

APPEAL NO. 121007
FILED JULY 19, 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 May 2, 2012, in [City], Texas, with [hearing officer] presiding as hearing officer. The hearing officer resolved the sole disputed issue before him by deciding that the first certification of maximum medical improvement (MMI) and impairment rating (IR) from [Dr. S] on February 17, 2011, became final under Section 408.123. We note that the actual issue reported out of the benefit review conference (BRC) was whether the first certification of MMI and IR from Dr. S on February 17, 2011, became final under Section 408.123 and 28 TEX. ADMIN. CODE § 130.12 (Rule 130.12). The appellant (claimant) appeals the hearing officer's finality determination. The respondent (self-insured) responds, urging affirmance.

DECISION

Reversed and rendered.

TIMELY DISPUTE

The hearing officer found that Dr. S's IR was provided to the claimant by verifiable means on September 29, 2011, and that the claimant did not dispute Dr. S's IR within 90 days after the date the rating was provided by requesting a BRC. The hearing officer's findings are supported by sufficient evidence.

EXCEPTION TO FINALITY UNDER SECTION 408.123(f)(1)(B)

The parties stipulated that the claimant sustained a compensable injury on [date of injury]. The claimant testified he was injured when he tripped and fell at work. The claimant also testified that he immediately went to the emergency room and was diagnosed with a broken left clavicle and given a sling and pain medications. The claimant testified he treated with [Dr. P]. In a medical record dated December 10, 2010, Dr. P noted an impression of "[left] [c]lavicle [f]racture: [h]ealed," and stated the "[p]atient has full [range of motion] and no movement at the fracture site. He will [return to work] with no restrictions. He understands that the bump at the fracture site will be present forever."

The claimant testified that six weeks after the date of injury he felt that his injury was improving; however, after that point he began feeling increased levels of pain and a burning sensation. The claimant testified that these symptoms continued to increase and he began feeling popping in his left shoulder. In evidence is a medical record dated July 13, 2011, from Dr. P, noting the claimant complained of a burning sensation

throughout his clavicle, and that his fracture site “feels like it moves.” Dr. P noted that an x-ray of the claimant’s left clavicle revealed a healed midshaft clavicle fracture with shortening and displacement, and recommended a CT scan “to rule out any area of nonunion despite his [x-ray] looking like it is healed.” In evidence is a report of a CT scan dated August 5, 2011. The report stated there was no evidence for a new fracture, and listed an impression of “old healed left clavicle fracture with mild deformity, no other abnormalities.”

After reviewing the August 5, 2011, CT scan report, Dr. P noted in a record dated August 10, 2011, that the CT scan revealed a midshaft clavicle fracture. Dr. P stated “We will refer him to [(Dr. C)] for takedown of a malunion.” In a record dated September 2, 2011, Dr. P noted the following impression: “[left] [s]houlder [p]ain . . . [c]lavicle fracture – [m]alunion.”

The claimant testified that on November 8, 2011, he underwent surgery to repair a malunion in his left clavicle. In evidence is an operative report dated November 8, 2011, for a “[l]eft shoulder clavicle open reduction and internal fixation.” The report states:

[The claimant] had a malunited clavicle that has still been popping and giving him trouble and shortened shoulder area, which is causing dyskinesia at the shoulder itself. He has failed conservative management and was subsequently scheduled for open reduction and internal fixation.

* * * *

Clearly, the clavicle was malunited and had a large prominence in this area, and we were able to then dissect down to the fracture site and displace it in order to freshen the edges of the fracture itself. We used the saw in order to make a horizontal cut in the clavicle in order to get extension of the clavicle and reduce it back to its normal position Once in place, the clavicle looked nicely reduced. The bony prominence was removed.

The claimant testified that after the November 8, 2011, surgery he has felt improvement in his shoulder. Medical records in evidence dated November 14, November 23, and December 21, 2011, note the claimant’s progress post-surgery.

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)(1)(B) provides that an employee's first certification of MMI or assignment of an IR may be disputed after the period described in Subsection (e) if compelling medical evidence exists of a clearly mistaken diagnosis or a previously undiagnosed medical condition.

The hearing officer stated in the Background Information that “[u]nder Section 408.123(f)(1)(B), there were no misdiagnoses before the date [the] [c]laimant had delivery of the certification by verifiable means. [The] [c]laimant was diagnosed with the malunion before he called the [Texas Department of Insurance, Division of Workers’ Compensation] on September 29, 2011.” The hearing officer found that there was no clearly mistaken diagnosis or a previously undiagnosed medical condition after September 29, 2011; and that the claimant was diagnosed with a malunion on August 15, 2011.

In Appeals Panel Decision (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 malunion of the left clavicle needed to have been made known prior to the date the claimant disputed the first valid certification of MMI/IR. However, we hold here, as we did in APD 080297-s, *supra*, that there is no requirement in the statute that the previously undiagnosed medical condition must have been present at the time of the first certification of MMI/IR, and we decline to read such requirement into the statute.

The evidence established that the claimant sustained a left fractured clavicle, and despite conservative care and treatment, the fracture failed to properly heal and ultimately formed a malunion, which was diagnosed by Dr. P on August 15, 2011, and required an open reduction and internal fixation surgery to reconstruct the claimant's left clavicle. Dr. S did not consider a malunion diagnosis in her February 17, 2011, MMI/IR certification. The evidence further established that after the surgery to repair the malunion the claimant's condition has continued to improve. We hold there was compelling medical evidence of a previously undiagnosed medical condition, which was

a malunion of the claimant's left clavicle, and that the subsequent diagnosis of the malunion constituted a previously undiagnosed medical condition and is an exception to finality under Section 408.123(f)(1)(B). We therefore reverse the hearing officer's determination that the first certification of MMI and assigned IR from Dr. S on February 17, 2011, became final under Section 408.123, and render a new decision that the first certification of MMI and assigned IR from Dr. S on February 17, 2011, did not 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

[DP]
[ADDRESS]
[CITY], TEXAS [ZIP CODE].

Carisa Space-Beam
Appeals Judge

CONCUR:

Cynthia A. Brown
Appeals Judge

Margaret L. Turner
Appeals Judge