APPEAL NO. 101902
FILED FEBRUARY 14, 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 November 2, 2010.

The hearing officer resolved the disputed issues before him by determining that the appellant (claimant) reached clinical maximum medical improvement (MMI) on July 18, 2008, with a one percent impairment rating (IR) as certified by the designated doctor, (Dr. K).

The claimant appealed the hearing officer's determinations on MMI and IR, contending that Dr. K's amended certification of MMI/IR was done without the re-examination of the claimant and therefore cannot be afforded presumptive weight or adopted by the hearing officer. The respondent (carrier) responded, urging affirmance.

DECISION

Reversed and remanded as reformed.

FACTUAL BACKGROUND

The parties stipulated that the claimant sustained a compensable injury on _____. The evidence reflects that the claimant was injured at work when a heavy filing cabinet fell on the claimant's left foot and ankle. In evidence is the medical report by (Dr. V), dated April 10, 2008, in which Dr. V, an orthopedic surgeon, diagnosed the claimant's work injury as left great toe distal phalanx fracture and left ankle sprain grade 3.

STIPULATION REFORMED

At the CCH, the hearing officer received the parties' stipulation as to the extent of the compensable injury of _____. The parties stipulated that the compensable injury involved a fractured great toe and ankle sprain on the left. We note that in the hearing officer's decision and order, Finding of Fact No. 1.D., incorrectly states that the compensable injury involved a fractured great toe and ankle sprain on the right. Accordingly, per the parties' stipulation, we reform Finding of Fact No. 1.D., to state that the compensable injury involved a fractured great toe and ankle sprain on the left.

MMI AND IR

Section 408.1225(c) provides that the report of the designated doctor has presumptive weight, and that 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 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 evidence reflects that Dr. K, the designated doctor appointed to determine MMI/IR, extent of injury and return to work, examined the claimant on October 2, 2008. Dr. K certified that the claimant reached MMI on that date with an IR of eight percent based on loss of function to the left great toe and abnormal range of motion (ROM) for the left ankle.

In evidence is the peer review report dated October 31, 2008, by (Dr. B), who disagreed with that portion of Dr. K's assigned impairment for the left ankle. In that report, Dr. B stated that in Dr. K's narrative report, Dr. K indicated that there was no ligamentous instability, no gait change, and normal left ankle muscle strength. Therefore, in Dr. B's opinion, there was no clinical basis for the left ankle impairment of seven percent assigned by Dr. K. Dr. B did not discuss Dr. K's assigned one percent impairment for the loss of function for the left great toe or the doctor's certified MMI date of October 2, 2008.

In evidence is a letter of clarification (LOC) dated December 1, 2008, sent by the Division to Dr. K. Attached to the LOC is Dr. B's peer review report and the carrier's letter requesting a LOC to which Dr. K would respond by identifying the basis for his assigned seven percent impairment for the left ankle sprain.

In a response dated December 10, 2008, without physically re-examining the claimant, Dr. K stated that after further review of the medical records and the comments from Dr. B that "I elect to modify my [IR] and certification of [MMI]." Dr. K further stated that "[d]ue to the normal left ankle [ROM] [as documented by (Dr. O) in his required medical examination (RME) report] on July 18, 2008, and the lack of any medical records to support active treatment beyond that date. I elect to change the date of [MMI] to July 18, 2008." Dr. K stated that he rescinded his previous IR of eight percent because the only positive findings in his October 2, 2008, examination were pain and tenderness which he did not consider permanent conditions. Dr. K further opined that the claimant only qualified for a one percent IR based on the ROM loss of the left great toe. Dr. K submitted to the Division an amended Report of Medical Evaluation (DWC-69). The date of certification on the DWC-69 is "12-10-08." Dr. K's amended certification of MMI is July 18, 2008, with an amended IR of one percent.

