APPEAL NO. 132061
FILED OCTOBER 23, 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 July 31, 2013, in [City], 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 a complex regional pain syndrome/reflex sympathetic dystrophy (CRPS/RSD) of the right ankle; (2) the appellant (claimant) reached maximum medical improvement (MMI) on October 19, 2012; and (3) the claimant's impairment rating (IR) is one percent. The claimant appealed all of the hearing officer's determinations and requests that the referral doctor's certification of MMI of January 23, 2013, with a one percent IR be adopted. The respondent (carrier) responded, urging affirmance.

DECISION

Affirmed in part and reversed and remanded in part.

The parties stipulated that on [date of injury], the claimant sustained a compensable injury, and that [Dr. B] is the designated doctor appointed by the Texas Department of Insurance, Division of Workers' Compensation (Division) for MMI and IR. The claimant testified that he sustained right foot and ankle injuries when he fell five feet from a scaffold on [date of injury]. It is undisputed that the claimant sustained a right ankle fracture. In evidence is the carrier's Request for Designated Doctor Examination (DWC-32) dated September 27, 2012, which lists accepted compensable injury as "right ankle/foot contusion/sprain."

EXTENT OF INJURY

The hearing officer's determination that the compensable injury of [date of injury], does not extend to a CRPS/RSD of the right ankle 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. B, the designated doctor, examined the claimant on November 12, 2012. In a Report of Medical Evaluation (DWC-69) dated November 20, 2012, Dr. B certified that the claimant reached clinical MMI on October 19, 2012, with a one percent 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). In his narrative report dated November 12, 2012, Dr. B stated that:

According to the [Medical Disability Advisor, Workplace Guidelines for Disability Duration, excluding all sections and tables relating to rehabilitation published by the Reed Group, Ltd. (MDG)] for a nondisplaced fracture of the talus, for heavy workload, maximum duration of disability is 154 days, which is five months/four days past the injury, which would give him a [MMI] date of October 19, 2012.

Dr. B's certification that the claimant reached MMI on October 19, 2012, with a one percent IR cannot be adopted. The Appeals Panel has previously held that the MDG cannot be used alone, without considering the claimant's physical examination and medical records, in determining a claimant's date of MMI. *See* Appeals Panel Decision (APD) 130191, decided March 13, 2013, and APD 130187, decided March 18, 2013. In this case, Dr. B based his date of MMI solely on the MDG without considering the claimant's physical examination and medical records. Accordingly, we reverse the hearing officer's determination that the claimant reached MMI on October 19, 2012.

Given that the MMI determination is reversed, we must also reverse the hearing officer's IR determination because it was based on a date of MMI of October 19, 2012. The IR must be assessed as of the date of MMI. *See* Rule 130.1(c)(3). Because the MMI must be re-assessed, so must the IR. Accordingly, we reverse the hearing officer's determination that the claimant's IR is one percent.

There are two other certifications of MMI and IR in evidence, however neither one can be adopted. [Dr. N], the doctor selected by the treating doctor acting in place of the treating doctor, examined the claimant on March 27, 2013, and in a DWC-69

dated March 29, 2013, certified that the claimant reached MMI on January 23, 2013, with a one percent IR.

In his narrative report, Dr. N gave the following measurements for range of motion (ROM) of the right ankle and hindfoot: ankle dorsiflexion 20 degrees; ankle plantar flexion 20 degrees; hindfoot inversion 25 degrees, and hindfoot eversion 10 degrees. For loss of ROM of the right hindfoot, Dr. B correctly assigned a one percent whole person impairment using Table 43 on page 3/78 of the AMA Guides. However, for loss of ROM of the right ankle, Dr. B incorrectly assigned a zero percent impairment. Using Table 42 on page 3/78 of the AMA Guides, Dr. B correctly assigned a zero percent impairment for 20 degrees in dorsiflexion, though he incorrectly assigned a zero percent impairment for 20 degrees in plantar flexion. According to Table 42, 20 degrees in plantar flexion would result in a three percent whole person impairment, not a zero percent impairment. Therefore, an impairment for the right ankle was not done in accordance with the AMA Guides. Dr. N's certification of MMI and IR cannot be adopted.

[Dr. L], the treating doctor, examined the claimant on April 15, 2013, and he certified that the claimant reached MMI on April 15, 2013, and that the claimant did not have any permanent impairment as a result of the compensable injury. Dr. L's narrative report dated April 15, 2013, does not explain why he placed the claimant at MMI on April 15, 2013.

Since there are no other certifications of MMI and IR 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 a CRPS/RSD of the right ankle.

We reverse the hearing officer's determinations that the claimant reached MMI on October 19, 2012, with a one percent IR, and we remand the issues of MMI and IR to the hearing officer for further action consistent with this decision.

REMAND INSTRUCTIONS

Dr. B is the designated doctor in this case. On remand, the hearing officer is to determine whether Dr. B is still qualified and available to be the designated doctor. If Dr. B 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 MMI and IR for the [date of injury], compensable injury.

The hearing officer is to request a stipulation from the parties as to what conditions are included in the compensable injury. After the stipulation to the compensable injury, the hearing officer is to advise the designated doctor what conditions are included in the compensable injury of [date of injury]. The hearing officer is also to advise the designated doctor that the [date of injury], compensable injury does not include CRPS/RSD. The hearing officer is to request the designated doctor to give an opinion on the claimant's MMI and rate the entire compensable injury in accordance with the AMA Guides considering the medical record and the certifying examination. The hearing officer is to advise the designated doctor to explain how he arrived at his date of MMI, and that the date of MMI cannot be based solely on the MDG.

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 MMI and 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 **TEXAS MUTUAL INSURANCE COMPANY** and the name and address of its registered agent for service of process is

RICHARD GERGASKO, PRESIDENT
6210 EAST HIGHWAY 290
AUSTIN, TEXAS 78723.

Veronica L. Ruberto
Appeals Judge

CONCUR:

Carisa Space-Beam
Appeals Judge

Margaret L. Turner
Appeals Judge