

APPEAL NO. 140002
FILED MARCH 10, 2014

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 November 12, 2013, in [City], Texas, with [hearing officer] presiding as hearing officer. The hearing officer resolved the disputed issues by deciding that: (1) the compensable injury extends to bilateral carpal tunnel syndrome (CTS), bilateral trigger finger, and tendonitis of both hands; (2) the respondent/cross-appellant (claimant) reached maximum medical improvement (MMI) on April 3, 2012; (3) the claimant's impairment rating (IR) is 12%; and (4) as a result of the decision and order of the CCH in [Docket No. 1] and affirmation by Appeals Panel Decision (APD) 120295, decided April 16, 2012, the Texas Department of Insurance, Division of Workers' Compensation (Division) does not have jurisdiction to determine the extent of injury to the bilateral CTS, bilateral trigger finger, and tendonitis in both hands at this hearing.

The appellant/cross-respondent (carrier) appealed the hearing officer's determinations of the extent of the compensable injury and that the Division does not have jurisdiction to determine the extent of injury to the bilateral CTS, bilateral trigger finger, and tendonitis in both hands at this hearing. The carrier argued that no evidence supports the claimant's claim that the extent-of-injury conditions in dispute were caused by his work activities. Additionally, the carrier argues that the prior CCH included no conclusion of law addressing the disputed conditions so it was error for the hearing officer to conclude the Division did not have jurisdiction to address the extent-of-injury conditions in dispute at the present CCH. The appeal file did not contain a response from the claimant to the carrier's appeal.

The claimant cross-appealed disputing the hearing officer's determinations of MMI and IR. In his cross-appeal the claimant also provided arguments to support the hearing officer's determinations on the issues of extent of injury and jurisdiction. The claimant argues that the greater weight of the evidence proves the correct certification of MMI and IR came from the designated doctor, [Dr. W]. The carrier responded, urging affirmance of the MMI and IR determinations, arguing [Dr. D] is the only examining doctor who rated the entire compensable injury.

DECISION

Affirmed in part; reversed and rendered in part; and reversed and remanded in part.

The parties stipulated that: (1) the claimant's duties were repetitive and traumatic; (2) the claimant sustained a compensable injury in the form of a repetitive

trauma occupational disease with a [date of injury], date of injury; and (3) the claimant has been diagnosed with bilateral CTS, bilateral trigger finger, and tendonitis of both hands.

EXTENT OF INJURY

The hearing officer determined that the Division did not have jurisdiction to determine the extent of the injury to include bilateral CTS, bilateral trigger finger, and tendonitis of both hands but then made an alternative determination on the extent of injury to the disputed conditions on the merits. The hearing officer's alternative determination that the compensable injury of [date of injury], extends to bilateral CTS, bilateral trigger finger, and tendonitis of both hands is supported by sufficient evidence and is affirmed.

RES JUDICATA

In *Barr v. Resolution Trust Corp.*, 837 S.W.2d 627 (Tex. 1992), the Texas Supreme Court noted that, broadly speaking, res judicata is the generic term for a group of related concepts concerning the conclusive effects given final judgments, and that within this general doctrine, there are two principal categories: (1) claim preclusion (also known as res judicata); and (2) issue preclusion (also known as collateral estoppel). The Supreme Court further noted that res judicata, or claim preclusion, prevents the relitigation of a claim or cause of action that has been finally adjudicated, as well as related matters that, with the use of diligence, should have been litigated in the prior suit, and that issue preclusion, or collateral estoppel, prevents relitigation of particular issues already resolved in a prior suit. In *Barr*, the Supreme Court reaffirmed the "transactional" approach to res judicata, stating that a subsequent suit will be barred if it arises out of the same subject matter of a previous suit and which through the exercise of due diligence, could have been litigated in a prior suit. The doctrine of res judicata has been applied to administrative action that has been characterized by the courts as adjudicatory, judicial, or quasi-judicial. *Bryant v. L.H. Moore Canning Co.*, 509 S.W.2d 432 (Tex. Civ. App.-Corpus Christi, 1974), cert. denied 419 U.S. 845.

A CCH was held on January 19, 2012, to determine if the claimant sustained a compensable repetitive trauma injury with a date of injury of [date of injury], and whether the claimant had disability resulting from an injury sustained on [date of injury]. The following Findings of Fact were included in the decision and order of the January 19, 2012, CCH: (3) A June 23, 2011, nerve conduction study reflected that [the] [c]laimant had severe [CTS] on the right hand and moderate [CTS] on the left hand; (4) [Dr. B], [the] [c]laimant's treating doctor, diagnosed bilateral CTS and triggering fingers and his opinion was that those injuries were the result of [the] [c]laimant's job activities; and (5) [the] [c]laimant sustained damage or harm to the physical structure of his body in the

form of bilateral upper extremity repetitive trauma injuries due to repetitious and physically traumatic activities that occurred over time and arose out of and in the course and scope of his employment.

