APPEAL NO. 142008
FILED NOVEMBER 5, 2014

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 August 21, 2014, in El Paso, 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 extend to a medial malleolar fracture and Charcot arthropathy of the left ankle; (2) the respondent (claimant) has not reached maximum medical improvement (MMI), and therefore, an impairment rating (IR) is premature; and (3) the first certification of MMI and assigned IR from (Dr. S) on September 11, 2013, did not become final under Section 408.123 and 28 TEX. ADMIN. CODE § 130.12 (Rule 130.12).

The appellant (carrier) appealed the hearing officer's extent of injury, MMI, IR, and finality determinations based on sufficiency of the evidence grounds. The claimant responded, urging affirmance.

DECISION

Affirmed in part and reversed and remanded in part.

The parties stipulated that: (1) on [Date of Injury], the claimant sustained a compensable injury; (2) the treating physician certified that the claimant reached MMI on September 11, 2013, with no impairment; and (3) on September 20, 2013, the claimant received the narrative report and Report of Medical Evaluation (DWC-69) issued by the treating physician. It is undisputed that the carrier has accepted as compensable a left ankle sprain/strain injury.

EXTENT OF INJURY

The hearing officer's determination that the compensable injury sustained on [Date of Injury], does extend to a medial malleolar fracture and Charcot arthropathy of the left ankle is supported by sufficient evidence and is affirmed.

FINALITY

The hearing officer's determination that the first certification of MMI and assigned IR from Dr. S on September 11, 2013, did not become final under Section 408.13 and Rule 130.12 is supported by sufficient evidence and is affirmed.

MMI AND 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 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 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.

The only certification of MMI/IR in evidence was from Dr. S, the treating doctor. Dr. S examined the claimant on September 11, 2013, and certified that the claimant reached MMI on September 11, 2013, with no impairment. Dr. S's certification cannot be adopted because it does not rate the medial malleolar fracture and Charcot arthropathy of the left ankle. The hearing officer made a finding of fact that Dr. S's certification of MMI/IR is not supported by the preponderance of the evidence. That finding of fact is supported by sufficient evidence.

In this case there was no other certification of MMI and IR for the hearing officer to adopt. The hearing officer determined that the claimant had not reached MMI, and therefore, an IR for the compensable injury is premature. The hearing officer states in the Discussion portion of her decision that the "[c]laimant testified that he continues to wear a boot and is limited in his activities. The evidence established that further material recovery from or lasting improvement to the compensable injury could reasonably be anticipated subsequent to the September 11, 2013 certification of [MMI] by the initial treating physician."

In Appeals Panel Decision (APD) 111393, decided November 23, 2011, the Appeals Panel held that a hearing officer can determine that the claimant is not at MMI in the absence of a Report of Medical Evaluation (DWC-69) when the only DWC-69 in evidence certifying a date specific for MMI is contrary to the preponderance of the other medical evidence. However, in APD 111393 there was correspondence from the claimant's treating doctor which stated that the claimant still has not reached MMI, and

a medical report from the referral doctor which stated that the claimant is not at MMI. We distinguish APD 111393 from the case before us, in that there is no medical report from any doctor that states that the claimant has not reached MMI.

Furthermore, we note that there is no evidence that a designated doctor was appointed to opine on the disputed issues of MMI and IR. In APD 020385, decided March 18, 2002, the Appeals Panel stated that "[u]nder the provisions of Section 408.125, no determination can be made regarding the claimant's IR because there is no report from a designated doctor." Given that there is no medical report from a doctor that opines that the claimant is not at MMI, and a designated doctor has not been appointed to opine on the issues of MMI and IR, we reverse the hearing officer's MMI and IR determinations. Accordingly, we reverse the hearing officer's determination that the claimant has not reached MMI, and therefore, an IR for the compensable injury is premature and 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 sustained on [Date of Injury], does extend to a medial malleolar fracture and Charcot arthropathy of the left ankle.

We affirm the hearing officer's determination that the first certification of MMI and assigned IR from Dr. S on September 11, 2013, did not become final under Section 408.13 and Rule 130.12.

We reverse the hearing officer's determination that the claimant has not reached MMI and therefore, an IR for the compensable injury is premature and we remand the issues of MMI and IR to the hearing officer for further action consistent with this decision.

REMAND INSTRUCTIONS

On remand, the hearing officer is to determine whether a designated doctor has been appointed to determine MMI and IR. If a designated doctor has not been appointed, then the hearing officer is to appoint a designated doctor to determine whether the claimant reached MMI, and if so, assign the claimant's 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], extends to: (1) left ankle sprain/strain; (2) medial malleolar fracture of the left ankle; and (3) Charcot arthropathy of the left ankle.

The hearing officer is then to request that the designated doctor determine whether the claimant reached MMI, and if so, assign an IR for the claimant's compensable injury of [Date of Injury], based on the claimant's condition as of the MMI date, considering the claimant's medical record and the certifying examination in accordance with Rule 130.1(c)(3).

The parties are to be provided with the hearing officer's letter to the designated doctor and the designated doctor's response. The parties are to be allowed an opportunity to respond. The hearing officer is then to make a determination on MMI and IR supported by the evidence and 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 **NEW HAMPSHIRE 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.

Veronica L. Ruberto
Appeals Judge

CONCUR:

Carisa Space-Beam
Appeals Judge

Margaret L. Turner
Appeals Judge