

APPEAL NO. 150613
MAY 19, 2015

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 February 19, 2015, in Austin, 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], extends to right ankle lateral malleolus and metaphyseal fracture with bony contusion of the bone marrow on the right ankle, distal fibular fracture, avulsion fracture of fibular tip, complete tear of the anterior talofibular ligament (ATFL) and tear of the calcaneofibular ligament (CFL) with right ankle instability, lateral ankle ligament rupture, tenosynovitis, depression, and right ankle sprain; (2) the compensable injury of [date of injury], does not extend to depression¹ and pain disorder with psychological factors; (3) the first certification of maximum medical improvement (MMI) and assigned impairment rating (IR) from designated doctor (Dr. T) on March 1, 2013, did not become final under Section 408.123 and 28 TEX. ADMIN. CODE § 130.12 (Rule 130.12); (4) the respondent (claimant) had disability from December 14, 2012, to October 15, 2013, resulting from an injury sustained on [date of injury]; (5) the date of MMI is October 15, 2013; and (6) the claimant's IR is seven percent.

The appellant (carrier) appealed, arguing that the hearing officer's decision and order is against the great weight and preponderance of the evidence and is manifestly unjust. The carrier contends the hearing officer's determination that the first certification of MMI and assigned IR from Dr. T on March 1, 2013, did not become final is not supported by the evidence. The carrier also notes that the hearing officer's findings of fact and conclusions of law regarding the extent issue involving depression and pain disorder with psychological factors are conflicting. The carrier also argued that the disability determination and the extent-of-injury determination in the claimant's favor was against the great weight and preponderance of the evidence. The claimant responded, urging affirmance of the disputed determinations.

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 the carrier has accepted as compensable a right ankle lateral malleolus fracture and ATFL; and the date of statutory MMI is October 15, 2013. The claimant testified he was loading his truck and when he stepped down, his foot got caught on the

¹ We note there is a discrepancy in the hearing officer's determination of depression and pain disorder with psychological factors which will be discussed below.

bumper and pulled him down on top of it. The medical records reflect that the claimant had surgery to his ankle on February 7, 2012 (open reduction and internal fixation); June 28, 2012 (hardware removal); and June 23, 2014 (arthroscopic synovectomy, removal of retained hardware, and primary repair of the lateral collateral ankle ligament).

DISABILITY

The hearing officer's determination that the claimant had disability from December 14, 2012, to October 15, 2013 (the disability period in dispute) resulting from an injury sustained on [date of injury], is supported by sufficient evidence and is affirmed.

EXTENT OF INJURY

That portion of the hearing officer's determination that the compensable injury of [date of injury], extends to right ankle lateral malleolus and metaphyseal fracture with bony contusion of the bone marrow on the right ankle, distal fibular fracture, avulsion fracture of fibular tip, complete tear of the ATFL and tear of the CFL with right ankle instability, lateral ankle ligament rupture, tenosynovitis and right ankle sprain is supported by the evidence and is affirmed.

The hearing officer in Finding of Fact No. 4 found in part that the compensable injury of [date of injury], extends to depression and pain disorder with psychological factors. However, in Finding of Fact No. 5, the hearing officer in part found that the compensable injury of [date of injury], does not extend to depression and pain disorder with psychological factors. Similarly in Conclusion of Law Nos. 3 and 4 and the decision, the hearing officer made conflicting determinations regarding depression.

Accordingly, we reverse the hearing officer's decision concerning the conditions of depression and pain disorder with psychological factors and remand that portion of the extent-of-injury issue regarding depression and pain disorder with psychological factors to the hearing officer for further action consistent with this decision.

SECTION 408.123 AND RULE 130.12 FINALITY

Section 408.123(e) provides that "[e]xcept as otherwise provided by this section, an employee's first valid certification of [MMI] and first valid assignment of an [IR] is final if the certification or assignment is not disputed before the 91st day after the date written notification of the certification or assignment is provided to the employee and the carrier by verifiable means." Section 408.123(f) provides in pertinent part that an employee's first certification of MMI or assignment of an IR may be disputed after the

period described by Subsection (e) if compelling medical evidence exists of improper or inadequate treatment of the injury before the date of the certification or assignment which would render the certification or assignment invalid.

The hearing officer's finding that the claimant did not dispute Dr. T's IR within 90 days after the date the rating was provided was not appealed. The hearing officer found that compelling medical evidence exists of improper or inadequate treatment of the injury before the date of the certification or assignment that would render the certification or assignment invalid.