The extent-of-injury issue certified for resolution in the present CCH was: “Does the compensable injury extend to include bilateral [CTS], bilateral trigger finger, and tendonitis of the fourth finger of both hands?” The parties agreed at the CCH to revise the issue to read as follows: “Does the compensable injury extend to include bilateral [CTS], bilateral trigger finger and tendonitis of both hands?”

In the present CCH, the hearing officer found that the substance of the extent of injury issue listed at the CCH was actually litigated during a prior CCH on January 19, 2012, and that decision and order was appealed and has become final as per APD 120295, *supra*.

That portion of the hearing officer’s determination that as a result of the decision and order of the CCH in [Docket No. 1] and affirmation by APD 120295, *supra*, the Division does not have jurisdiction to determine the extent of the injury to include bilateral CTS and bilateral trigger finger is supported by sufficient evidence and is affirmed.

However, the evidence does not reflect that the condition of tendonitis of both hands was specifically addressed at the January 19, 2012, CCH. In the January 19, 2012, CCH, the hearing officer made a specific finding regarding the bilateral CTS and bilateral trigger finger but did not make a finding regarding tendonitis in both hands. Under these circumstances, we cannot agree that the issue of extent of injury as to the alleged condition of tendonitis in both hands is barred under the doctrine of res judicata. For the above stated reasons, we reverse that portion of the hearing officer’s determination that as a result of the decision and order of the CCH in [Docket No. 1] and affirmation by APD 120295, *supra*, the Division does not have jurisdiction to determine the extent of the injury to include tendonitis in both hands at this hearing and render a new decision that the Division does have jurisdiction to determine whether the claimant’s compensable injury of [date of injury], extends to tendonitis of both hands. As previously noted, we affirm the hearing officer’s determination that the claimant’s compensable injury of [date of injury], extends to tendonitis of both hands on the merits.

MMI/IR

The hearing officer determined that the claimant reached MMI on April 3, 2012, and the claimant’s IR is 12% as found by Dr. D. Dr. D, the post-designated doctor required medical examination doctor, examined the claimant on September 26, 2013. Dr. D provided alternative certifications. Dr. D provided a certification placing the

claimant at MMI on April 3, 2012, with a 0% IR considering nonspecific myofascial soft tissue wrist hand sprain/strain, noting “[a]ll measureable parameters are normal which accrues 0% impairment.”

Dr. D provided an alternative rating considering bilateral CTS, certifying the claimant reached MMI on April 3, 2012, with a 12% IR. Dr. D subsequently provided an addendum dated November 8, 2013, providing an alternative certification for the sole diagnosis of bilateral tendonitis. For that diagnosis, Dr. D opined that the claimant reached MMI on December 5, 2011, with a 0% IR. The hearing officer notes in the Background Information section of his decision and order that Dr. D’s certification is the only rating that complies 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) (AMA Guides). However, none of the narratives and alternative ratings provided by Dr. D consider and rate the entire compensable injury.

The hearing officer adopted the certification by Dr. D that the claimant reached MMI on April 3, 2012, with a 12% IR. However, that certification from Dr. D only considered and rated the claimant’s bilateral CTS. The certification adopted by the hearing officer did not consider or rate the bilateral tendonitis or bilateral trigger finger. Accordingly, the hearing officer’s determinations that the claimant reached MMI on April 3, 2012, and the claimant’s IR is 12% are reversed.

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. P] was initially appointed as the designated doctor for purposes of MMI and IR. Dr. P examined the claimant on July 6, 2012, and certified that the claimant was not at MMI but was expected to reach MMI on April 15, 2013. Dr. P's initial report only considered bilateral CTS. Dr. P provided an amendment to his report and noted that the compensable injury based on the Request for Designated Doctor Examination (DWC-32) included bilateral CTS and tendonitis to bilateral 4th finger and certified that the claimant had not reached MMI. Dr. P did not consider and rate bilateral trigger finger and therefore his certification cannot be adopted.

Dr. W was subsequently appointed as designated doctor for purposes of MMI and IR. Dr. W examined the claimant on May 15, 2013, and certified that the claimant reached MMI on that date with a 29% IR. However, the only diagnosis Dr. W considered was CTS, although he noted that "the numbness and trigger finger concerns have resolved for the most part." Dr. W measured the claimant's range of motion in both the right and left wrist resulting in no impairment.

