APPEAL NO. 101746
FILED JANUARY 24, 2011

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 October 4, 2010. With regard to the two disputed issues before her the hearing officer determined that the appellant (claimant) reached maximum medical improvement (MMI) as certified by (Dr. A), a designated doctor, on November 23, 2009, and that the claimant's impairment rating (IR) is zero percent.

The claimant appealed, contending that Dr. A's report had several technical deficiencies and that the report did not comply with either the Texas Department of Insurance, Division of Workers' Compensation (Division) rules or 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 respondent (carrier) responded, asserting that the claimant's appeal was not timely and otherwise urging affirmance of the hearing officer's decision.

DECISION

Reversed and rendered.

TIMELINESS OF THE CLAIMANT'S APPEAL

The carrier alleges that the claimant's appeal is untimely based on the deemed receipt rule, 28 TEX. ADMIN. CODE § 102.5 (Rule 102.5). However, records of the Division reflect that a copy of the hearing officer's decision and order was sent to the claimant's attorney at an address different than the one listed on the claimant's attorney's letterhead and the address listed by the claimant's attorney on the sign-in sheet at the CCH. As a result the date of receipt cannot be deemed, there is no evidence of actual receipt, and untimeliness of the appeal is not established. The 15-day period to file an appeal does not begin until both the claimant and the claimant's attorney are deemed to have received the decision and order. Frank v. Liberty Ins. Corp., 255 S.W.3d 314 (Tex. App.—Austin 2008, pet. denied). The claimant's appeal filed November 18, 2010, was therefore considered timely. We further note that Division records show the hearing officer's decision and order being mailed to a carrier other than the one listed on the corrected Insurance Carrier Information form.

MMI

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.

The parties stipulated that the claimant sustained a compensable injury on _____. Although the claimant testified, her testimony did not include the mechanism or extent of the injury. Dr. A, the designated doctor, appointed to determine MMI and IR, in his report dated November 23, 2009, recited that the claimant was an executive assistant and the:

> . . . employee indicated she fell off a ladder and injured her left ankle. She returned back at work, and tripped on carpet with crutches and subsequently injured her right ankle as well.

The carrier, in a Notice of Disputed Issue(s) and Refusal to Pay Benefits (PLN-11) dated March 23, 2009, accepted a "bilateral ankle sprain/strain and osteochondritis dissecans." In the treatment history Dr. A notes that the claimant "underwent surgery on 04-03-2009" by (Dr. M), the treating doctor who "performed arthroscopy of resection of joint pathology at the right ankle." Dr. A noted that the claimant had a normal gait and "[n]o swelling was noted at either ankle." Dr. A certified the claimant at MMI on November 23, 2009.

Sixteen days later on December 9, 2009, Dr. M performed surgery on the claimant's left ankle. The pre-operative diagnosis was "[c]apsulitis and synovitis with possible osteochrondritis, left ankle." The post-operative diagnosis was "[o]steochondral lesion, left ankle." The claimant testified that the surgery helped her ankle "a little bit" but she continued to have severe pain and repeated injections in her left ankle and that she is scheduled for a second surgery for her left ankle. Dr. M's notes support the claimant's testimony that she is scheduled for a second surgery for her left ankle. In a letter of clarification (LOC) dated April 8, 2010, the December 9, 2009, operative report and additional medical reports from Dr. M were sent to Dr. A. By letter dated April 12, 2010, Dr. A replied that he had reviewed his examination of the claimant and the submitted reports and had no changes or revisions to make on his original assessment. Dr. A stated his examination "revealed no abnormal findings at the time of [his] medical examination."

The claimant had left ankle surgery sixteen days after the designated doctor's examination and the designated doctor failed to comment on the surgery in response to the LOC which contained the December 9, 2009, operative report. The carrier argues that the surgery did not result in any further material recovery. In Appeals Panel Decision (APD) 012284, decided November 1, 2001, the Appeals Panel noted that MMI is defined 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." In that case, the Appeals Panel commented that the question was not whether the claimant actually recovered or improved during the period at issue, but whether, based upon reasonable medical probability, material recovery or

lasting improvement could reasonably be anticipated. In this case, some improvement was initially reported in the records but then increased complaints of pain was noted. In an office note dated January 27, 2010, Dr. M notes additional surgical intervention was discussed. In an office note dated March 10, 2010, Dr. M stated that the claimant is still not at MMI and surgical intervention was discussed. An office note dated September 29, 2010, stated a surgical procedure of ankle arthroscopy was "to be performed" and "informed consent was read and signed by the patient."

Dr. M is the treating doctor and he at length indicates that additional left ankle surgery is required and the claimant is not at MMI. As previously noted, the designated doctor, Dr. A, certified MMI on November 23, 2009, sixteen days prior to the December 9, 2009, left ankle surgery and when sent the operative report of that surgery and other medical reports, simply said he had no changes to make in his original assessment and that his examination revealed no abnormal findings.

In reviewing a "great weight" challenge, we must examine the entire record to determine if: (1) there is only "slight" evidence to support the finding; (2) the finding is so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust; or (3) the great weight and preponderance of the evidence supports its nonexistence. *See* Cain v. Bain, 709 S.W.2d 175 (Tex. 1986). We reverse the hearing officer's determination that the claimant reached MMI as certified by Dr. A on November 23, 2009, as being so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust. We render a new decision that the claimant had not reached MMI in accordance with Dr. M's reports.

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. 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.

Because we have reversed the hearing officer's determination that the claimant reached MMI on November 23, 2009, and rendered a new decision that the claimant is not at MMI, a determination regarding the claimant's IR is premature. MMI must be certified before an IR is assigned. *See* Section 408.123(a), Rule 130.1(b)(2) and APD 030091-s, decided March 5, 2003. We note here that using Dr. A's range of motion (ROM) measurements for the left ankle, a 20 degree inversion measurement in Table 43, page 5/78 of the AMA Guides warrants a one percent IR, which would be an abnormal finding although Dr. A assessed a zero percent impairment stating his examination revealed no abnormal findings. Dr. A, the designated doctor incorrectly applied his ROM measurements using the AMA Guides.

Accordingly, we reverse the hearing officer's determination that the claimant's IR is zero percent. We render a new decision that because the claimant is not at MMI, a determination of the claimant's IR is premature.

SUMMARY

The hearing officer's determination that the claimant reached MMI on November 23, 2009, with a zero percent IR is reversed and we render a new decision that the claimant is not at MMI and therefore a determination of an IR is premature.

The true corporate name of the insurance carrier is **FARMINGTON CASUALTY COMPANY** and the name and address of its registered agent for service of process is

CORPORATION SERVICE COMPANY
D/B/A CSC-LAWYERS INCORPORATING SERVICE COMPANY
211 EAST 7TH STREET, SUITE 620
AUSTIN, TEXAS 78701-3218.

_____
Thomas A. Knapp
Appeals Judge

CONCUR:

_____
Cynthia A. Brown
Appeals Judge

_____
Margaret L. Turner
Appeals Judge