APPEAL NO. 200017
FILED MARCH 6, 2020

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 8, 2018, with the record closing on November 25, 2019, in (city), Texas, with (administrative law judge) as the administrative law judge (ALJ). The ALJ resolved the disputed issues by deciding that: (1) the respondent (claimant) reached maximum medical improvement (MMI) on March 9, 2018; and (2) the claimant's impairment rating (IR) is 39%.

The appellant (carrier) appealed the ALJ's determinations regarding MMI and IR. The carrier further argued that the ALJ abused her discretion by appointing a second designated doctor and by the specific instructions in numerous, unwarranted letters of clarification (LOC) to the designated doctors. There was no response from the claimant to the carrier's appeal in the file.

DECISION

Reversed and rendered.

FACTUAL SUMMARY

The parties stipulated, in part, that the compensable injury of (date of injury), extends to third degree burns of the bilateral feet and that on November 17, 2017,(Dr. L) was properly certified to perform IR evaluations in accordance with 28 TEX. ADMIN. CODE § Rule 130.1 (Rule 130.1). The claimant worked for an asphalt company and on (date of injury), he was preparing to clean out a 35,000 gallon tank filled with ground-up rubber and asphalt. The tank contained heating pipes that reach temperatures up to 350-400°F, and the claimant was unaware that these were functioning at the time the injury occurred. The claimant fell through the asphalt and became stuck inside the tank with his boots on top of the heating pipes for half an hour before he was removed. The claimant's burns ultimately required surgery with skin grafting on October 19, 2016.

Dr. L initially examined the claimant on April 21, 2017, as designated doctor for the purpose of determining MMI and IR. Dr. L considered the diagnoses of: third degree tar/asphalt burns, plantar aspect both feet, left more involved; status post split thickness skin grafts to both feet; and approximately 20% skin graft bilateral heels. Dr. L determined that the claimant was not at MMI because he needed physical therapy as he continued to heal and that his rate of recovery was slowed by his age and diabetes.

Dr. L examined the claimant a second time on November 17, 2017, and certified that the claimant reached MMI on August 29, 2017, with a 9% IR. Dr. L explained in his narrative report that the claimant reached MMI on August 29, 2017, because he had completed physical therapy on that date and was independent with a home exercise program. He further noted that the claimant was still having issues with drainage from the wound, but this was due to his uncontrolled diabetes and not a result of his work-related injury. 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), Dr. L placed the claimant in Class 1 of Table 2: Impairment Classes and Percents for Skin Disorders on page 280 and assigned a 9% IR. Under Table 2, the AMA Guides state, "[t]he impact of the skin disorder on daily activities should be the primary consideration in determining the class of impairment. The frequency and intensity of signs and symptoms and the frequency and complexity of medical treatment should guide the selection of an appropriate impairment percentage and estimate within any class." Class 1 applies when there is no limitation or limitation in the performance of few activities of daily living.

The ALJ sent Dr. L a letter of clarification (LOC 1) on December 4, 2018, asking him to clarify his placement of the claimant in Class 1 of Table 2 given the discussion in his report of the claimant's slow shuffling gait in diabetic shoes and the fact that he bears weight only on his toes when his shoes are removed. Dr. L responded to LOC 1 on December 7, 2018, and explained that the claimant has significant diabetic peripheral neuropathy which limits his weightbearing tolerance and that the work-related injury is not responsible for his ongoing symptoms.

The ALJ sent Dr. L a second letter of clarification (LOC 2) on January 15, 2019, again asking how the claimant's compensable burns did not aggravate his weightbearing tolerance given the claimant was able to work without restrictions prior to the injury with diabetes. Additionally, the ALJ questioned whether the skin graft donor sites were rated as part of the compensable injury. Dr. L responded on January 21, 2019, stating that the claimant's wound healing was significantly impaired by his diabetes and advanced age. He again explained that the claimant's shuffling gait had been documented in previous records and was not related to his work injuries. He further stated that the skin grafts were successful and healed without issues and that the present right foot ulcer was more consistent with a diabetic foot ulcer. He also noted that the claimant's diabetes appears to have worsened with time and noncompliance. He selected Class 1 in Table 2 in this case because no treatment is required related to the burns; however, Dr. L then amended his rating by assigning a 9% impairment to each foot for a total of 17% IR.

