APPEAL NO. 131110
FILED JULY 8, 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 (CCH) was held on April 11, 2013, in [City], Texas, with [hearing officer] presiding as hearing officer. The hearing officer resolved the disputed issues by deciding that: (1) the appellant (claimant) sustained disability from January 1 through November 11, 2011; (2) the claimant reached maximum medical improvement (MMI) on July 29, 2010; and (3) the claimant has a zero percent impairment rating (IR).

The claimant appealed the hearing officer's MMI and IR determinations, contending the MMI/IR certification adopted by the hearing officer fails to consider the entire compensable injury as agreed to by the parties in a Benefit Dispute Agreement (DWC 24) dated February 19, 2013. The respondent (carrier) responded, urging affirmance. The hearing officer's determination that the claimant sustained disability from January 1 through November 11, 2011, was not appealed and has become final pursuant to Section 410.169.

DECISION

Reversed and remanded.

The claimant testified she injured her left ankle and foot when she misstepped while climbing down a ladder at work on [date of injury]. Although the parties did not stipulate to the date of statutory MMI, the parties agreed at the beginning of the CCH that statutory MMI occurred on November 11, 2011. We note there was no issue of finality under Section 408.123(e) before the hearing officer.

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 Texas Department of Insurance, Division of Workers' Compensation (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.

The hearing officer determined the claimant reached MMI on July 29, 2010, with a zero percent IR per [Dr. P], the designated doctor appointed by the Division to determine in part the claimant's MMI and IR.

Dr. P initially examined the claimant on July 29, 2011, and in a Report of Medical Evaluation (DWC-69) and narrative report dated that same date, certified the claimant reached clinical MMI on July 29, 2011, with a zero percent IR. In her narrative report Dr. P noted that the compensable injury per the carrier is a post fracture arthralgia left foot. Dr. P based the zero percent IR on range of motion (ROM) measurements taken of the left foot during the July 29, 2011, examination.

On February 19, 2013, a DWC-24 was signed by the parties and approved by the Division. In the DWC-24 the parties agreed that the compensable injury of [date of injury], extends to left talus fracture, left ankle ligamentous injury, left ankle synovitis, left tarsal tunnel syndrome, and tendonitis. It was undisputed that Dr. P's July 29, 2011, MMI/IR certification did not consider the extent-of-injury conditions agreed to by the parties.

The hearing officer made the following Findings of Fact:

No. 8. [Dr. P's] July 29, 2010, report reflects [that the claimant's] medical condition at the point in time at which, based on reasonable medical probability, further material recovery from or lasting improvement to [the claimant's] [date of injury], compensable injury could no longer reasonably be anticipated.

No. 9. A preponderance of the medical evidence contained in the record of the [CCH] is not contrary to [Dr. P's] report of July 29, 2010.

We note that the hearing officer's Findings of Fact listed above, Conclusion of Law No. 4, and the decision state that the claimant reached MMI on July 29, 2010, rather than July 29, 2011, which is the date of MMI actually certified by Dr. P. The hearing officer's Findings of Fact Nos. 8 and 9 are so against the great weight and preponderance of the evidence as to be manifestly unjust. Further, Dr. P's July 29, 2011, MMI/IR certification cannot be adopted because it does not consider the entire compensable injury. *See* Appeals Panel Decision (APD) 110463, decided June 13, 2011; and APD 101567, decided December 20, 2010. Accordingly, we reverse the

hearing officer's determination that the claimant reached MMI on July 29, 2010, with a zero percent IR.

There are two other MMI/IR certifications in evidence. The first is from [Dr. D], a doctor selected by the treating doctor to act in the treating doctor's place. Dr. D examined the claimant on June 12, 2012, and in a DWC-69 and narrative report dated that same date certified the claimant reached MMI statutorily on November 5, 2011, with a three percent IR. Although not noted in the decision, the parties agreed at the CCH that the date of statutory MMI is November 11, 2011. Dr. D certified that the claimant reached MMI statutorily on November 5, 2011, which is not the date of statutory MMI as agreed to by the parties. Accordingly, Dr. D's certification of MMI and IR cannot be adopted.

