APPEAL NO. 151590
FILED OCTOBER 8, 2015

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). An expedited contested case hearing (CCH) was held on June 18, 2015, in Midland, Texas, with (hearing officer) presiding as hearing officer. Prior to issuing a Decision and Order in this case, the hearing officer,(hearing officer), ceased to be a hearing officer with the Texas Department of Insurance, Division of Workers' Compensation (Division) and the case was reassigned to hearing officer, (hearing officer), to listen to the CCH recording held on June 18, 2015, review evidence, and write a decision to resolve the issues in dispute.

The hearing officer resolved the disputed issues by deciding that: (1) (Dr. F) certification of maximum medical improvement (MMI) and impairment rating (IR) did not become final under Section 408.123 and 28 TEX. ADMIN. CODE § 130.12 (Rule 130.12); and (2) (Dr. B) was appointed to serve as designated doctor in accordance with Sections 408.0041 and 408.123 and Rules 127.1 and 127.5.

The appellant (carrier) appeals the hearing officer's determinations based on sufficiency of the evidence. The appeal file does not contain a response from the respondent (claimant).

DECISION

Reversed and rendered.

The claimant sustained a left wrist injury while pulling on a pair of pants from a pressing machine when she felt a pop in her left wrist. The parties stipulated that the claimant sustained a compensable injury on (date of injury); the first certification of MMI and IR was issued by Dr. F on May 31, 2012; and the claimant did not dispute Dr. F's certification within 90 days of receiving it through verifiable means.

Dr. F, the designated doctor, examined the claimant on May 31, 2012, and certified that the claimant reached MMI on January 10, 2012, with a zero percent 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). At the CCH the claimant argued that she met an exception under Section 408.123(f)(1)(B), a clearly mistaken diagnosis or previously undiagnosed medical condition, specifically carpal tunnel syndrome (CTS).

FINALITY

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 provides in part:

> (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) a 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.

The hearing officer determined that Dr. F's certification of MMI and IR did not become final under Section 408.123 and Rule 130.12. In Finding of Fact No. 3 the hearing officer found the following:

> At the time of [Dr. F's] May 31, 2012 certification, there existed an undiagnosed medical condition, [CTS], later determined to be part of the (date of injury) compensable injury, which represents an exception to the [90-day] rule for disputing that certification under Section 408.123(f)(1)(B).

In the Discussion portion of the decision, the hearing officer states that:

> Prior to [Dr. F's] certification, the medical record contains repeated references to left arm and wrist pain. It was speculated that the cause of such symptoms could be [CTS], though that was merely conjecture until June 7, 2012, when an EMG ordered by the claimant's neurologist,[(Dr.

K)], confirmed the presence of that condition. Up to that point, there had been no actual diagnosis, merely the speculation that [CTS] might be present. The claimant contends that such conjecture does not constitute an actual diagnosis and that because the true diagnosis was not made until after the first certification of MMI and IR, it constitutes an exception to the [90-day] rule.

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Mere speculation is not a diagnosis, and because the [CTS] later determined to have been part of the compensable injury was not actually diagnosed until after the certification from Dr. F was issued, it thus constitutes an undiagnosed medical condition under Section 408.123(f)(1)(B). [Dr. F's] certification did not become final under that exception.

The hearing officer determined that Dr. F's certification of MMI/IR dated May 31, 2012, did not become final under Section 408.123(f)(1)(B) because: (1) there was no actual diagnosis of CTS and mere speculation of CTS is not a diagnosis; and (2) CTS was not diagnosed until after Dr. F's certification of MMI/IR.

In this case, the hearing officer believes that because an "actual diagnosis" of CTS had not been made that this case, the exception under Section 408.123(f)(1)(B) has been met. An exception to finality requires compelling medical evidence. Review of the record shows that an initial medical report dated November 16, 2011, indicates that the claimant was treated by a physician's assistant, (JG), for left wrist pain. JG referred the claimant for diagnostic testing and physical therapy for her left wrist pain. In evidence is a request for an EMG of the left upper extremity dated March 9, 2012, which states that the doctor suspects the claimant has CTS and needs a diagnostic confirmation. In a medical report dated April 4, 2012, JG referred the claimant to Dr. K for pain and burning sensation in the left wrist. In evidence is a medical report dated June 7, 2012, from Dr. K in which he opines that the claimant's EMG was significant for CTS of a very mild degree on the left wrist.