On February 6, 2019, the ALJ issued a Presiding Officer's Directive to Order Designated Doctor Exam in order to appoint a new designated doctor for the purposes of evaluating MMI and IR. (Dr. A) was subsequently appointed and examined the claimant on April 27, 2019. Dr. A also certified that the claimant reached MMI on August 29, 2017, with a 9% IR. He explained that he agreed with Dr. L that by that date the claimant had completed physical therapy and belonged in Class 1 of Table 2 on page 280 of the AMA Guides.

The ALJ sent Dr. A a letter of clarification (LOC 3) on May 20, 2019. The ALJ instructed Dr. A that the date of MMI should not take into consideration any underlying conditions that would affect the healing time of the compensable injury. She also informed him that the claimant underwent debridement procedures of his feet for diabetic heel ulcers on November 20, 2017, and December 28, 2017. The ALJ asked Dr. A if there was a reasonable expectation that the compensable injury would improve after the debridement surgeries. Regarding IR, the ALJ informed Dr. A that the AMA Guides provide that impairment can be assigned for range of motion (ROM) and nerve deficits that result from the burns that can be combined with the skin impairment. The ALJ asked if the skin grafts resulted in ROM deficits. Additionally, the ALJ informed Dr. A that impairment can also be assigned under Table 67: Impairments for Skin Loss on page 88 of the AMA Guides and directed Dr. A to include an impairment in consideration of this table.

On June 7, 2019, Dr. A responded to LOC 3 and amended the MMI date to June 28, 2018, because that is a date six months following the second debridement surgery for diabetic heel ulcers. Regarding the IR, Dr. A stated that there is no indication in the records of complications causing diminished ROM or nerve deficits. Regarding Table 67 on page 88 of the AMA Guides for skin loss impairment under "heel covering that limits standing and walking time," Dr. A stated that given his physical exam this was not an issue and does not contribute to further impairment.

The ALJ sent Dr. A another letter of clarification (LOC 4) on June 26, 2019, and asked Dr. A to clarify the MMI date in light of a medical record from (Dr. B) dated March 9, 2018. In this report, Dr. B stated that the claimant was following up after the excisional debridements of bilateral heel diabetic ulcers. Dr. B concluded that both the left and right heels were healed and no further visits at the wound center were needed. Regarding the IR, the ALJ informed Dr. A that (Dr. O) examined the claimant on September 28, 2018, and did find ROM deficits and to clarify his opinion that the claimant did not have ROM deficits in light of Dr. O's exam. The ALJ directed Dr. A to provide an IR that includes an impairment based on Dr. O's September 28, 2018, ROM measurements if he does not think the claimant has ROM deficits. The ALJ also requested further clarification on Dr. A's choice of Class 1 of Table 2 "given that

standing is a basic position for walking, dressing and others [sic]" and the claimant stated that standing makes his pain worse. Additionally, the ALJ pointed out that the claimant has a prescription for the medication gabapentin, and therefore, "[the claimant] has at least intermittent treatment for his compensable injury." The ALJ then directed Dr. A to provide an IR that places the claimant in Class 2 of Table 2. Regarding Table 67 for skin loss, the ALJ again asks Dr. A to clarify why he believes it is not an issue and that the claimant had skin loss on both heels in addition to skin loss on the plantar surface. The ALJ then directed Dr. A to provide an IR that includes an impairment under Table 67 for skin loss. The ALJ concluded LOC 4 by stating:

> In summary, please provide two clarifications [sic], one certification of MMI and IR based upon your understanding of the AMA Guides, 4th edition. And, one certification of MMI and IR that places [the claimant] in Class 2 (and assigns an IR) of Table 2, page 280, and assigns an IR for Skin Loss, as provided for by Table 67, page 88, and assigns an IR based upon a ROM deficit for the left and right ankles, as measured by Dr. [O].

