

APPEAL NO. 150024
FILED FEBRUARY 04, 2015

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 August 5, 2014, with the record closing on December 1, 2014, in Lufkin, Texas, with [hearing officer] presiding as hearing officer. The hearing officer resolved the disputed issues by deciding that: (1) the compensable injury of [Date of Injury], extends to a plantar nerve injury; (2) the compensable injury of [Date of Injury], does not extend to a right ankle deltoid ligament tear, right ankle post-traumatic myositis, complex regional pain syndrome (CRPS), right knee sprain/strain, or hemangioma within T12; (3) the date of maximum medical improvement (MMI) is May 18, 2013; and (4) the appellant's (claimant) impairment rating (IR) is 6%.

The claimant appealed the hearing officer's IR determination, as well as the hearing officer's determination regarding the extent of the compensable injury that was adverse to her, contending that those determinations are contrary to the preponderance of the evidence and so against the great weight of the evidence as to be clearly wrong or manifestly unjust. The respondent (carrier) responded, urging affirmance of the hearing officer's determinations.

The hearing officer's determinations that the compensable injury of [Date of Injury], extends to a plantar nerve injury and that the date of MMI is May 18, 2013, have not been appealed and have become final pursuant to Section 410.169.

DECISION

Affirmed in part and reversed and remanded in part.

The parties stipulated that on [Date of Injury], the claimant sustained compensable injuries of a right ankle sprain/strain and right ankle tenosynovitis, and that the claimant reached MMI on May 18, 2013, her statutory date of MMI, as certified by (Dr. T), the first designated doctor appointed by the Texas Department of Insurance, Division of Workers' Compensation (Division). The claimant testified that she twisted her right ankle when she stepped in a hole.

EXTENT OF INJURY

The hearing officer's determination that the compensable injury of [Date of Injury], does not extend to a right ankle deltoid ligament tear, right ankle post-traumatic

myositis, CRPS, right knee sprain/strain, or hemangioma within T12 is supported by sufficient evidence and is affirmed.

IR

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's IR is 6% as certified by (Dr. M), the second designated doctor appointed by the Division to determine the extent of the compensable injury.

The claimant argued on appeal that Dr. M's IR could not be adopted because Dr. M should not have been appointed to determine MMI and IR. The hearing officer found that the appointment of Dr. M, for the re-examination of the claimant, was with the most recently appointed designated doctor, and therefore a valid appointment. The hearing officer's finding is supported by sufficient evidence.

However, we note that there is no MMI/IR certification in evidence from Dr. M, or any other doctor, certifying that the claimant's IR is 6%. Accordingly, we reverse the hearing officer's determination that the claimant's IR is 6%. We note that Dr. M's MMI/IR certification contains errors that would prevent its adoption, as discussed below.

Dr. M examined the claimant on October 22, 2014, and in a Report of Medical Evaluation (DWC-69) certified that the claimant reached MMI statutorily on May 18, 2013, with a 10% 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. M noted in his attached narrative report that the compensable injury is a right ankle sprain/strain, right ankle tenosynovitis, and a plantar nerve injury. Dr. M assessed 4% impairment based on range of motion (ROM) measurements taken of the claimant's right ankle, and 6% impairment under Table 68 on page 3/89 of the AMA Guides, Table 11 on page 3/48 of the AMA Guides, and Table 12 on page 3/49 of the AMA Guides for a combined 10% IR.

Dr. M noted that under Table 68 on page 3/89 of the AMA Guides, the maximum percent whole person impairment (WPI) for a **sensory deficit** involving the medial plantar nerve is 2%, and the maximum percent WPI for a sensory deficit involving the lateral plantar nerve is 2%. Dr. M stated that according to Table 11 on page 3/48 of the AMA Guides, the claimant had a 75% sensory deficit in the right medial plantar nerve and a 75% sensory deficit in the right lateral plantar nerve.

Dr. M noted that under Table 68 on page 3/89 of the AMA Guides, the maximum percent WPI for a **motor deficit** involving the medial plantar nerve is 2%, and the maximum percent WPI for a motor deficit involving the lateral plantar nerve is 2%. Dr. M stated that according to Table 12 on page 3/49 of the AMA Guides, the claimant had a 75% motor deficit in the right medial plantar nerve and a 75% motor deficit in the right lateral plantar nerve.

