APPEAL NO. 140237
FILED APRIL 11, 2014

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). Contested case hearings were held on August 5 and September 25, 2013, with the record closing on December 19, 2013, in [City], Texas, with [hearing officer] presiding as the hearing officer. The hearing officer resolved the disputed issues by deciding that: (1) the appellant (claimant) reached maximum medical improvement (MMI) on September 12, 2012; and (2) the claimant's impairment rating (IR) is zero percent.

The claimant appealed the hearing officer's determinations regarding MMI and IR. The claimant argued that the evidence supports his assertion that he has not reached MMI and an IR is premature. The appeal file does not contain a response from the respondent (carrier).

DECISION

Reversed and remanded.

The parties stipulated that: (1) the claimant sustained a compensable injury on [date of injury]; (2) [Dr. C], was appointed by the Texas Department of Insurance, Division of Workers' Compensation (Division) as the designated doctor to determine MMI, IR, and return to work; and (3) the compensable injury of [date of injury], extends to a right ankle sprain, tarsal navicular fracture, and right foot sprain.

The claimant testified that he was a truck driver for the employer and that on [date of injury], he was getting out of the truck, lost his balance, and fell backwards with his right foot bent up underneath him.

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 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. C, the designated doctor, performed two certifying examinations on the claimant. The hearing officer determined that the claimant reached MMI on September 12, 2012, and that the claimant's IR is zero percent as certified by Dr. C during the second designated doctor examination on November 4, 2013. The Report of Medical Evaluation (DWC-69) accompanying Dr. C's narrative for the November 4, 2013, examination does certify a September 12, 2012, date of clinical MMI with a zero percent IR. Additionally, the narrative report lists diagnoses of: (1) right ankle sprain; (2) right foot sprain; and (3) nondisplaced fracture of the right foot accessory navicular bone. However, when Dr. C explains the MMI date in the narrative report dated November 4, 2013, he states that the date of MMI is November 19, 2012. Dr. C further explains that there has been no significant change in the claimant's condition since November 19, 2012, and that to assign an IR he is using the range of motion (ROM) measurements documented on November 19, 2012, because they are the most competent and complete findings closest to the MMI date.

Therefore, there is an internal inconsistency between the MMI date Dr. C certified on the DWC-69 and the MMI date Dr. C certified in the accompanying narrative report. Because the narrative report and DWC-69 list completely different dates regarding when the claimant reached MMI, we do not consider that internal inconsistency to be a clerical error that can be corrected. *See* Appeals Panel Decision (APD) 130739, decided May 7, 2013. Accordingly, the hearing officer's determination that the claimant reached MMI on September 12, 2012, is reversed.

With regard to the IR, Rule 130.1(c)(3) provides that an assignment of IR shall be based on the claimant's condition as of the MMI date. Given that we have reversed the hearing officer's MMI determination, we reverse the hearing officer's determination that the claimant's IR is zero percent

Dr. C first examined the claimant on November 19, 2012, and certified that the claimant reached MMI on September 12, 2012, with a zero percent IR. As the hearing officer noted in the Discussion portion of her decision, Dr. C "examined the right foot and ankle; however, he did not specifically identify the compensable right foot sprain in the diagnosis portion" of his narrative report. As noted previously, the parties stipulated that the compensable injury includes both a right ankle sprain and a right foot sprain.

Dr. C failed to consider the entire compensable injury when certifying MMI and assigning an IR, and as such his first certification cannot be adopted. *See* APD 110463, decided June 13, 2011; and APD 101567, decided December 20, 2010.

The claimant's treating doctor, [Dr. T], examined the claimant on April 9, 2013, and certified that the claimant reached MMI on January 4, 2013, with a zero percent IR. Dr. T listed diagnoses of: (1) tarsal navicular closed fracture; (2) right ankle sprain; (3) right ankle pain; and (4) right foot sprain in his narrative report. However, as noted by the hearing officer in the decision, the narrative report from Dr. T does not include ROM measurements or other objective clinical findings to support his assignment of a zero percent IR, nor does it explain how he arrived at a zero percent whole person impairment for the four diagnoses listed in his narrative report.

Rule 130.1(c)(3) provides in pertinent part that the assignment of an IR shall be based on the injured employee'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;
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> (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 (0%) [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) (AMA Guides)]. The doctor's inability to obtain required measurements must be explained.

In this case, Dr. T did not assign an IR in accordance with Rule 130.1(c)(3) because he did not include any information in his narrative report to establish how he

arrived at his assessment of impairment for the claimant's compensable injury. *See* APD 131804 decided October 3, 2013; and APD 111924, decided February 22, 2012. Accordingly, Dr. T's certification cannot be adopted.

On July 31, 2013, [Dr. K], the doctor selected by the treating doctor to act in place of the treating doctor, examined the claimant and determined that the claimant had not reached MMI. While Dr. K lists the diagnoses of a closed right tarsal navicular bone avulsion fracture, right ankle strain/sprain, and right foot strain/sprain in the accompanying narrative report, the hearing officer correctly noted that the report also lists "chronic pain secondary to work related injury of [date of injury]," which was neither stipulated to nor actually litigated by the parties. Since Dr. K considered a condition that has not been determined to be a part of the compensable injury, Dr. K's opinion cannot be adopted.

Since there is no certification of MMI and IR in evidence that can be adopted, we remand the issues of MMI and IR to the hearing officer for further action consistent with this decision.

SUMMARY

We reverse the hearing officer's determinations that the claimant reached MMI on September 12, 2012, and that the claimant's IR is zero percent and remand the issues of MMI and IR to the hearing officer.

REMAND INSTRUCTIONS

Dr. C is the designated doctor in this case. On remand, the hearing officer is to determine whether Dr. C is still qualified and available to be the designated doctor. If Dr. C is no longer qualified or is no longer 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.

If Dr. C is still qualified and available to serve as the designated doctor, the hearing officer is to advise Dr. C that his November 4, 2013, DWC-69 and accompanying narrative report have an internal inconsistency regarding the date of MMI.

The hearing officer is to advise the appointed designated doctor that the compensable injury of [date of injury], extends to a right ankle sprain, tarsal navicular fracture, and right foot sprain as stipulated by the parties. The hearing officer is to request that the designated doctor 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 the evidence and 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, 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 **COMMERCE & INDUSTRY 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 78701-3218.

Tracey T. Guerra
Appeals Judge

CONCUR:

Carisa Space-Beam
Appeals Judge

Margaret L. Turner
Appeals Judge