In Appeals Panel Decision (APD) 100766, decided August 16, 2010, the Appeals Panel reversed a hearing officer's MMI date determination based on a designated doctor's amended certification of MMI date. In that case, the designated doctor examined the claimant on May 11, 2009, and certified that the claimant reached MMI on

that date. Subsequently, without physically re-examining the claimant, the designated doctor twice amended his prior certification of MMI/IR. The Appeals Panel has held that an amended certification of MMI without a medical examination is a violation of Rule 130.1(b)(4)(B) which requires the certifying doctor to perform a complete medical examination of the injured employee for the explicit purpose of determining MMI. The Appeals Panel stated that the designated doctor's amended certifications of MMI could not be adopted because they were amended without an examination in violation of Rule 130.1(b)(4)(B) and that the only valid and adoptable certification from the designated doctor was the certification that the claimant reached MMI on May 11, 2009, with a zero percent IR. The Appeals Panel further stated that the report of the designated doctor has presumptive weight and that the hearing officer did not determine whether the designated doctor's certification of MMI as of the date of May 11, 2009, had presumptive weight. Rather the hearing officer adopted the post-designated doctor RME doctor's certification of MMI/IR. The hearing officer did not determine whether the preponderance of the evidence was contrary to the designated doctor's other certifications of MMI/IR prior to adopting the RME doctor's certification of MMI/IR. Therefore, we reversed the hearing officer's MMI date determination and remanded the MMI issue to the hearing officer.

Similarly, in the instant case, the hearing officer erred in giving presumptive weight to Dr. K's amended certification of MMI/IR because Dr. K did not physically re-examine the claimant for the explicit purpose of determining MMI and assigning an IR based on the injured employee's condition as of the MMI date before amending his certification of MMI/IR, thereby violating Rules 130.1(b)(4)(B) and 130.1(c)(3). Furthermore, the hearing officer erred in not determining whether Dr. K's original certification of MMI/IR has presumptive weight and whether the preponderance of the medical evidence is contrary to Dr. K's certification of MMI as of October 2, 2008, and assigned eight percent IR. Accordingly, we reverse the hearing officer's decision that the claimant reached clinical MMI on July 18, 2008, with a one percent IR and we remand the case to the hearing officer. *See* Section 408.1225(c).

REMAND INSTRUCTIONS

The hearing officer is to determine if Dr. K's original certification of MMI/IR that the claimant reached MMI on October 2, 2008, with an eight percent IR is supported by the evidence and can be adopted.

If the hearing officer determines that the aforementioned certification of MMI/IR is contrary to the preponderance of the medical evidence, then the hearing officer is to determine whether one of the other MMI/IR certifications in evidence can be adopted.

If the hearing officer determines that there are no other certifications of MMI/IR that are supported by the evidence and that can be adopted, the hearing officer is to determine whether Dr. K is still qualified and available to be the designated doctor, and if so, request that Dr. K provide a DWC-69 and narrative report certifying when the claimant reached MMI and the claimant's IR based on the claimant's current

compensable injury, which includes a fracture of the left great toe and left ankle sprain, and considering the medical record and certifying examination in accordance with this decision. The hearing officer is to provide the LOC and the designated doctor's response to the parties and allow the parties an opportunity to respond and then make a determination regarding the MMI date and the IR. If Dr. K is no longer qualified and available to serve as the designated doctor, then another designated doctor is to be appointed pursuant to Rule 126.7(h)[1] to determine the claimant's MMI date and IR.

SUMMARY

We reverse the hearing officer's determination that the claimant reached clinical MMI on July 18, 2008, with a one percent IR and remand the case to the hearing officer.

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.

[1] We note that the Division has adopted new rules concerning designated doctor scheduling and examinations effective February 1, 2011. The pertinent part of Rule 126.7(h) cited above is provided in the new Rule 127.5(d).

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
350 NORTH ST. PAUL STREET
DALLAS, TEXAS 75201.

_____
Cynthia A. Brown
Appeals Judge

CONCUR:

_____
Thomas A. Knapp
Appeals Judge

_____
Carisa Space-Beam
Appeals Judge