

APPEAL NO. 130399
FILED MARCH 26, 2013

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 January 9, 2013, in [City], Texas, with [hearing officer] presiding as hearing officer. The hearing officer resolved the disputed issues by deciding that: (1) the date of maximum medical improvement (MMI) is January 6, 2012; (2) the appellant's (claimant) impairment rating (IR) is five percent; and (3) the [date of injury], compensable injury does not extend to a left wrist sprain/strain.

The claimant appealed all of the hearing officer's determinations. The respondent (carrier) responded, urging affirmance.

DECISION

Affirmed in part and reversed and remanded in part.

The parties stipulated that the claimant sustained a compensable injury on [date of injury], that includes left lateral meniscus tear, left ankle anterior talofibular ligament (ATFL) sprain without instability, lumbar paraspinal soft tissue strain, and multiple contusions to both lower extremities, and that the Texas Department of Insurance, Division of Workers' Compensation (Division) appointed [Dr. L] as the designated doctor on the issues of MMI and IR. The claimant testified he was injured at work on [date of injury], when a refrigerator he was carrying down a flight of stairs fell on him, pushing against his knees.

EXTENT OF INJURY AND MMI

The hearing officer's determinations that the [date of injury], compensable injury does not extend to a left wrist sprain/strain, and that the date of MMI is January 6, 2012, are supported by sufficient evidence and are 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 reached MMI on January 6, 2012, with a five percent IR per Dr. L, the designated doctor appointed to determine MMI and IR.

Dr. L examined the claimant on April 11, 2012, and certified that the claimant reached clinical MMI on January 6, 2012, with a five percent IR. In his narrative report dated April 11, 2012, Dr. L noted that both the lumbar strain/sprain and multiple contusions had resolved with no impairment, and that the sprain and tear of the ATFL of the left ankle had resolved with no evidence of instability. Dr. L assigned a zero percent impairment for those conditions. Dr. L then turned to the left knee, and stated that he used Table 37, Impairments from Leg Muscle Atrophy, page 3/77 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) and assessed a five percent IR.

Dr. L based the five percent IR on findings of atrophy only in the left thigh on physical examination. Specifically, Dr. L noted right thigh and right calf measurements of 51 cm and 40 cm, respectively, and noted left thigh and left calf measurements of 47 cm and 38 cm, respectively. Thus, there were 4 cm of atrophy of the left thigh, and 2 cm atrophy of the left calf.

Table 37, page 3/77 of the AMA Guides provides that a difference in thigh circumference of 3 or more centimeters results in a five percent whole person (WP) impairment. Table 37 also provides that a difference in calf circumference of 2 to 2.9 cm results in a three to four percent WP impairment. In an example listed on page 3/76 for determining muscle atrophy under Table 37, the AMA Guides provide that 2 cm of thigh muscle atrophy and 1 cm of calf muscle atrophy resulted in a three percent WP thigh impairment and a one percent calf impairment under Table 37, which are then combined using the Combined Values Chart on page 322 to result in a four percent WP impairment.

Dr. L assessed the five percent impairment based only on leg muscle atrophy found in the left thigh. However, Dr. L noted he found atrophy in both the left thigh muscle and left calf muscle. Nowhere does Dr. L explain why he did not include a rating for the 2 cm of left calf muscle atrophy found in his examination. Therefore, we reverse the hearing officer's determination that the claimant's IR is five percent.

There is only one other certification of MMI and IR in evidence, which is from [Dr. J], the first designated doctor appointed in this case. Dr. J examined the claimant

on October 17, 2011, and determined that the claimant had not yet reached MMI but was expected to do so on January 17, 2012. Dr. J's certification of MMI and IR cannot be adopted because the hearing officer's determination that the claimant reached MMI on January 6, 2012, is supported by the evidence and has been affirmed.

Because there is no assessment of IR that can be adopted, we remand the IR issue 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 a left wrist sprain/strain.

We affirm the hearing officer's determination that the date of MMI is January 6, 2012.

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

REMAND INSTRUCTIONS

The designated doctor for IR is Dr. L. On remand the hearing officer is to determine if Dr. L is still qualified and available to serve as the designated doctor. If Dr. L is still qualified and available to serve as the designated doctor, the hearing officer is to request Dr. L to explain why his five percent IR for the claimant's left knee under Table 37, page 3/77 of the AMA Guides does not include any impairment for 2 cm of left calf muscle atrophy as found in his April 11, 2012, examination. The hearing officer is to then forward any explanation from Dr. L to the parties and allow the parties an opportunity to comment. The hearing officer is then to make a determination of IR that is supported by the evidence and is consistent with this decision.

If Dr. L is no longer qualified or available to serve as the designated doctor, another designated doctor is to be appointed to determine the IR for the compensable injury of [date of injury]. The hearing officer is to advise the designated doctor that the compensable injury of [date of injury], includes a stipulated left lateral meniscus tear, left ankle ATFL sprain without instability, lumbar paraspinal soft tissue strain, and multiple contusions to both lower extremities. Further, the hearing officer is to advise the designated doctor that the [date of injury], compensable injury does not extend to a left wrist sprain/strain.

The hearing officer is to request the designated doctor to rate the entire compensable injury based on the claimant's condition as of January 6, 2012, the claimant's date of MMI, in accordance with the AMA Guides considering the medical record and the certifying examination.

The designated doctor's report is to be made available to the parties and the parties are to be allowed an opportunity to comment. The hearing officer is then to make a determination of IR that is supported by the evidence and is 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 **ZENITH INSURANCE COMPANY** and the name and address of its registered agent for service of process is

JAMES H. MOODY, III
2001 BRYAN STREET, SUITE 1800
DALLAS, TEXAS 75201.

Carisa Space-Beam
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Margaret L. Turner
Appeals Judge