APPEAL NO. 110527
FILED JUNE 3, 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 March 24, 2011. The hearing officer determined that: (1) the compensable injury of _____, includes a disc herniation at L4-5; and (2) the first certification of maximum medical improvement (MMI) and assigned impairment rating (IR) from (Dr. M) on June 29, 2010, did not become final under Section 408.123. The appellant (self-insured) appeals the hearing officer's finality determination. The respondent (claimant) responds, urging affirmance. The hearing officer's determination that the compensable injury of _____, includes a disc herniation at L4-5 has not been appealed and has become final pursuant to Section 410.169.

DECISION

Reversed and rendered.

The parties stipulated that: (1) the claimant sustained a compensable injury on _____; (2) the first valid certification of MMI/IR was made by Dr. M, the treating doctor, on June 29, 2010; (3) Dr. M's MMI/IR certification was delivered to the claimant by verifiable means on July 2, 2010; and (4) Dr. M's MMI/IR certification was not disputed by the claimant within 90 days of its delivery to him on July 2, 2010.

The claimant sustained a lumbar injury on _____, while in the course and scope of employment when the bus he was riding in hit a pothole. In evidence is a new patient consultation note dated February 19, 2010, from Dr. M in which he diagnosed the claimant with: (1) acute right low back pain; (2) central disk herniation causing significant stenosis at L4-5; and (3) history of previous work-related back injury. Dr. M prescribed the claimant pain medications and chiropractic and physical therapy treatments. The claimant also completed 10 sessions of work-hardening.

(Dr. Mk), the designated doctor, examined the claimant on May 4, 2010, for purposes of MMI, IR, extent of injury, and return to work. Dr. Mk certified the claimant had not reached MMI as of the exam date but was expected to do so on or about August 4, 2010.

Dr. M, the claimant's treating doctor, examined the claimant on June 29, 2010, and certified the claimant reached MMI on that date and assigned a zero percent IR. In his narrative report dated June 29, 2010, Dr. M noted the claimant's diagnoses as: (1) chronic low back pain following the work-related injury; (2) central disk herniation causing significant stenosis at L4-5; and (3) history of previous work-related back injury. Dr. M noted:

> [The claimant] states that he has done well. He is having perhaps 2/10 back pain and he mostly describes it as an aching and still primarily in the

> right lateral paraspinal muscles and the mid lumbar levels. He is not taking any medications . . . . He is off for the summer and does not return to work until the school resumes in August 2010.

However, the claimant testified that once he returned to work in August 2010, his symptoms became much worse. The claimant returned to Dr. M, and in a follow-up note dated September 20, 2010, Dr. M noted that he would refill the claimant's pain medication, add another pain medication, and see how the claimant felt over the next couple of months.

The claimant testified he continued to feel pain and continued treating with Dr. M. In a follow-up note dated December 8, 2010, Dr. M stated ". . . given that [the claimant] is worsening, he obviously has not reached [MMI] for this injury. So, I will formally request that this be rescinded." Dr. M certified the claimant had not reached MMI but was expected to do so on or about March 31, 2011.

In a follow-up note dated January 7, 2011, Dr. M stated "I have also formally requested resending (*sic*) his [MMI], which was done in June 2010 when [the claimant] was doing fairly well but subsequent to that, he has deteriorated and he is now requiring further active care and will likely go on to need surgery and he should therefore be covered during that time period."

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. Section 408.123(f) provides in pertinent part that 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: "(C) improper or inadequate treatment of the injury before the date of the certification or assignment that would render the certification or assignment invalid." Section 408.123(f)(1)(C) provides by its express terms that improper or inadequate treatment giving rise to the exception must take place before the date of the certification or assignment that would render the certification or assignment invalid. *See* Appeals Panel Decision (APD) 052666-s, decided February 1, 2006.

At the CCH, the claimant contended that the fact the June 29, 2010, certification of MMI and IR assignment was issued prior to his return to work in August 2010, was compelling medical evidence that he had inadequate and improper treatment for the compensable injury prior to Dr. M's certification of MMI and assigned IR on June 29, 2010, because it was unknown he would be unable to return to work. The hearing officer found there was compelling medical evidence which established improper or inadequate treatment of the injury before the date of the certification or assignment that would render the certification or assignment invalid.

In this case, there is no compelling medical evidence that any of the claimant's treatment prior to Dr. M's certification of MMI and assigned IR on June 29, 2010, was improper or inadequate. As previously mentioned, Dr. M's narrative report dated June 29, 2010, noted the claimant told Dr. M that he "has done well," and that the pain in his back had decreased. Further, as previously discussed, Dr. M noted that the June 29, 2010, certification and assignment was done when the claimant "was doing fairly well" and subsequent to that certification and assignment the claimant deteriorated and required care and possibly surgery. 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 080474, decided May 30, 2008. 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 June 29, 2010, the date of Dr. M's certification of MMI and assigned IR.

We therefore reverse the hearing officer's determination that the first certification of MMI and assigned IR from Dr. M on June 29, 2010, did not become final under Section 408.123 and render a new decision that the first certification of MMI and assigned IR from Dr. M on June 29, 2010, did become final under Section 408.123.

The true corporate name of the insurance carrier is **(a self-insured governmental entity)** and the name and address of its registered agent for service of process is

**(ADDRESS)**
**(CITY), TEXAS (ZIP CODE)**.

_____
Carisa Space-Beam
Appeals Judge

CONCUR:

_____
Cynthia A. Brown
Appeals Judge

_____
Margaret L. Turner
Appeals Judge