APPEAL NO. 100841
FILED AUGUST 23, 2010

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 May 12, 2010. The disputed issues before the hearing officer were:

(1) Did the appellant's (claimant) first certification of maximum medical improvement (MMI) and assigned impairment rating (IR) from (Dr. B) become final under Section 408.123?

(2) What is the claimant's MMI?

(3) What is the claimant's IR?

(4) Did the claimant sustain disability from March 12 through November 16, 2009?

The hearing officer determined that: (1) the claimant's first certification of MMI/IR from Dr. B became final under Section 408.123; (2) the claimant reached MMI on October 17, 2008; (3) the claimant's IR is two percent; and (4) the claimant sustained disability from March 12 through November 16, 2009. The claimant appealed the hearing officer's finality, MMI and IR determinations. The respondent (self-insured) responded, urging affirmance. The hearing officer's disability determination has not been appealed and has become final pursuant to Section 410.169.

DECISION

Reversed and rendered in part, reversed and remanded in part.

The claimant testified that he sustained a right knee injury at work on _____. In evidence is a medical report dated July 11, 2008, which shows that the treating doctor, (Dr. D), diagnosed a dislocation of the patella. An MRI of the right knee dated July 25, 2008, shows an impression of "[s]uspected bone infarcts in the distal femoral metaphysis and proximal tibial metadiaphysis" and "[l]ow grade chondromalacia patellae." Dr. B, the doctor acting in place of the treating doctor, examined the claimant on October 17, 2008, and in a Report of Medical Evaluation (DWC-69) and narrative both dated October 17, 2008, Dr. B certified that the claimant reached MMI on that date with a two percent IR. Dr. B diagnosed the claimant with a "[r]ight [k]nee [s]train/[p]atellofemoral [p]ain." At the CCH, the claimant argued that he did not receive Dr. B's first certification on October 17, 2008, by verifiable means. In the alternative, the claimant argues that his diagnosed condition of a quadriceps tendon tear constitutes a clearly mistaken diagnosis or a previously undiagnosed medical condition and is an exception to finality under Section 408.123(f)(1)(B).

FINALITY UNDER SECTION 408.123

The hearing officer determined that Dr. B's certification of MMI and assigned IR were provided to the claimant by verifiable means no later than November 30, 2008, and that the claimant did not dispute Dr. B's certification of MMI and assigned IR within 90 days of receipt. The hearing officer's determination is supported by sufficient evidence.

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

The claimant testified that he continued to have right knee pain after he returned to work for five months. The evidence reflects that the claimant sought treatment for his right knee with Dr. D. In a report dated January 27, 2009, Dr. D states that the claimant continued to have chronic instability of the right patella even though the claimant underwent rehabilitation treatment and Dr. D recommended that the claimant undergo arthroscopic surgery for his right knee. An operative report dated March 23, 2009, shows a preoperative and postoperative diagnosis of "[c]hronic and stable right patella with chronic dislocation" and the surgery performed was an "[a]rthroscopic exam to the right knee with lateral retinacular release." In a report dated June 2, 2009, Dr. D states that the claimant is nine weeks post surgery and that the surgery did not help him at all, because he continues to have "ongoing symptomatology with the extensive mechanism in the patellofemoral joint surface." In a report dated July 16, 2009, Dr. D noted that "[m]ovement of the patella is still noticeably uncomfortable to the [claimant]" and Dr. D recommended an MRI of the right knee. An MRI of the right knee dated July 21, 2009, shows "[p]ostoperative changes of lateral patellar retinacular release." In a report dated July 29, 2009, Dr. D states that he has "run out of options as far as what we may try. We have tried steroid injections, physical therapy, and I put him in a patellar stabilizing brace, and none of this has given him much assistance." Dr. D referred the claimant to another orthopedic surgeon, (Dr. I).