Dr. A responded to LOC 4 on July 5, 2019, by changing the MMI date to March 9, 2018, in accordance with Dr. B's medical report of that date. Dr. A stated based on his training and experience that he is well aware of normal ROM, which the claimant had upon his exam, and could not give an opinion on Dr. O's exam. He further explained his placement of the claimant in Class 1 of Table 2, stating that certain activities of daily living require more standing and other activities can be done from a sitting position, which improves the claimant's pain. Regarding the claimant's use of gabapentin, Dr. A explained that this medication is used for neuropathic pain and that given the claimant's history of diabetic neuropathic pain, he cannot definitely say that it is treatment for the heel injury. He again stated that the skin grafts were appropriately healed and the claimant has a history of poorly controlled diabetes and neuropathic pain. He further wrote that given the claimant's pain pattern does not follow any dermatomal pattern, Dr. A concluded that the standing issues do not result in additional impairment. However, Dr. A complied with the ALJ's request and provided two certifications of MMI/IR, both with an MMI date of March 9, 2018. The first certification assigned a 9% IR, unchanged from his previous one. The second certification placed the claimant in Class 2 of Table 2, included a rating for skin loss per Table 67, and impairment for ROM based on Dr. O's measurements as instructed by the ALJ, which resulted in a 32% IR.

The ALJ sent Dr. A another letter of clarification (LOC 5) on September 6, 2019, seeking clarification of Dr. A's assignment of 5% impairment for skin loss under Table 67. The ALJ informed Dr. A that Table 67 provides for a 10% impairment for each foot for the heels. Additionally, the ALJ asked Dr. A to explain if there should be additional impairment assigned for skin loss to the plantar surface. Dr. A responded on

September 26, 2019, and amended his alternate certification to a 38% IR in order to include a 10% IR under Table 67 for each heel. He additionally explained the skin loss and scarring were limited to the heels, so no additional impairment for the plantar surface was appropriate.

The ALJ sent Dr. A another letter of clarification (LOC 6) on November 6, 2019, informing him that under Class 2 of Table 2, the required impairment range is from 10%-24% and it appeared that Dr. A assigned a 9%. Dr. A responded on November 11, 2019, and acknowledged he incorrectly calculated the impairment under Table 2. He amended the impairment to 10% under Class 2 of Table 2, resulting in a total IR of 39%, which was ultimately adopted by the ALJ.

ABUSE OF DISCRETION

An abuse of discretion is the standard to use in reviewing a decision to appoint a second designated doctor. Appeals Panel Decision (APD) 960454, decided April 17, 1996. An abuse of discretion occurs when a decision is made without reference to any guiding rules or principles. *See Morrow v. H.E.B., Inc*., 714 S.W.2d 297 (Tex. 1986); *See also* APD 931034, decided December 27, 1993. In APD 011607, decided August 28, 2001, the Appeals Panel held that normally the appointment of a second designated doctor is appropriate only in those cases where the first designated doctor is unable or unwilling to comply with the required AMA Guides or requests from the Commission (now Texas Department of Insurance, Division of Workers' Compensation (Division)) for clarification, or if he or she otherwise compromises the impartiality demanded of the designated doctor. If a designated doctor cannot or refuses to comply with the requirements of the 1989 Act, a second designated doctor may be appointed. *See* APD 961436, decided September 5, 1996. *See also* APD 050649, decided May 3, 2005.

In the instant case, Dr. L had been properly appointed as the designated doctor to determine MMI and IR. After certifying the claimant at MMI with a 9% IR, Dr. L responded to the ALJ's LOC 1 and provided the requested clarification explaining why the claimant belonged in Class 1 of Table 2. Dr. L again responded to the ALJ's LOC 2 in which she repeated her concern regarding the claimant's placement in Class 1 as well as inquiring about any impairment for the skin graft donor sites. Following that response, the ALJ issued an order to appoint a new designated doctor for the purpose of MMI and IR in the case. There is no indication that Dr. L was unable or unwilling to comply with the required AMA Guides or requests for clarification or that his impartiality was compromised. As such, we hold that the ALJ abused her discretion in appointing a second designated doctor for MMI and IR in this case.

Pursuant to Rule 127.20(c), the Division, at its discretion, may request clarification from the designated doctor on issues the Division deems appropriate.

