APPEAL NO. 160846
FILED JUNE 29, 2016

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing was held on April 11, 2016, in Denton, 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), does not extend to complex regional pain syndrome (CRPS) of the right lower extremity, annular tear at L5-S1 and non-verifiable lumbar radiculopathy; (2) the appellant (claimant) reached maximum medical improvement (MMI) on January 9, 2015, as certified by (Dr. Y), the designated doctor appointed by the Texas Department of Insurance, Division of Workers' Compensation (Division); and (3) the claimant's impairment rating (IR) is 6% as assigned by Dr. Y.

The claimant appealed the hearing officer's determinations on all disputed issues arguing that the claimant has not reached MMI; that the designated doctor did not rate the entire compensable injury; and that the hearing officer's extent-of-injury determination is contrary to the preponderance of the evidence.

The respondent (carrier) responded, urging affirmance.

DECISION

Affirmed in part and reversed and remanded in part.

The parties stipulated that the carrier has accepted as compensable a right calcaneus and tibial fracture, laceration of the tibial artery and vein, and a lumbar strain/sprain. The claimant was injured on (date of injury), when he fell from a truck, sustaining injuries to his right ankle and low back.

EXTENT OF INJURY

The hearing officer's determination that the compensable injury of (date of injury), does not extend to CRPS of the right lower extremity, annular tear at L5-S1, and non-verifiable lumbar radiculopathy 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 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. Y conducted his examination on February 7, 2015, and certified that the claimant had reached MMI on January 9, 2015, the date the claimant completed physical therapy.

Dr. Y indicated that the claimant was entitled to a 5% IR for the right calcaneal fracture under Table 64 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) or an IR of 6% based upon range of motion (ROM) loss of the right ankle. Dr. Y stated that because ROM impairments could not be combined with Table 64 impairments, he determined to use the greater and assigned an IR of 6%. We note with respect to the lower extremities, the AMA Guides provide at page 3/84 that some impairment estimates are assigned more appropriately on the basis of a diagnosis than on the basis of findings on physical examination and that the physician, in general, should decide which estimate best describes the situation and should use only one approach for each anatomic part. The AMA Guides, however, go on to state at page 3/84 that there may be instances in which elements of both diagnostic and examination approaches will apply to a specific situation. We note further that in his narrative of February 7, 2015, Dr. Y states "[The claimant's] [ROM] on [January 9, 2015, MMI] was slightly better than today's measurement. For impairment purpose (sic) I will use today's measurement."

Dr. Y discusses neither an MMI date nor an IR for the compensable tibial fracture and laceration of the tibial artery and vein. Neither does he explain in his report that impairment for these compensable conditions is properly addressed under the AMA Guides by his assignment of an IR for right ankle ROM loss or that the correct MMI date for these conditions is January 9, 2015. Accordingly, we reverse the hearing officer's determinations that the claimant reached MMI on January 9, 2015, with an IR of 6%.

The only other certifications of MMI/IR in evidence are those of (Dr. T), a referral of the treating doctor, who examined the claimant on June 12, 2015, and again on December 16, 2015. On June 12, 2015, Dr. T certified that the claimant had not reached MMI because he believed the claimant's condition would improve with additional treatment. This certification cannot be adopted because Dr. T considered the claimant's symptoms of CRPS, a condition determined not to be part of the compensable injury. In his report of December 16, 2015, Dr. T certified that the claimant reached MMI on December 15, 2015, with a 14% IR derived from 4% impairment for right ankle ROM loss together with 10% impairment under lumbosacral DRE Category III. Given that lumbar radiculopathy is not part of the compensable injury, Dr. T's December 16, 2015, certification cannot be adopted.

Since there is no certification 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 affirm the hearing officer's determination that the compensable injury of (date of injury), does not extend to CRPS of the right lower extremity, annular tear at L5-S1, and non-verifiable lumbar radiculopathy.

We reverse the hearing officer's determinations that the claimant reached MMI on January 9, 2015, with an IR of 6% and remand the issues of MMI/IR to the hearing officer.

REMAND INSTRUCTIONS

Dr. Y is the designated doctor in this case. On remand, the hearing officer is to determine whether Dr. Y is still qualified and available to be the designated doctor. If Dr. Y is no longer qualified or is not available to serve as the designated doctor, then another designated doctor is to be appointed to determine the claimant's MMI/IR for the (date of injury), compensable injury.

The hearing officer is to instruct the designated doctor that that the compensable injury of (date of injury), extends to a right calcaneus and tibial fracture, laceration of the tibial artery and vein, and a lumbar strain/sprain. The hearing officer should request that the designated doctor give an opinion on MMI, (informing the designated doctor of the correct statutory date and that the MMI date can be no later than the statutory date) and IR of the entire compensable injury based on the claimant's condition as of the MMI date certified, considering the medical record and the certifying examination in accordance with Rule 130.1(c)(3) and the AMA Guides. The hearing officer should

point out to the designated doctor that, with respect to the lower extremities, the AMA Guides provide at page 3/84 that some impairment estimates are assigned more appropriately on the basis of a diagnosis than on the basis of findings on physical examination and that the physician, in general, should decide which estimate best describes the situation and should use only one approach for each anatomic part but that the AMA Guides further state at page 3/84 that there may be instances in which elements of both diagnostic and examination approaches will apply to a specific situation. The hearing officer should request that the parties stipulate to the date of statutory MMI applicable to this case, or if not, take evidence from the parties so the hearing officer can determine the correct date of statutory MMI.

The parties are to be provided with the designated doctor's new certification of MMI and assignment of IR and are to be allowed an opportunity to respond. The hearing officer is then to make a determination concerning MMI/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 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* Appeals Panel Decision 060721, decided June 12, 2006.

The true corporate name of the insurance carrier is **ZURICH AMERICAN 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.

K. Eugene Kraft
Appeals Judge

CONCUR:

Carisa Space-Beam
Appeals Judge

Margaret L. Turner
Appeals Judge