

APPEAL NO. 122502
FILED JANUARY 30, 2013

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 12, 2012, and concluded on October 29, 2012, in [City], Texas, with [hearing officer] presiding as hearing officer. Regarding the disputed issues, the hearing officer determined that: (1) the compensable injury of [date of injury], does not extend to a partial tear at the myotendinous junction of the left supraspinatus tendon; (2) the appellant (claimant) reached maximum medical improvement (MMI) on June 14, 2011; and (3) the claimant's impairment rating (IR) is 10%.

The claimant appealed, contending that he had sustained a left shoulder injury in the compensable accident, the IR from the designated doctor, adopted by the hearing officer, did not rate the entire compensable injury, and the designated doctor did not correctly rate the compensable injury. The respondent (carrier) responded, urging affirmance.

DECISION

Affirmed in part and reversed and remanded in part.

It is undisputed that the claimant, a truck driver, sustained a very serious injury when he lost control of his truck and went through a guard rail off of a bridge. The parties stipulated that the claimant sustained a compensable communitated open right tibial plateau fracture, pulmonary contusion, loosened teeth, cervical sprain/strain, lumbar sprain/strain, and bilateral hip strain injury on [date of injury]. The parties further stipulated that the claimant's compensable injury of [date of injury], does not extend to cervical disc arthritis, cervical disc desiccation, lumbar disc arthritis, and lumbar disc desiccation. The parties also stipulated that [Dr. J] is the designated doctor appointed by the Texas Department of Insurance, Division of Workers' Compensation (Division) to evaluate: (1) MMI; (2) IR; (3) extent of injury; and (4) did the incident on [date of injury], cause, enhance, and/or worsen any pre-existing condition.

EXTENT OF INJURY

The hearing officer's determination that the compensable injury of [date of injury], does not extend to a partial tear at the myotendinous junction of the left supraspinatus tendon is supported by sufficient evidence and is affirmed.

MMI/IR

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 on 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.

Dr. J, the designated doctor, examined the claimant on July 14, 2011, certified that the claimant reached MMI on June 14, 2011, and assessed a 10% IR. Dr. J’s diagnoses were: (1) [s]tatus post-open reduction and internal fixation type 3c labral plateau fracture; (2) [s]tatus post-tibial artery sprain; (3) [n]europathy tibial nerve, traumatic with severe hyperesthesias; (4) [d]egenerative disc disease cervical spine with cervical facet syndrome; and (5) [d]egenerative disc disease lumbar spine with lumbar facet syndrome. The diagnoses did not include the stipulated conditions of pulmonary contusion and loosened teeth.

For the cervical spine, Dr. J placed the claimant in Diagnosis-Related Estimate (DRE) Cervicothoracic Category I: Complaints or Symptoms for a 0% whole person (WP) impairment. For the lumbar spine Dr. J placed the claimant in DRE Lumbosacral Category I: Complaints or Symptoms for a 0% WP impairment.

Dr. J recorded measurements for both the right and left hips. In his narrative report regarding the hips, Dr. J stated that:

A full physical examination with range of motion [(ROM)] was performed and resulted in 4% [WP] impairment per Table 40 on page [3/78] [of 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) (AMA Guides)] with comparison to the opposite side. Per instruction only one value each can be assigned from the tables on this page.

We note that in Appeals Panel Decision (APD) 110741, decided July 25, 2011, the Appeals Panel stated “[i]n Section 3.2e entitled ‘[ROM],’ page 3/77, of the AMA Guides, provide that ‘[e]valuating permanent impairment of the lower extremity according to its [ROM] is a suitable method.’ Section 3.2e does not require that a

certifying doctor must only use the most severe impairment for an individual direction of motion within the same table [Tables 40 through 43].” Dr. J was required to provide an IR for the claimant’s bilateral hip injury, as stipulated to be compensable by the parties. Because Dr. J stated he compared the ROM loss to the opposite side he did not take into account both the right and left hips that were to be rated.

Dr. J also assigned a 3% impairment for a tibial nerve injury citing Table 68, page 3/89 of the AMA Guides. We note that all estimates listed in Table 68 are for complete motor or sensory loss for the named peripheral nerve. Dr. J modified the estimates for partial dysesthesia for a sciatic nerve as listed in Table 68 using Table 11, page 3/48 of the AMA Guides. The specific provisions of the AMA Guides do not prohibit using Table 11 to rate the value of a partial dysesthesia loss using Table 68. However, there is an extent of injury question involving the use of Table 68 because the other certifying doctor in this case, [Dr. F], a doctor selected by the treating doctor acting in place of the treating doctor rates a common peroneal nerve. The hearing officer must determine which peripheral nerve is involved in the compensable injury and is to be rated.

