

APPEAL NO. 111573  
FILED DECEMBER 19, 2011

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 September 27, 2011. With regard to the disputed issues, the hearing officer determined that: the compensable injury sustained on (date of injury), extends to deep venous thrombosis (DVT) of the left lower extremity (LLE) but does not extend to cellulitis of the LLE; the appellant (claimant) did not have disability from January 3 through June 20, 2011; the claimant reached maximum medical improvement (MMI) on November 29, 2010; and that the claimant's impairment rating (IR) is 5%.

The claimant appealed the hearing officer's determination that the compensable injury does not include cellulitis of the LLE, that the claimant does not have disability, the MMI date and the IR. The respondent (carrier) responded, urging affirmance. The hearing officer's determination that the compensable injury sustained on (date of injury), includes DVT of the LLE has not been appealed and has become final pursuant to Section 410.169.

DECISION

Affirmed in part and reversed and remanded in part.

The parties stipulated that the claimant sustained a compensable injury on (date of injury). The claimant testified that on the date of the injury while at work, she stepped on a push pin or tack which punctured her left great toe. The medical records reflect the toe became infected and after further complications the claimant's left great toe was amputated on August 13, 2010. The hearing officer, in her Background Information, commented that the carrier has accepted a puncture wound of the left great toe resulting in an infection and osteomyelitis, and amputation of the left great toe as a result of the osteomyelitis. The parties stipulated that the Texas Department of Insurance, Division of Workers' Compensation (Division) appointed (Dr. K) as the designated doctor to determine the date of MMI, IR, and the extent of injury. The evidence reflects there are three certifications of MMI and IR in evidence, two alternative certifications from the designated doctor and one from a post-designated doctor required medical examination (RME) doctor, (Dr. O).

## **EXTENT OF INJURY OF CELLULITIS AND DISABILITY**

The hearing officer's determinations that the compensable injury does not extend to cellulitis of the LLE and that the claimant did not have disability from January 3 through June 20, 2011, are supported by sufficient evidence and are affirmed.

### **MMI AND IR**

The hearing officer noted that the carrier has accepted a compensable puncture wound of the left great toe, infection of the left great toe, osteomyelitis and amputation of the left great toe as part of the compensable injury.

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.

Dr. K, the designated doctor, appointed to address extent of injury, MMI and IR examined the claimant on June 21, 2011. In an amended narrative dated July 5, 2011, Dr. K opined on the extent of the compensable injury, stating:

Based on the available documentation and today's evaluation, the compensable injury of (date of injury), extends to include osteomyelitis of the left big toe, amputation of the left big toe, and [DVT] of the [LLE]. Based on the documentation, the patient's [DVT] occurred 10-11 days post-surgery on the affected lower extremity and is probably associated with the patient's immobility or decreased mobility after surgery.

Dr. K also gave alternative certifications of MMI and IR attaching two Reports of Medical Evaluation (DWC-69) to his amended narrative dated July 5, 2011. In one alternative certification of MMI and IR, Dr. K stated:

Based on the available documentation and today's evaluation, the patient reached MMI on [November 29, 2010], with respect to the extent of injury that is accepted by the carrier (left foot infection, great toe amputation due to osteomyelitis). It is noted that on [November 29, 2010], [(Dr. C)] stated that "this [the wound] is well healed. . . ." He released her to return to regular duty work without restrictions.

For conditions accepted by the carrier, based on Table 63 (page 83) "Impairment Estimates for Amputations" the patient receives 5% whole person [(WP)] impairment for amputation of great toe at MTP joint.

Dr. K's certification of MMI on November 29, 2010, with a 5% IR cannot be adopted because it does not include the DVT which the hearing officer, in an unappealed determination, found was part of the compensable injury.

In the other alternative certification of MMI and IR, Dr. K stated:

The patient reached MMI as of today [June 21, 2011], with respect to other conditions that were disputed by the carrier (including cellulitis of the lower extremities, DVT, poor circulation, post phlebitis syndrome, hypercuagulate state).

For conditions claimed by the patient (amputation of left big toe, DVT, cellulitis of the [LLE] and severe post-cellulitis edema of the [LLE]) the patient receives 5% impairment for [the] left big toe amputation. In addition, using Table 14 on page 198 ("Impairment of the Lower Extremity Due to Peripheral Vascular Disease") the patient belongs in class 3, which gives her 50% impairment of the lower extremity. This is converted to 20% impairment of the [WP]. Combining 5% WP impairment for the amputation of the big toe and 20% WP impairment for severe edema of the [LLE] gives a total of 24% impairment of the [WP].

Dr. K's certification of MMI on June 21, 2011, with a 24% IR cannot be adopted because Dr. K included cellulitis which was determined not to be part of the compensable injury.

Therefore, the two alternative certifications of MMI and IR by Dr. K cannot be adopted because the 24% IR includes the cellulitis, which the hearing officer determined

was not part of the compensable injury (and which we have affirmed) and the 5% IR did not include DVT, which the hearing officer, in an unappealed finding, determined was part of the compensable injury.

The only other certification of MMI and IR in evidence is by Dr. O, the post-designated doctor RME doctor, who examined the claimant on September 16, 2011. In evidence, is a DWC-69 and narrative dated September 21, 2011, from Dr. O. Dr. O certified that the claimant reached MMI on November 29, 2010, "because all infection, left toe amputation and everything appeared to be healed. She was on Coumadin because she had had the [DVT], but the Doppler follow-up showed that had basically cleared to a great degree as well." Dr. O assessed a 5% IR based on the amputation of the left great toe. Dr. O's certification of MMI and assignment of IR cannot be adopted because Dr. O did not rate the DVT which has been determined to be part of the compensable injury.

Because neither Dr. K, the designated doctor, nor Dr. O rated the entire compensable injury which extends to DVT, and does not extend to cellulitis of the LLE, we reverse the hearing officer's determination that the claimant reached MMI on November 29, 2010, with a 5% IR and remand the case back to the hearing officer for further consideration consistent with this decision.

### **REMAND INSTRUCTIONS**

Dr. K is the designated doctor in this case. On remand, the hearing officer is to determine whether Dr. K is still qualified and available to be the designated doctor. If Dr. K is no longer qualified or available to serve as the designated doctor, then another designated doctor is to be appointed pursuant to Rule 127.5(c) to determine the date of MMI and IR for the compensable injury. The hearing officer is to advise the designated doctor that the compensable injury includes a puncture wound of the left great toe, infection of the left great toe, osteomyelitis, amputation of the left great toe and DVT but does not extend to cellulitis of the LLE. The designated doctor is to rate the entire compensable injury 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). The parties are to be provided with the hearing officer's letter to the designated doctor and the designated doctor's response. The parties are to be allowed an opportunity to respond.

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 Division, 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 Appeals Panel Decision 060721, decided June 12, 2006.

The true corporate name of the insurance carrier is **TRAVELERS INDEMNITY COMPANY** and the name and address of its registered agent for service of process is

**CORPORATION SERVICE COMPANY  
d/b/a CSC-LAWYERS INCORPORATING SERVICE COMPANY  
211 EAST 7TH STREET, SUITE 620  
AUSTIN, TEXAS 78701-3218.**

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Thomas A. Knapp  
Appeals Judge

CONCUR:

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Cynthia A. Brown  
Appeals Judge

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Margaret L. Turner  
Appeals Judge