In a report dated August 13, 2009, Dr. I opined that the claimant's status is "post lateral retinacular release with pretty severe pain in the lateral aspect of his knee greater than six months out" and recommended surgery to relieve the claimant's right knee pain. An operative report dated September 4, 2009, shows a preoperative diagnoses of "[r]ight knee patellofemoral chondromalacia" and "[s]evere pain vastus lateralis, status post lateral retinacular release" and a postoperative diagnoses of "[c]hondromalacia of trochlear groove" and "[v]astus lateralis tear from the quadriceps tendon." The operative report shows that the claimant underwent an "[a]rthroscopic evaluation and chondroplasty of the trochlear groove" and an "[o]pen vastus lateralis

repair back to the quadriceps tendon." In a report dated October 19, 2009, Dr. I states that the claimant "was in excruciating pain prior to surgery. After repair of this, the [claimant's] pain has really gone down considerably and overall he is feeling much improved." At the CCH, the claimant testified that after the September 4, 2009, surgery to his right knee felt better.

The operative report of the September 4, 2009, surgery and Dr. I's medical reports constitute compelling medical evidence of a previously undiagnosed medical condition, mainly the vastus lateralis tear from the quadriceps tendon. Prior medical treatment had concentrated on the chondromalacia of the patella (kneecap). The postoperative diagnosis for the first time addresses a vastus lateralis tear from the quadriceps tendon which was repaired by the September 4, 2009, surgery. In Appeals Panel Decision (APD) 080297-s, decided April 11, 2008, the Appeals Panel stated 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. We hold that the finding of the tear from the quadriceps tendon during the September 4, 2009, surgery to be compelling medical evidence of a previously undiagnosed medical condition, sufficient to meet the requirement of Section 408.123(f)(1)(B).

In reviewing a "great weight" challenge, we must examine the entire record to determine if: (1) there is only "slight" evidence to support the finding; (2) the finding is so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust; or (3) the great weight and preponderance of the evidence supports its nonexistence. *See* Cain v. Bain, 709 S.W.2d 175 (Tex. 1986). Under the facts of this case, the hearing officer's determination that the first certification of MMI and assigned IR from Dr. B on October 17, 2008, became final under Section 408.123 is so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust.

We reverse the hearing officer's decision and render a new decision that the first certification of MMI and assigned IR from Dr. B on October 17, 2008, did not become final under Section 408.123 because there is compelling medical evidence of a previously undiagnosed medical condition, the vastus lateralis tear from the quadriceps tendon. We reverse the hearing officer's determination that the first certification of MMI and IR assigned by Dr. B on October 17, 2008, became final pursuant to Section 408.123 and we render a new decision that the first certification of MMI and IR assigned by Dr. B on October 17, 2008, did not become final pursuant to Section 408.123.

MMI AND IR

The hearing officer determined that the claimant reached MMI on October 17, 2008, with a two percent IR, because she determined that the first certification of MMI and assigned IR by Dr. B became final pursuant to Section 408.123. Given that we have reversed and rendered a new decision that the first certification of MMI and IR assigned by Dr. B on October 17, 2008, did not become final pursuant to Section 408.123, we likewise reverse the hearing officer's MMI and IR determinations and we remand the MMI and IR issues to the hearing officer.

SUMMARY

We reverse the hearing officer's determination that the first certification of MMI and IR assigned by Dr. B on October 17, 2008, became final pursuant to Section 408.123 and we render a new decision that the first certification of MMI and IR assigned by Dr. B on October 17, 2008, did not become final pursuant to Section 408.123.

We reverse the hearing officer's MMI and IR determinations and we remand the MMI and IR issues to the hearing officer.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Texas Department of Insurance, Division of Workers' Compensation, pursuant to Section 410.202 which was amended June 17, 2001, to exclude Saturdays and Sundays and holidays listed in Section 662.003 of the Texas Government Code in the computation of the 15-day appeal and response periods. *See* APD 92642, decided January 20, 1993.

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

For service in person the address is:

JONATHAN BOW, EXECUTIVE DIRECTOR
STATE OFFICE OF RISK MANAGEMENT
300 W. 15TH STREET
WILLIAM P. CLEMENTS, JR. STATE OFFICE BUILDING, 6TH FLOOR
AUSTIN, TEXAS 78701.

For service by mail the address is:

JONATHAN BOW, EXECUTIVE DIRECTOR
STATE OFFICE OF RISK MANAGEMENT
P.O. BOX 13777
AUSTIN, TEXAS 78711-3777.

_____
Veronica L. Ruberto
Appeals Judge

CONCUR:

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Cynthia A. Brown
Appeals Judge

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Thomas A. Knapp
Appeals Judge