not file a response.

DECISION

Affirmed.

COMPENSABLE INJURY ISSUE

It is undisputed that the claimant was in the course and scope of her employment when she was involved in a motor vehicle accident (MVA) on _____. The disputed matter was whether the claimant sustained an injury in the MVA, and conflicting evidence was presented on that matter at the CCH. The hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). As the finder of fact, the hearing officer resolves the conflicts in the evidence and determines what facts have been established. The hearing officer found that the claimant "did not injure herself nor cause damage or harm to the physical structure of her body during the course and scope of her employment on _____." Although there is conflicting evidence, we conclude that the hearing officer's determination that the claimant did not sustain a compensable injury, as defined by Section 401.011(10), is supported by sufficient evidence and is not so against the great weight and preponderance of the evidence as to be clearly wrong and unjust.

DISABILITY ISSUE

Although the hearing officer found that due to the claimed injury (back and neck strains which were determined not to be sustained in the MVA) the claimant was unable to obtain and retain employment at her preinjury wages from December 13, 2003, through January 29, 2004, she concluded that the claimant did not have disability because the claimant did not sustain a compensable injury. While the hearing officer's finding regarding the period of time the claimant was unable to obtain and retain employment at preinjury wages is supported by sufficient evidence, we conclude that

the hearing officer did not err in determining that the claimant did not have disability because, without a compensable injury, the claimant would not have disability as defined by Section 401.011(16).

SECTION 408.123 FINALITY ISSUE

It is undisputed that the carrier did not timely dispute Dr. O's March 10, 2004, certification of MMI and assignment of a five percent IR. See Section 408.123(d) and Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.12 (Rule 130.12) regarding the 90-day dispute period. However, the carrier appeals the finding that it did not timely dispute Dr. O's certification of MMI and IR on the basis that "it is the carrier's position that the claimant must first prove compensability before we can even get to the question of the 90-day Rule." The claimant appeals the hearing officer's conclusion of law that the first certification of MMI and assigned IR from Dr. O on March 10, 2004, did not become final under Section 408.123 because there was no basis for either (MMI or IR) since the claimant did not sustain a compensable injury.

The hearing officer did not err in finding that the carrier did not timely dispute Dr. O's certification of MMI and IR because one of the issues at the CCH was whether Dr. O's certification of MMI and IR became final under Section 408.123. The hearing officer was making a finding of fact on a disputed issue. If the Appeals Panel were to have reversed the hearing officer's determination on the compensability issue and found in favor of the claimant on that issue, then the hearing officer's finding that the carrier did not timely dispute Dr. O's certification of MMI and IR would provide the basis for making a determination on appeal on the Section 408.123 finality issue.

As noted, there was also a disputed issue of whether the claimant sustained a compensable injury and we are affirming the hearing officer's determination that the claimant did not sustain a compensable injury. With certain enumerated exceptions, Section 408.123(d) provides that the first valid certification of MMI and the first valid assignment of IR to an employee are final if the certification of MMI and/or the assigned IR is not disputed within 90 days after written notification of the MMI and/or assignment of IR is provided to the claimant and the carrier by verifiable means. The 1989 Act and rules of the Texas Workers' Compensation Commission contemplate that in order to have a determination of MMI and IR, there must be a compensable injury. For example, Section 401.011(24) provides that IR means the percentage of permanent impairment of the whole body resulting from a compensable injury, and Rule 130.1(d)(1)(B)(iii) requires the doctor's narrative report to include findings related to the compensable injury and an explanation of the analysis performed to find whether MMI was reached. Because the claimant did not sustain a compensable injury, the hearing officer did not err in concluding that the first certification of MMI and IR from Dr. O did not become final under Section 408.123. Without a compensable injury, there is no basis for determining MMI and IR under the 1989 Act. This decision is significant in that we hold that the 90-day dispute provision of Section 408.123(d) and Rule 130.12 will not operate to make an MMI and IR certification final where there is no compensable injury.

However, we want to make clear that we reject the carrier's assertion that when it receives a certification of MMI and IR before a decision is made regarding compensability, the 90-day rule does not apply. If the carrier fails to timely dispute the first valid certification of MMI and IR, and the compensability issue is resolved in favor of the claimant, the finality provision of Section 408.123(d) and Rule 130.12 will apply, unless an exception provided for in Section 408.123(e) is shown.

We affirm the hearing officer's decision and order.

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

**DONALD R. GRAY
13042 CHIMNEY OAK DRIVE
SAN ANTONIO, TEXAS 78249.**

Robert W. Potts
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Margaret L. Turner
Appeals Judge