The only other MMI/IR certification in evidence is a second certification from Dr. P. The parties stated on the record that after a letter of clarification was sent to Dr. P notifying her about the extent-of-injury conditions agreed upon by the parties in the February 19, 2013, DWC-24, Dr. P again evaluated the claimant to determine the claimant's MMI and IR. Dr. P examined the claimant on March 26, 2013, and in a DWC-69 dated that same date and accompanying narrative report certified that the claimant reached MMI statutorily on November 10, 2011, with a six percent IR. It is undisputed that Dr. P considered the entire compensable injury as agreed to by the parties. As previously noted, the parties agreed at the CCH that the date of statutory MMI is November 11, 2011. Dr. P certified the claimant reached MMI statutorily on November 10, 2011, which is not the date of statutory MMI as agreed to by the parties. Accordingly, her certification of MMI cannot be adopted.

We now turn to Dr. P's six percent IR. Dr. P took ROM measurements of the claimant's left and right ankles during the March 26, 2013, examination. An IR based on these ROM measurements would not yield a six percent IR. However, Dr. P noted in her narrative report that regarding the left foot/ankle, "[ROM] taken from the [February 20, 2012] office note (the closest documented [ROM] I could find on the [statutory] MMI date) yields a [six percent] Whole Person Impairment," and "Tarsal Tunnel Syndrome impairment is reflected in the [ROM] deficit, therefore no additional impairment is applied." Dr. P clearly bases the six percent IR on the ROM measurements taken during a February 20, 2012, office visit and not on the ROM measurements taken during the March 26, 2013, examination. The office note relied upon by Dr. P for the ROM findings is not in evidence. Dr. P does not otherwise discuss the February 20, 2012, office note or list the ROM measurements contained in that note.

Rule130.1(c)(3) provides in pertinent part that the assignment of an IR shall be based on the injured worker's condition as of the MMI date considering the medical record and the certifying examination and the doctor assigning the IR shall:

(A) identify objective clinical or laboratory findings of permanent impairment for the current compensable injury;

(B) document specific laboratory or clinical findings of an impairment;

(C) analyze specific clinical and laboratory findings of an impairment;

(D) compare the results of the analysis with the impairment criteria and provide the following:

(i) [a] description and explanation of specific clinical findings related to each impairment, including zero percent [IRs]; and

(ii) [a] description of how the findings relate to and compare with the criteria described in the applicable chapter 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). The doctor's inability to obtain required measurements must be explained.

Dr. P's reliance on an office note not in evidence on which to base her six percent IR does not comply with Rule 130.1(c)(3), and as such it cannot be adopted.

Since there are no other MMI/IR certifications in evidence, we remand the issues of MMI and IR to the hearing officer for further action consistent with this decision.

REMAND INSTRUCTIONS

Dr. P is the designated doctor in this case. The hearing officer is to determine whether Dr. P is still qualified and available to be the designated doctor. If Dr. P 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 correct date of statutory MMI as agreed to by the parties is November 11, 2011. The hearing officer is to request the designated doctor to consider the February 19, 2013, DWC-24, in addition to the medical records already in the designated doctor's possession, and determine whether or not the conditions accepted on the DWC-24 existed prior to statutory MMI, which is November 11, 2011, as agreed to by the parties.

The designated doctor is to be requested to give an opinion on MMI (which cannot be after the November 11, 2011, statutory MMI date) and IR that takes into account the entire compensable injury, which may or may not include the conditions listed in the DWC-24, based on the claimant's date of MMI.

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* APD 060721, decided June 12, 2006.

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

RICHARD J. GERGASKO, PRESIDENT
6210 EAST HIGHWAY 290
AUSTIN, TEXAS 78723.

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Carisa Space-Beam
Appeals Judge

CONCUR:

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Veronica L. Ruberto
Appeals Judge

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Margaret L. Turner
Appeals Judge