

APPEAL NO. 111447
FILED NOVEMBER 28, 2011

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). This case returns following our remand in Appeals Panel Decision (APD) 110741, decided July 25, 2011, for the hearing officer to make findings of fact and conclusions of law consistent with that decision, concerning the issues of maximum medical improvement (MMI) and impairment rating (IR) based on the record developed at the contested case hearing (CCH) held on April 25, 2011. No further CCH was necessary and none was held by the hearing officer. In the original CCH, the disputed issues before the hearing officer were:

- (1) What is the date of MMI?
- (2) What is the appellant's (claimant) IR?

In his Decision On Remand, the hearing officer again determined that the claimant reached MMI on October 5, 2009, with a 9% IR as certified by (Dr. K), a referral doctor acting in place of the treating doctor, (Dr. C).

The claimant again appealed the hearing officer's determinations on MMI/IR, contending that the certification of MMI/IR of (Dr. J), the designated doctor appointed by the Texas Department of Insurance, Division of Workers' Compensation (Division) to address MMI/IR, was entitled to presumptive weight and should be adopted. The respondent (carrier) responded, urging affirmance.

DECISION

Reversed and rendered.

The parties stipulated that the claimant sustained a compensable injury on (date of injury). The claimant testified that he broke both ankles, falling from a drilling rig at work. The evidence reflects that the claimant was working on an oil rig, fell off a 16 foot high platform, and landed on both legs, breaking both ankles. The medical evidence reflects that the claimant had multiple operations for his severe bilateral ankle injuries and developed resultant bilateral post-traumatic arthrosis.¹ There was no assertion that

¹ We note that Dr. C uses the terms "arthritis" and "arthrosis" interchangeably when discussing the post-traumatic condition of the claimant's bilateral ankles which developed and resulted from the compensable injury of (date of injury).

the post-traumatic arthrosis was due to anything other than the compensable injury to the bilateral ankles.

It is undisputed that Dr. J was appointed by the Division to determine MMI/IR. The evidence reflects there are three certifications of MMI/IR in evidence:

- (1) Dr. K, the referral doctor acting in place of the treating doctor, examined the claimant on October 21, 2009, and certified the claimant reached clinical MMI on October 5, 2009, with 9% IR;
- (2) Dr. J, the designated doctor, examined the claimant on February 5, 2010, and certified the claimant reached clinical MMI on December 15, 2009, with 20% IR; and
- (3) (Dr. R), a post-designated doctor required medical examination (RME) doctor, examined the claimant on December 28, 2010, and certified that the claimant reached statutory MMI on April 30, 2010, with 10% IR.

In the Background Information section of his Decision On Remand, the hearing officer stated:

[Dr. K] certified that the date of [MMI] was October 5, 2009, but did not explain why he chose that date. [Dr. J] used December 15, 2009, as the date of [MMI], but he gave no reason for picking that date either. On December 15, 2009 [Dr. C] reported that the post-traumatic arthritis in the [c]laimant's ankles had become symptomatic, but on September 22, 2009, he specifically stated that the [c]laimant had 'definitely healed' and his condition had plateaued. The mere fact that the [c]laimant's last visit with his treating doctor occurred on December 15, 2009, does not support a finding of [MMI] on that date. [Dr. R] failed to explain why he chose to use the alleged date of statutory [MMI]. The only indications of the [c]laimant receiving healthcare after December 15, 2009, are the references found in [Dr. R's] report. Those references fail to document any material recovery or lasting improvement in the [c]laimant's condition.

[omission]

[Dr. K's] determination that the [c]laimant reached [MMI] on October 5, 2009, is consistent with [Dr. C's] September 22, 2009, statement that the [c]laimant's ankle injuries had completely healed. It is the earliest date of [MMI] certified by any of the doctors. Ongoing symptoms from the

[c]laimant's bilateral arthritis may have worsened after October 5, 2009, but there is a lack of evidence that he experienced further material recovery or lasting improvement in his condition after that date. Since there is no explanation given by [Dr. J, the designated doctor] for his certification of [MMI] on December 15, 2009, the hearing officer finds that the preponderance of the evidence is contrary to [Dr. J's] certification of [MMI] and that [Dr. K's] certification of [MMI] on October 5, 2009, is supported by the evidence.

On remand, in Findings of Fact Nos. 11 and 12, the hearing officer found that the claimant did not experience further material recovery from or lasting improvement to his bilateral ankle injuries or bilateral ankle arthritis after October 5, 2009 (the date of MMI certified by Dr. K, the referral doctor acting in place of the treating doctor) and that the preponderance of the evidence is contrary to the designated doctor's certification of MMI on December 15, 2009. In Finding of Fact No. 13, the hearing officer further found that the preponderance of the evidence is contrary to the designated doctor's determination that the claimant's IR on December 15, 2009, was 20% because that determination was based upon the claimant's condition as of February 5, 2010, and not his condition as of December 15, 2009.

Section 401.011(30)(A) defines MMI as "the earliest date after which, based on reasonable medical probability, further material recovery from or lasting improvement to an injury can no longer reasonably be anticipated." Section 408.1225(c) provides that the report of the designated doctor has presumptive weight, and the Division shall base its determination of whether the employee has reached MMI on the report of the designated doctor unless the preponderance of the other medical evidence is to the contrary. Section 408.125(c) provides that the report of the designated doctor shall have presumptive weight, and the Division shall base the IR on that report unless the preponderance of the other medical evidence is to the contrary, and that, if the preponderance of the medical evidence contradicts the IR contained in the report of the designated doctor chosen by the Division, the Division shall adopt the IR of one of the other doctors. 28 TEX. ADMIN. CODE § 130.1(c)(3) (Rule 130.1(c)(3)) provides that the assignment of an IR for the current compensable injury shall be based on the injured employee's condition as of the MMI date considering the medical record and the certifying examination.