Dr. W then assessed impairment for strength and sensation for the right wrist. Dr. W placed the claimant in Grade 3 for sensory deficits using Table 11 on page 3/48 of the AMA Guides for 60% impairment. Dr. W then multiplied 60% assessed for sensory deficit with 38% using Table 15, on page 3/54 of the AMA Guides for the median nerve below the midforearm. Dr. W placed the claimant in Grade 4 for motor deficits using Table 12 on page 3/49 of the AMA Guides for 25%. Dr. W then multiplied 25% assessed for motor deficit by 10% from Table 15 for the median nerve below the midforearm. Dr. W combined the motor and sensory deficit impairments for 25% upper extremity impairment which he then converted to 15% whole person impairment using Table 3, on page 3/20 of the AMA Guides.

Dr. W then assessed impairment for strength and sensation for the left wrist. We note that the narrative mistakenly refers to the right wrist when discussing the impairment assessed under the heading left wrist/hand. Dr. W again placed the claimant in Grade 3 using Table 11 for 60% impairment which he then multiplied by 38% using Table 15 for the median nerve below the midforearm. For motor strength, Dr. W placed the claimant in Grade 4 for 50% impairment. However, we note that the maximum value using Table 12 for Grade 4 is 25% rather than 50%. Dr. W then multiplied 50% by 10% using Table 15 for the median nerve below the forearm. Dr. W combined the motor and sensory deficits for 27% upper extremity impairment of 27% which he converted to 16% whole person.

Dr. W then combined the 15% impairment assessed with the right wrist with 16% impairment assessed for the left wrist for a total whole person impairment of 29%. However, as previously noted Dr. W only considered and rated the bilateral CTS and

did not consider or rate bilateral tendonitis or bilateral trigger finger. We also note that Dr. W used the wrong impairment for his assessment in Grade 4 motor deficit for the claimant's left wrist. Accordingly, Dr. W's certification of MMI and IR cannot be adopted.

The only other certification in evidence is from [Dr. We], a doctor selected by the treating doctor to act in his place. Dr. We examined the claimant on May 13, 2013, and certified that the claimant reached MMI on that date with a 28% IR. The only diagnosis discussed and considered by Dr. We in certifying the claimant's MMI and IR was bilateral CTS. Dr. We did not consider and rate the entire compensable injury and therefore his certification cannot be adopted.

Since no certification can be adopted, we reverse the hearing officer's determination that the claimant reached MMI on April 3, 2012, and that the claimant's IR is 12% and remand the issues of MMI and IR to the hearing officer for further action consistent with this decision.

SUMMARY

We affirm the hearing officer's determination that the compensable injury of [date of injury], extends to tendonitis in both hands as well as his alternative determination that the compensable injury of [date of injury], extends to bilateral CTS and bilateral trigger finger.

We affirm that portion of the hearing officer's determination that as a result of the decision and order of the CCH in [Docket No. 1] and affirmation by APD 120295, *supra*, the Division does not have jurisdiction to determine the extent of the injury to include bilateral CTS and bilateral trigger finger.

We reverse that portion of the hearing officer's determination that as a result of the decision and order of the CCH in [Docket No. 1] and affirmation by APD 120295, *supra*, the Division does not have jurisdiction to determine the extent of the injury to include tendonitis in both hands at this hearing and render a new decision that the Division does have jurisdiction to determine whether the claimant's compensable injury of [date of injury], extends to tendonitis of both hands.

We reverse the hearing officer's determination that the claimant reached MMI on April 3, 2012, and that the claimant's IR is 12% and remand the issues of MMI and IR to the hearing officer.

REMAND INSTRUCTIONS

Dr. W is the designated doctor in this case. On remand, the hearing officer is to determine whether Dr. W is still qualified and available to be the designated doctor. If

Dr. W 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 [date of injury], compensable injury.

The hearing officer is to advise the designated doctor that the compensable injury of [date of injury], includes bilateral CTS, bilateral trigger finger, and tendonitis of both hands. The hearing officer is to request the designated doctor to give an opinion on the claimant's date of MMI and rate the entire compensable injury in accordance with the AMA Guides considering the medical record and the certifying examination.

The parties are to be provided with the designated doctor's new MMI/IR certification and are to be allowed an opportunity to respond. The hearing officer is then to make a determination on MMI and IR 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 **ZENITH INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**CT CORPORATION SYSTEM
350 NORTH SAINT PAUL STREET, SUITE 2900
DALLAS, TEXAS 75201-4234.**

Margaret L. Turner
Appeals Judge

CONCUR:

Tracey T. Guerra
Appeals Judge

Carisa Space-Beam
Appeals Judge