According to Rule 127.20(b)(3), requests for clarification must include questions for the designated doctor to answer that are neither inflammatory nor leading. As detailed above, the ALJ in LOC 4 directed Dr. A to provide an alternate IR consisting of medical opinions that were contrary to his own. She instructed Dr. A to place the claimant specifically in Class 2 of Table 2, use Table 67, and award impairment for ROM deficits based specifically on another doctor's measurements despite the previous objections of the designated doctor. The ALJ's instructions were leading in nature and substituted the ALJ's medical judgment for the expert medical judgment of the designated doctor. Under the facts of this case, we hold that this constituted an abuse of discretion.

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, in part, 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.

As discussed above, the ALJ adopted the alternate certification of Dr. A that the claimant reached MMI on March 9, 2018, with a 39% IR for the compensable injury. The IR consists of 10% impairment under Class 2 of Table 2, 10% impairment for each heel for skin loss under Table 67, and 17% impairment for ROM deficits according to Dr. O's September 28, 2018, exam. The impairment awarded under Table 67 is for "heel covering that limits standing and walking." Impairment awarded under Table 2 is also based on the impact of the skin disorder on daily activities. On page 280 of the AMA Guides, it states that "[i]f other chapters also were used to estimate the impairment from a patient's skin disorder, the skin disorder evaluation would *exclude* consideration of the components evaluated with those chapters." In this case, using both Table 2 and Table 67 awards impairment for the same components and is duplicative, which is inconsistent with AMA Guides. Therefore, we reverse the ALJ's determination that the

claimant reached MMI on March 9, 2018, with a 39% IR. Similarly, as the 32% IR and 38% IR by Dr. A awarded impairments under both Table 2 and Table 67, they cannot be adopted.

Dr. A also certified that the claimant reached MMI on March 9, 2018, with a 9% IR. Dr. A determined the MMI date based on Dr. B's medical record dated March 9, 2018, that stated the claimant had healed after excisional debridement procedures for bilateral heel diabetic ulcers and needed no further visits. Bilateral heel diabetic ulcers are conditions that have not been determined to be part of the compensable injury, were not stipulated to as compensable by the parties, and were not actually litigated as being part of the injury in the CCH. As the medical evidence indicates that this MMI date is based on treatment for conditions that are not a part of the compensable injury, it cannot be adopted.

Dr. L, in response to LOC 2, issued an amended certification that the claimant reached MMI on August 29, 2017, with a 17% IR. Dr. L awarded a 9% based on Class 1 in Table 2; however, he awarded that impairment for each foot. As Table 2 provides for impairments based on skin disorders as a whole, and not for individual body parts, this is an inappropriate use of the AMA Guides and this certification cannot be adopted.

Dr. L and Dr. A both initially certified that the claimant reached MMI on August 29, 2017, with a 9% IR. They awarded 9% according to Class 1 in Table 2 and explained that the claimant reached MMI because he had completed physical therapy and any ongoing problems were no longer due to the compensable injury. As Dr. A's appointment as the second designated doctor was an abuse of discretion, presumptive weight will be afforded to the certification of Dr. L. This certification from Dr. L is in accordance with the AMA Guides and the preponderance of the evidence is not against it.

Accordingly, we reverse the ALJ's determination that the claimant reached MMI on March 9, 2018, with a 39% IR, and render a new decision that the claimant reached MMI on August 29, 2017, with a 9% IR in accordance with the certification of Dr. L.

SUMMARY

We hold that the ALJ abused her discretion by appointing a second designated doctor for MMI and IR in this case.

We hold that the ALJ abused her discretion by directing the designated doctor to issue an alternate IR based on her specifications in a leading LOC.

We reverse the ALJ's determination that the claimant reached MMI on March 9, 2018, with a 39% IR, and render a new decision that the claimant reached MMI on August 29, 2017, with a 9% IR in accordance with the certification of Dr. L.

The true corporate name of the insurance carrier is **ACCIDENT FUND NATIONAL INSURANCE COMPANY** 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.

Cristina Beceiro
Appeals Judge

CONCUR:

Carisa Space-Beam
Appeals Judge

Margaret L. Turner
Appeals Judge