Dr. J also assigned a 3% impairment for the right tibial plateau fracture referencing Table 64, page 3/85 of the AMA Guides. However, Table 64 lists a 2% WP impairment for an undisplaced plateau fracture and other impairment for a displaced plateau fracture based on the angulation measured. Dr. J explains that he does “not have reliable information on angulation so no greater impairment can be considered here.” Dr. J is required to address the angulation, or lack thereof, for the tibial plateau fracture impairment and whether or not the claimant sustained an undisplaced or displaced fracture in using Table 68 to rate a tibial plateau fracture impairment.

The parties stipulated that the compensable injury includes a pulmonary contusion and loosened teeth. Dr. J did not rate either the stipulated pulmonary contusion or the loosened teeth. Dr. J’s report cannot be adopted because: Dr. J did not rate the entire compensable injury, ie. bilateral hips (Dr. J only rated one hip), pulmonary contusion, and loosened teeth. The Appeals Panel has held that the designated doctor’s failure to apply the AMA Guides or rate the entire injury are grounds for rejecting his opinion as to MMI and IR. See APD 121215, decided August 30, 2012; APD 121244, decided August 16, 2012.

Accordingly, the hearing officer’s finding that the June 14, 2011, date of MMI, and 10% IR as certified by Dr. J is not contrary to the preponderance of the evidence is against the great weight and preponderance of the evidence. We reverse the hearing officer’s determination that the claimant reached MMI on June 14, 2011, and that the claimant’s IR is 10%.

Also in evidence is a Report of Medical Evaluation (DWC-69) and narrative dated March 12, 2012, from Dr. F. The hearing officer, in his Background Information, identifies Dr. F as a “[c]arrier-selected doctor” however, the evidence establishes that Dr. F was a referral doctor selected by the treating doctor acting in place of the treating doctor. Dr. F examined the claimant on March 12, 2012, and certified that the claimant reached MMI on July 14, 2011, with a 21% IR. In assessing the 21% IR, Dr. F rated the cervical spine as DRE Cervicothoracic Category II: Minor Impairment for 5% WP impairment; the lumbar spine DRE Lumbosacral Category II: Minor Impairment for 5% WP impairment; the left shoulder for 5% WP impairment; and the right knee with 4% WP impairment and right lower extremity sensory deficits and dysesthesia 4% WP impairment.

Dr. F’s evaluation cannot be adopted for the following reasons: (1) Dr. F rated the left shoulder injury which the hearing officer found, and we have affirmed in this decision, was not part of the compensable injury; and (2) Dr. F failed to rate the pulmonary contusion and loosened teeth, which the parties stipulated are part of the compensable injury.

There is no other certification of MMI/IR in evidence. Because there is no MMI date and IR that can be adopted, we remand the issues of MMI/IR for further action consistent with this decision.

SUMMARY

We affirm the hearing officer’s determination that the compensable injury of [date of injury], does not extend to a partial tear of the myotendinous junction of the left supraspinatus tendon.

We reverse the hearing officer’s determinations that the claimant reached MMI on June 14, 2011, and that the claimant’s IR is 10% and remand the issues of MMI/IR for further action consistent with this decision.

REMAND INSTRUCTIONS

The designated doctor for MMI and IR is Dr. J. On remand, the hearing officer is to determine if Dr. J is still qualified and available to serve as the designated doctor. If Dr. J is no longer qualified or available to serve as the designated doctor, then another designated doctor is to be appointed to determine the claimant’s MMI and IR for the compensable injury of [date of injury].

The hearing officer is to advise the designated doctor that the compensable injury includes communitated open right tibial plateau fracture, pulmonary contusion,

loosened teeth, cervical sprain/strain, lumbar sprain/strain, and bilateral hip strain injury. The designated doctor is also to be advised that the compensable injury does not extend to cervical disc arthritis, cervical disc desiccation, lumbar disc arthritis, lumbar disc desiccation, and a partial tear of the myotendinous junction of the left supraspinatus tendon.

The hearing officer is to determine which peripheral nerve is to be rated and to advise the designated doctor. The hearing officer may take additional evidence regarding the rating of the peripheral nerve.

The designated doctor is to be requested to re-examine the claimant, rate the entire compensable injury and render an opinion on MMI/IR as of the date of MMI in accordance with the AMA Guides and 28 TEX. ADMIN. CODE § 130.1 (Rule 130.1) considering the claimant's medical record and the certifying examination. The hearing officer is to make the designated doctor's report available to the parties and to allow the parties to respond. The hearing officer is then to make a determination of MMI and IR that is supported by the evidence and is consistent with this decision.

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 APD 060721, decided June 12, 2006.

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

**CT CORPORATION SYSTEM
350 NORTH ST. PAUL STREET
DALLAS, TEXAS 75201.**

Thomas A. Knapp
Appeals Judge

CONCUR:

Cynthia A. Brown
Appeals Judge

Margaret L. Turner
Appeals Judge