Dr. T, the Texas Department of Insurance, Division of Workers' Compensation (Division)-appointed designated doctor, examined the claimant on March 1, 2013. Dr. T certified on March 1, 2013, that the claimant reached MMI on December 14, 2012, and assigned a four 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). The four percent IR was based on loss of range of motion of the right ankle.

In her discussion, the hearing officer stated the following: "[a]lthough two surgeries were performed, given that [the] [c]laimant was no better off as a result, and was sent to pain management with a diagnosis of possible [complex regional pain syndrome], the treatment appears to have been inadequate. To have [the] [c]laimant's condition improve so dramatically following a surgery performed by a second doctor is compelling evidence that the treatment was, at the very least, inadequate."

Just because there is subsequent surgery or treatment which proves beneficial to the claimant does not automatically amount to inadequate treatment. Appeals Panel Decision (APD) 052666-s, decided February 1, 2006. Further, just because a surgery did not result in the best, or hoped for, outcome does not mean that it is automatically, in and of itself, inadequate or improper. APD 050378, decided April 19, 2005. The hearing officer decided that the claimant received improper or inadequate treatment because the claimant's condition improved dramatically following a surgery performed by a second doctor. Because the hearing officer used the wrong standard to determine finality we reverse the hearing officer's determination that the first certification of MMI and assigned IR from Dr. T on March 1, 2013, did not become final under Section 408.123 and Rule 130.12 and remand this issue to the hearing officer for further action consistent with this decision.

We note that in a medical narrative dated September 12, 2014, (Dr. W) stated: "[i]f the [extent of injury] now extends to include the ligament injury, then [the claimant] was not afforded the appropriate treatment that within reasonable medical probability, would have been anticipated to have resulted in further material recovery. This included

additional imaging and a subsequent reconstructive surgery. He has not yet been afforded [Official Disability Guidelines-Treatment in Workers' Compensation published by Work Loss Data Institute] recommended physical therapy. When [the claimant] was afforded some of the appropriate care after this statutory MMI date, his function improved. In all medical probability, the severe pain with weight bearing at the lateral ankle was due to scar tissue impingement and/or loose bodies. This is evident by the fact that once it was removed, [the claimant] was able to ambulate without an assistive device with a more normal pattern." See APD 111393, decided November 23, 2011.

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. 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 and remanded a portion of the extent-of-injury issue and the finality issue, we also reverse the hearing officer's determination that the claimant reached MMI on October 15, 2013, with an IR of seven percent.

SUMMARY

We affirm the hearing officer's determination that the claimant had disability from December 14, 2012, to October 15, 2013.

We affirm that portion of the hearing officer's determination that the compensable injury of [date of injury], extends to right ankle lateral malleolus and metaphyseal fracture with bony contusion of the bone marrow on the right ankle, distal fibular fracture avulsion fracture of fibular tip, complete tear of the ATFL and tear of the CFL with right ankle instability, lateral ankle ligament rupture, tenosynovitis and right ankle sprain.

We reverse that portion of the hearing officer's extent-of-injury determination concerning depression and pain disorder with psychological factors and remand the extent-of-injury issue regarding depression and pain disorder with psychological factors to the hearing officer.

We reverse the hearing officer's determination that the first certification of MMI and assigned IR from designated doctor, Dr. T on March 1, 2013, did not become final under Section 408.123 and Rule 130.12 and remand the finality issue to the hearing officer.

We reverse the hearing officer's determination that the claimant's date of MMI is October 15, 2013, and the claimant's IR is seven percent and remand the issues of MMI and IR to the hearing officer.

REMAND INSTRUCTIONS

On remand the hearing officer is to make a determination of whether the compensable injury of [date of injury], extends to depression and/or pain disorder with psychological factors based on the evidence in the record.

The hearing officer is to then make a determination of whether the first certification of MMI and assigned IR from designated doctor, Dr. T, on March 1, 2013, became final based on whether there is compelling medical evidence to establish any prior improper or inadequate treatment of the injury before the date of the first certification.

After the hearing officer has made a determination regarding whether the compensable injury extends to depression and/or pain disorder with psychological factors and finality of the first certification, the hearing officer is then to make a determination of the claimant's MMI and IR for the compensable injury sustained on [date of injury].

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 **INDEMNITY INSURANCE COMPANY OF NORTH AMERICA** and the name and address of its registered agent for service of process is

**CT CORPORATION SYSTEM
1999 BRYAN STREET, SUITE 900
DALLAS, TEXAS 75201-3136.**

Margaret L. Turner
Appeals Judge

CONCUR:

Veronica L. Ruberto
Appeals Judge

Carisa Space-Beam
Appeals Judge