In APD 012284, decided November 1, 2001, the Appeals Panel noted that the question regarding the date of MMI was not whether the claimant actually recovered or improved during the period at issue, but whether based upon reasonable medical probability, material recovery or lasting improvement could reasonably be anticipated. The Appeals Panel held "it is of no moment that the treatment did not ultimately prove

successful in providing material recovery or lasting improvement in the claimant's condition, where, as here, the recovery and improvement could reasonably be anticipated according to the designated doctor." See *also* APD 101746, decided January 24, 2011; APD 101567, decided December 20, 2010.

In his medical record dated September 22, 2009, Dr. C states under "Impression" "[s]tatus post bilateral tibial pilon fractures with complete healing and some resultant post-traumatic arthritis." Under "Plan," Dr. C states "I do not think we have anything left to offer him surgically for his ankles . . . I do not feel that any more therapy would benefit him however since he has pretty much plateaued at this point I also would like to resubmit for evaluation for his possible post-traumatic versus reactive depression from these injuries. It is not surprising that [the claimant] would require some professional evaluation due to his likely lifetime changes from his injuries. He will follow up with us as needed." Subsequently in a medical record dated December 15, 2009, Dr. C reports the claimant is presenting with increased pain for his bilateral ankles. X-rays taken on December 15, 2009, reveal "fairly significant post-traumatic arthrosis with osteophytes in all views. There is some collapse as well of the talus and the talar body with slight flattening. Also there is cartilage irregularity of the entire plafond." Under "Plan," Dr. C states, "I discussed with the patient and his wife at length the diagnosis. At this point, he is exhibiting post-traumatic arthrosis symptoms, right greater than left. I recommend conservative treatment at this point and he will restart his therapy on his own for [range of motion (ROM)] and strengthening and low impact aerobics to help improve muscle strength, balance, and coordination. As well, he will take anti-inflammatories over the counter to help with the pain. If this is ineffective over the next two months, then it is possible that he needs possible surgical management with arthrosis."

In his narrative report dated February 17, 2010, Dr. J documented his findings and opinions based on his certifying examination of February 5, 2010, the claimant's condition, and the medical record. Contrary to the hearing officer's discussion of Dr. J's certified date of MMI, in this narrative report, Dr. J explains the certified date of MMI, stating:

[The claimant] reported that he does not have any planned, pending or current pre-authorized treatments or other procedures, nor is he currently receiving pre-authorized treatment. It appears that he has reached a plateau in his recovery unless additional treatment, surgical intervention or some other procedure is pursued and authorized by the insurance carrier, but this does not appear to be the case at this time. Therefore, his condition has reached a level of [MMI] at this time [December 15, 2009].

There is an explanation by the designated doctor regarding the MMI date. The date of MMI is not whether the claimant actually recovered or improved during the period from October 5 through December 15, 2009, but whether based upon reasonable medical probability, material recovery or lasting improvement could reasonably be anticipated; therefore, the hearing officer erred in finding that the preponderance of the evidence is contrary to the designated doctor's opinion on MMI. We reverse the hearing officer's determination that the claimant reached MMI on October 5, 2009, and render a new decision that the claimant reached MMI on December 15, 2009.

As previously discussed, on remand, the hearing officer found that the preponderance of the evidence is contrary to the designated doctor's assigned 20% IR because it assessed an impairment for the claimant's condition on February 5, 2010, rather than the claimant's condition on December 15, 2009.

Dr. J, the designated doctor, in his narrative report dated February 17, 2010, assigned 20% IR based on deficits in the ROM of the claimant's bilateral ankles. As we previously discussed in APD 110741, *supra*, which is the basis for the remand of the issues of MMI/IR to the hearing officer, Dr. J's methodology in assessing impairment for the claimant's bilateral ankles under Tables 42 and 43 is in accordance with 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).

In Dr. J's narrative report, dated February 17, 2010, he documented the ROM deficits, measuring each ankle's "Dorsiflex," "Plantarflex," "Inversion," and "Eversion" obtained during his certifying exam on February 5, 2010. But in that same narrative report, Dr. J then compares his ROM measurements for the claimant's bilateral ankles to those measurements of Dr. K (the referral doctor acting in place of the treating doctor) obtained on October 21, 2009. Dr. J then assesses an IR for the claimant's condition as of the certified date of MMI, December 15, 2009. This IR determination meets the requirements of Rule 130.1(c), which does not provide that only ROM measurements obtained on the actual day determined to be the date of MMI can be used to determine the claimant's impairment for his condition on the date of MMI.

Therefore, in this case, the hearing officer erred in finding that the preponderance of the evidence is contrary to the designated doctor's opinion on IR and in failing to give presumptive weight to the designated doctor's opinion that the claimant's IR is 20%. We reverse the hearing officer's determination that the claimant's IR is 9% and render a new decision that the claimant's IR is 20%.

SUMMARY

We reverse the hearing officer's determination that the claimant reached MMI on October 5, 2009, with 9% IR as certified by Dr. K, the referral doctor acting in place of the treating doctor, and render a new decision that the claimant reached MMI on December 15, 2009, with 20% IR as certified by Dr. J, the designated doctor.

The true corporate name of the insurance carrier is **AMERICAN ZURICH INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**CORPORATION SERVICE COMPANY
211 EAST 7TH STREET, SUITE 620
AUSTIN, TEXAS 78701-3232.**

Cynthia A. Brown
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Margaret L. Turner
Appeals Judge