Based on the above figures, Dr. M assessed a 3% WPI for the right medial plantar nerve injury, and a 3% WPI for the right lateral plantar nerve injury, which combines to a 6% WPI.

The AMA Guides provide on page 3/88 that all estimates listed in Table 68 are for complete motor or sensory loss for the named peripheral nerve. Dr. M modified the estimates for partial sensory deficit involving the medial and lateral plantar nerves as listed in Table 68 using Table 11. The specific provisions of the AMA Guides do not prohibit using Table 11 to rate the value of a partial sensory deficit using Table 68. See generally Appeals Panel Decision (APD) 122502, decided January 30, 2013.

However, the AMA Guides also state on page 3/88 that “[p]artial motor loss should be estimated on the basis of strength testing” under Section 3.2d on page 3/76. Dr. M found a partial motor deficit involving the medial and lateral plantar nerves, and used Table 68 and Table 12 to determine those nerves’ impairment. According to the AMA Guides, any impairment for a partial motor deficit should be estimated on the basis of strength testing under Section 3.2d rather than Table 68. Therefore, the 10% IR assessed by Dr. M was not made in accordance with the AMA Guides, and as such could not be adopted.

There are other MMI/IR certifications in evidence. Dr. T, the first designated doctor, examined the claimant on June 5, 2013, and certified that the claimant reached MMI statutorily on May 18, 2013, with a 4% IR. Dr. T also submitted an alternate DWC-69, certifying that the claimant reached MMI statutorily on May 18, 2013, with a 17% IR. As noted above, the hearing officer’s determination that the compensable injury of [Date of Injury], extends to a plantar nerve injury was not appealed and has become final. Dr. T did not discuss or rate a plantar nerve injury, and therefore did not consider and rate the entire compensable injury in either of his MMI/IR certifications. Furthermore, Dr. T

noted in his narrative report that the 17% IR was based in part on a diagnosis of chronic pain syndrome, a condition which has not been accepted as compensable nor was it actually litigated by the parties at the CCH. Accordingly, neither Dr. T's 4% nor his 17% IR can be adopted.

There are also MMI/IR certifications from Dr. T in evidence certifying that the claimant has not reached MMI. However, the parties stipulated that the claimant reached MMI on May 18, 2013, the statutory date of MMI. Accordingly, Dr. T's certifications that the claimant has not reached MMI cannot be adopted.

As there is no MMI/IR certification in evidence that can be adopted, we remand the issue of 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], does not extend to a right ankle deltoid ligament tear, right ankle post-traumatic myositis, CRPS, right knee sprain/strain, or hemangioma within T12.

We reverse the hearing officer's determination that the claimant's IR is 6%, and we remand the issue of IR to the hearing officer for further action consistent with this decision.

REMAND INSTRUCTIONS

Dr. M is the designated doctor in this case. On remand, the hearing officer is to determine whether Dr. M is still qualified and available to be the designated doctor. If Dr. M 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 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], extends to a right ankle sprain/strain, right ankle tenosynovitis, and a plantar nerve injury. The hearing officer is also to inform the designated doctor that the compensable injury of [Date of Injury], does not extend to a right ankle deltoid ligament tear, right ankle post-traumatic myositis, CRPS, right knee sprain/strain, or hemangioma within T12. The hearing officer is further to advise the designated doctor that the date of MMI in this case is May 18, 2013, as stipulated by the parties.

The hearing officer is to request the designated doctor to rate the entire compensable injury as of the May 18, 2013, date of MMI, in accordance with the AMA Guides considering the medical record and the certifying examination. The hearing

officer is to inform the designated doctor that partial motor loss should be estimated on the basis of strength testing under Section 3.2d on page 3/76, as provided by the AMA Guides, rather than Table 68 on page 3/88.

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 the 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 **INDEMNITY INSURANCE COMPANY OF NORTH AMERICA** and the name and address of its registered agent for service of process is

**CT CORPORATION SYSTEM
1999 BRYAN STREET, SUITE 900
DALLAS, TEXAS 75201-3136.**

Carisa Space-Beam
Appeals Judge

CONCUR:

Cristina Beceiro
Appeals Judge

Margaret L. Turner
Appeals Judge