

APPEAL NO. 140114
FILED MARCH 10, 2014

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, 2013, in [City], Texas, with [hearing officer] presiding as hearing officer. The hearing officer resolved the disputed issues by deciding that: (1) the [date of injury], compensable injury extends to a lumbar herniated disc at L5-S1; (2) the first certification of maximum medical improvement (MMI) and assigned impairment rating (IR) from [Dr. D] on November 20, 2012, did not become final under Section 408.123 and 28 TEX. ADMIN. CODE § 130.12 (Rule 130.12); (3) the respondent (claimant) has not reached MMI; (4) because the claimant is not at MMI, an IR would be premature; and (5) the claimant had disability from April 25, 2013, through the present.

The appellant (self-insured) appealed all of the hearing officer's determinations, contending that there was insufficient medical evidence to establish causation between the extent-of-injury condition in dispute and the compensable injury, and even if the compensable injury extended to the disputed extent-of-injury condition the evidence does not support the claimant not having reached MMI. The self-insured also contends that the hearing officer committed harmful error in determining Dr. D's November 20, 2012, MMI/IR certification did not become final, and that there is no provision in the Act or Rules providing that the certifying doctor must rate the "entire" compensable injury to make the certification valid. The claimant responded, urging affirmance of the hearing officer's determinations.

DECISION

Affirmed.

Section 410.203(b) was amended effective September 1, 2011, to allow the Appeals Panel to affirm the decision of a hearing officer as prescribed in Section 410.204(a-1). Section 410.204(a) provides, in part, that the Appeals Panel may issue a written decision on an affirmed case as described in subsection (a-1). Subsection (a-1) provides that the Appeals Panel may only issue a written decision in a case in which the panel affirms the decision of a hearing officer if the case: (1) is a case of first impression; (2) involves a recent change in law; or (3) involves errors at the CCH that require correction but do not affect the outcome of the hearing. This case is a situation that requires correction but does not affect the outcome of the hearing.

The hearing officer's determinations that the [date of injury], compensable injury extends to a lumbar herniated disc at L5-S1; that the claimant has not reached MMI; that because the claimant is not at MMI an IR would be premature; and that the

claimant had disability from April 25, 2013, through the present are supported by sufficient evidence and are affirmed.

The hearing officer also determined that Dr. D's November 20, 2012, MMI/IR certification did not become final because his certification did not consider the claimant's herniated disc at L5-S1, the disputed extent-of-injury condition determined in favor of the claimant.

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:

- (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.

In Appeals Panel Decision (APD) 132594-s, decided January 3, 2014, the Appeals Panel held that while a subsequent resolution of the extent of the compensable injury may be an element of one of the three exceptions contained in Section 408.123(f), such a resolution in and of itself is not an exception to finality.

In the case on appeal, it was undisputed by the parties that the claimant did not timely dispute Dr. D's November 20, 2012, MMI/IR certification. The hearing officer based his finality determination on his determination that the compensable injury extends to a lumbar herniated disc at L5-S1. Under APD 132594-s, *supra*, the hearing officer's basis for his determination that Dr. D's November 20, 2012, MMI/IR certification did not become final is legally incorrect.

However, as noted in APD 132594-s, *supra*, a subsequent resolution of the extent of the compensable injury may be an element of one of the three exceptions contained in Section 408.123(f). In this case the claimant argued that the disputed extent-of-injury condition, the lumbar herniated disc at L5-S1, is a previously undiagnosed medical condition under Section 408.123(f)(1)(B).

The date of injury in this case is [date of injury]. Dr. D examined the claimant on November 20, 2012, and certified that the claimant reached MMI on that date and that the claimant had no permanent impairment as a result of the compensable injury. In an attached narrative report, Dr. D noted diagnoses of lumbar strain and thoracic strain. The first mention of a disc herniation at L5-S1 is contained on an MRI dated May 21, 2013, and reports dated after this MRI diagnose the claimant with a herniated disc at L5-S1. We hold that there was compelling medical evidence of a previously undiagnosed medical condition, which was a lumbar herniated disc at L5-S1, and that the subsequent diagnosis of the lumbar herniated disc at L5-S1 constituted a previously undiagnosed medical condition and is an exception to finality under Section 408.123(f)(1)(B). Because the evidence established that the exception contained in Section 408.123(f)(1)(B) applies in this case, we affirm the hearing officer's determination that the first MMI/IR certification from Dr. D on November 20, 2012, did not become final under Section 408.123 and Rule 130.12.

SUMMARY

We affirm the hearing officer's determination that the [date of injury], compensable injury extends to a lumbar herniated disc at L5-S1.

We affirm the hearing officer's determinations that the claimant has not reached MMI and that because the claimant is not at MMI an IR would be premature.

We affirm the hearing officer's determination that the claimant had disability from April 25, 2013, through the present.

We affirm the hearing officer's determination that the first MMI/IR certification from Dr. D on November 20, 2012, did not become final under Section 408.123 and Rule 130.12.

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

**SUPERINTENDENT
[ADDRESS]
[CITY], TEXAS [ZIP CODE].**

Carisa Space-Beam
Appeals Judge

CONCUR:

Tracey T. Guerra
Appeals Judge

Margaret L. Turner
Appeals Judge