As stated above, the first certification of MMI/IR was from Dr. F, the designated doctor. Dr. F examined the claimant on May 31, 2012, and certified that the claimant reached MMI on January 10, 2012, with a zero percent IR using the AMA Guides. Dr. F's narrative report dated May 31, 2012, lists a diagnosis of left wrist pain, references medical records listing left wrist pain, and notes that the claimant is using a wrist brace.

In Appeals Panel Decision (APD) 142307, decided December 22, 2014, the Appeals Panel reversed the hearing officer's determination that the first certification of

MMI/IR did not become final because there was no compelling medical evidence of a clearly mistaken diagnosis or previously undiagnosed medical condition of left shoulder, which included a SLAP tear of the superior labrum and labral tear. In that case the initial medical records referenced an MRI indicating a problem in the claimant's anterior superior labrum, an impression of a "possible SLAP tear" in the left shoulder.

In the instant case, as in APD 142307, *supra*, the evidence does not show compelling medical evidence of a clearly mistaken diagnosis or a previously undiagnosed medical condition, specifically CTS. The initial medical records indicate that the claimant was treated for left wrist pain and the claimant was using a wrist brace. Prior to the date of the first certification of MMI/IR, the claimant's treating doctor requested an EMG to confirm a diagnosis of left wrist CTS. The claimant was referred to Dr. K and was diagnosed with left wrist CTS prior to the expiration of the 90 days to dispute the first certification of MMI/IR.

Furthermore, the hearing officer erroneously believes that because a diagnosis of left wrist CTS was confirmed after the first certification of MMI/IR, the exception under Section 408.123(f)(1)(B) has been met. In APD 080297-s, decided April 11, 2008, the Appeals Panel held 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. It appears the hearing officer believed the claimant's misdiagnosis or previously undiagnosed condition of CTS needed to have been made known prior to the date of the first valid certification of MMI/IR. We note that the claimant was diagnosed with left wrist CTS prior to the expiration of the 90 days to dispute the first certification.

The hearing officer's decision that the first certification of MMI and assigned IR from Dr. F 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 unjust because compelling medical evidence does not exist of a clearly mistaken diagnosis or previously undiagnosed medical condition under the exception to finality in Section 408.123(f)(1)(B). Accordingly, we reverse the hearing officer's determination that Dr. F's certification of MMI and IR did not become final under Section 408.123 and Rule 130.12, and we render a new decision that the first certification of MMI and assigned IR from Dr. F on May 31, 2012, became final under Section 408.123 and Rule 130.12.

APPOINTMENT OF DESIGNATED DOCTOR

In a prior Decision and Order issued January 21, 2015, the hearing officer determined that the compensable injury extends to CTS. Subsequently, the claimant requested a designated doctor examination to opine on MMI and IR. The Division appointed Dr. B as the second designated doctor to opine on MMI and IR. The carrier

requested an expedited CCH to cancel the designated doctor's examination because the first certification of MMI/IR had become final under Section 408.123.

Given that we reversed the hearing officer's determination that Dr. F's certification of MMI and IR did not become final under Section 408.123 and Rule 130.12, and we rendered a new decision that the first certification of MMI and assigned IR from Dr. F on May 31, 2012, became final under Section 408.123 and Rule 130.12, we reverse the hearing officer's determination that Dr. B was appointed to serve as designated doctor in accordance with Sections 408.0041 and 408.123, and Rules 127.1 and 127.5, and we render a new decision that Dr. B was not appointed to serve as designated doctor in accordance with Sections 408.0041 and 408.123, and Rules 127.1 and 127.5.

SUMMARY

We reverse the hearing officer's determination that Dr. F's certification of MMI and IR did not become final under Section 408.123 and Rule 130.12, and we render a new decision that the first certification of MMI and assigned IR from Dr. F on May 31, 2012, became final under Section 408.123 and Rule 130.12.

We reverse the hearing officer's determination that Dr. B was appointed to serve as designated doctor in accordance with Sections 408.0041 and 408.123, and Rules 127.1 and 127.5, and we render a new decision that Dr. B was not appointed to serve as designated doctor in accordance with Sections 408.0041 and 408.123, and Rules 127.1 and 127.5.

The true corporate name of the insurance carrier is **AMERICAN CASUALTY COMPANY OF READING, PENNSYLVANIA** and the name and address of its registered agent for service of process is

CT CORPORATION SYSTEM
1999 BRYAN STREET, SUITE 900
DALLAS, TEXAS 75201-3136.

Veronica L. Ruberto
Appeals Judge

CONCUR:

Carisa Space-Beam
Appeals Judge

Margaret L. Turner
Appeals Judge