

APPEAL NO. 141559
FILED SEPTEMBER 25, 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 June 10, 2014, in Houston, Texas, with [hearing officer] presiding as hearing officer. The hearing officer resolved the disputed issues by deciding that: (1) the [Date of Injury], compensable injury does not extend to reflex sympathetic dystrophy (RSD) of the left lower extremity and plantar fasciitis of the left ankle; (2) the [Date of Injury], compensable injury does extend to a left ankle strain, left foot sprain, an injury to the peroneus longus tendon of the left foot, and an injury to the posterior tibial nerve of the left ankle; (3) the respondent/cross-appellant (claimant) has not reached maximum medical improvement (MMI); (4) the claimant had not reached MMI so an impairment rating (IR) cannot be assigned; and (5) the claimant had disability during the period at issue only beginning on May 31, 2013, and continuing through September 16, 2013, and beginning on October 6, 2013, and continuing through the date of the CCH.

The appellant/cross-respondent (carrier) appealed the hearing officer's determinations that the compensable injury extended to a left ankle strain, left foot sprain, an injury to the peroneus longus tendon of the left foot, and an injury to the posterior tibial nerve of the left ankle contending that the claimant did not meet her burden of proof of establishing that the compensable injury extended to the claimed conditions. The carrier also disputed the hearing officer's determinations that the claimant was not at MMI and therefore could not be assigned an IR as well as the hearing officer's determination that the claimant had disability beginning on May 31, 2013, and continuing through September 16, 2013, and beginning on October 6, 2013, and continuing through the CCH. The claimant responded, urging affirmance of the determinations disputed by the carrier. The claimant also cross-appealed, disputing the hearing officer's determination that the [Date of Injury], compensable injury does not extend to RSD of the left lower extremity and plantar fasciitis of the left ankle. The appeal file does not contain a response from the carrier to the claimant's cross-appeal.

The hearing officer's determination that the claimant did not have disability from September 17 through October 5, 2013, was not appealed and has become final pursuant to Section 410.169.

DECISION

Affirmed in part and reversed and remanded in part.

The parties stipulated in part that on [Date of Injury], the claimant sustained a compensable injury at least in the form of a Lisfranc ligament sprain. The claimant testified she was assisting a resident out of the shower when the resident slipped and stepped on the claimant's left foot.

EXTENT OF INJURY

The hearing officer's determination that the [Date of Injury], compensable injury does not extend to RSD of the left lower extremity and plantar fasciitis of the left ankle is supported by sufficient evidence and is affirmed.

The hearing officer's determination that the [Date of Injury], compensable injury extends to a left ankle strain, left foot sprain, an injury to the peroneus longus tendon of the left foot and an injury to the posterior tibial nerve of the left ankle is supported by sufficient evidence and is affirmed.

DISABILITY

The hearing officer's determination that the claimant had disability during the period at issue only beginning on May 31, 2013, and continuing through September 16, 2013, and beginning on October 6, 2013, and continuing through the date of the CCH 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 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 that the claimant has not reached MMI and because the claimant has not reached MMI, an IR would be premature per the certification of (Dr. A), a doctor selected to act in place of the treating doctor. Dr. A based his certification that the claimant was not at MMI in part on RSD. In his narrative report dated January 27, 2014, Dr. A stated, "[a]t this point, the examinee has not reached MMI, therefore, my recommendation is for the examinee to undergo specialized physical therapy to the left foot to ensure the improvement of the weakness of the extensor hallucis and the [RSD]." Dr. A gave the following diagnoses in his narrative report: "[s]tatus post traumatic injury to the left foot by another human resting on her left foot. This examinee has weakness of the extensor hallucis and mild [RSD]." As previously noted, the hearing officer's determination that the [Date of Injury], compensable injury does not extend to RSD has been affirmed. Accordingly, the hearing officer's determination that the claimant is not at MMI and that an IR is premature is reversed.

There are three other certifications of MMI/IR in evidence. First, (Dr. C), the designated doctor examined the claimant on August 7, 2013, and certified that the claimant reached MMI on May 30, 2013, with a zero percent IR, using 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). Dr. C only listed a left foot sprain/strain of Lisfranc ligament as the compensable injury. The hearing officer correctly noted in her discussion of the evidence that Dr. C did not take into account all of the diagnoses determined to be part of the compensable injury. Accordingly, Dr. C's certification that the claimant reached MMI on May 30, 2013, with a zero percent IR cannot be adopted. See Appeals Panel Decision (APD) 130961, decided June 3, 2013.

Second, in evidence is a certification of MMI/IR from the carrier-selected required medical examination doctor, (Dr. M). Dr. M examined the claimant on April 24, 2014, and certified that the claimant reached MMI on May 30, 2013, with a zero percent IR. Dr. M initially assessed zero percent impairment considering only the sprain of the Lisfranc ligament. Dr. M did not consider a left ankle sprain, left foot sprain, an injury to the peroneus longus tendon of the left foot or an injury to the posterior tibial nerve of the left ankle. Dr. M did not consider the entire compensable injury and accordingly, his certification of MMI/IR cannot be adopted.

Third, in evidence is an alternative certification of MMI/IR from Dr. M. Based on the same examination date of April 24, 2014, Dr. M certified that the claimant reached MMI on May 30, 2013, with a zero percent IR considering the following conditions: sprain of the Lisfranc ligament, RSD of the left foot, left ankle sprain, an injury to the posterior tibial nerve and an injury to the peroneus longus tendon. The hearing officer's determination that the compensable injury does not extend to RSD has been affirmed. Dr. M considered and rated a condition that has been determined not to be part of the compensable injury. Accordingly, this certification from Dr. M cannot be adopted.

There are no other certifications of MMI/IR in evidence. Therefore, we 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 [Date of Injury], compensable injury does not extend to RSD of the left lower extremity and plantar fasciitis of the left ankle.

We affirm the hearing officer's determination that the [Date of Injury], compensable injury extends to a left ankle strain, left foot sprain, an injury to the peroneus longus tendon of the left foot and an injury to the posterior tibial nerve of the left ankle.

We affirm the hearing officer's determination that the claimant had disability during the period at issue only beginning on May 31, 2013, and continuing through September 16, 2013, and beginning on October 6, 2013, and continuing through the date of the CCH.

We reverse the hearing officer's determinations that the claimant has not reached MMI and because the claimant has not reached MMI, an IR would be premature and remand the issues of MMI and IR to the hearing officer for further action consistent with this decision.

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 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 a Lisfranc ligament sprain, a left ankle strain, left foot sprain, an injury to the peroneus longus tendon of the left foot, and an injury to the posterior tibial nerve of the left ankle. Further, the hearing officer is also to advise the designated doctor that the compensable injury does not extend to RSD of the left lower extremity and plantar fasciitis of the left ankle as administratively determined.

The certification of MMI should be 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 considering the physical examination and the claimant's medical records.

The assignment of an IR is required to be based on the claimant's condition as of the MMI date considering the medical records and the certifying examination and according to the rating criteria of the AMA Guides and the provisions of Rule 130.1(c)(3). The parties are to be provided with the designated doctor's new certification of MMI/IR. The parties are to be allowed an opportunity to respond. The hearing officer is to determine the issues of 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 **AMERICAN ZURICH 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 78701-3232.**

Margaret L. Turner
Appeals Judge

CONCUR:

Veronica L. Ruberto
Appeals Judge

Carisa Space-Beam
Appeals Judge