

APPEAL NO. 210939
FILED SEPTEMBER 2, 2021

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 25, 2021, with the record closing on May 18, 2021, in (city), Texas, with (administrative law judge) presiding as the administrative law judge (ALJ). The ALJ resolved the disputed issues by determining that: (1) the compensable injury of (date of injury), extends to left lower extremity complex regional pain syndrome (CRPS); (2) the appellant/cross-respondent (claimant) reached maximum medical improvement (MMI) on July 1, 2020; and (3) the claimant's impairment rating (IR) is 12%. The claimant appealed the ALJ's IR determination. The respondent/cross appellant (self-insured) responded, urging affirmance of that determination. The self-insured's response also contains an untimely cross-appeal of the ALJ's extent-of-injury determination. The appeal file does not contain a response from the claimant to the self-insured's cross-appeal. The ALJ's determination that the claimant reached MMI on July 1, 2020, was not appealed and has become final pursuant to Section 410.169.

DECISION

Reversed and remanded.

The parties stipulated, in part, that the claimant sustained a compensable injury on (date of injury), that extends to a left ankle sprain, left ankle contusion, and left posterior tibial tendon dysfunction; the compensable injury does not extend to left ruptured tendon, left posterior tibial tendonitis, tendonitis left peroneal tendon, or left pes planus; in (docket number) it was determined that as of June 11, 2019, the claimant had not yet reached MMI; and disability began on June 27, 2018. The claimant testified she injured her left foot on (date of injury), when she stepped off a median over a puddle as she was approaching her place of work.

UNTIMELY CROSS-APPEAL

The deemed date of the self-insured's receipt of the ALJ's decision was May 26, 2021, and a timely cross-appeal must have been filed no later than Thursday, June 17, 2021. We note that May 31, 2021, "Memorial Day," is a holiday listed in Texas Government Code § 662.003, and that date was excluded in the computation of the time period to file an appeal. As noted above, the self-insured's response to the claimant's appeal also included a cross-appeal of the ALJ's extent-of-injury determination. The self-insured's response/cross-appeal is dated June 30, 2021, and was sent to and received by the Texas Department of Insurance, Division of Workers' Compensation (Division) via facsimile transmission on June 30, 2021. The appeal file

does not contain another copy of the cross-appeal sent to the Division. Accordingly, the cross-appeal contained in the self-insured's response/cross-appeal, having not been filed or mailed by June 17, 2021, is untimely as a cross-appeal. See 28 Tex. Admin. Code §§ 143.3(d), 102.5(d), and 102.3(b) (Rules 143.3(d), 102.5(d), and 102.3(b)). The self-insured's response was timely as a response and was considered.

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. 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.

The ALJ noted in her discussion that none of the certifications in evidence consider and rate the entire compensable injury, and therefore the ALJ issued a Presiding Officer's Directive to Order Designated Doctor Examination to obtain a certification that could be adopted. (Dr. B) was the designated doctor appointed by the Division to determine the claimant's date of MMI and IR. Dr. B examined the claimant on April 19, 2021, and certified the claimant reached MMI on July 1, 2020, with a 12% IR based upon a left ankle sprain, left ankle contusion, left posterior tibial tendon dysfunction, and left lower extremity CRPS. 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. B assigned 10% impairment for the claimant's left ankle based on range of motion (ROM) deficits, and 2% impairment under Table 68 Impairments from Nerve Deficits on page 3/89 for left lower extremity CRPS. Dr. B combined the 10% and 2% to result in a whole person impairment (WPI) of 12%.

In Appeals Panel Decision (APD) 120453, decided May 7, 2012, the ALJ determined the compensable injury extended to CRPS and that the claimant's IR was 20%. The Appeals Panel reversed the ALJ's IR determination because the certifying doctor "did not attempt to rate [CRPS] in the manner outlined in the AMA Guides." In reviewing the alternate certifications in evidence the Appeals Panel concluded none could be adopted, including that of the required medical examination (RME) doctor who had referenced Table 68 on page 3/89 of the AMA Guides in assessing impairment for CRPS. The Appeals Panel noted that Section 3.2I page 3/89 entitled "Causalgia and Reflex Sympathetic Dystrophy [RSD]" instructs that "[w]hen these conditions occur in

the lower extremity, they should be evaluated as for the upper extremity (UE) (Section 3.1k, p. 56).” The RME doctor failed to use the Causalgia and RSD Section 3.1k on page 3/56 of the AMA Guides, and as such his IR could not be adopted. See *also* APD 052243-s, decided November 29, 2005; APD 200548, decided May 26, 2020.

In the case on appeal Dr. B used Table 68 on page 3/89 to assess 2% impairment for the claimant’s left lower extremity CRPS. Dr. B failed to use the Causalgia and RSD Section 3.1k on page 3/56 of the AMA Guides, and his IR cannot be adopted. Therefore, we reverse the ALJ’s determination that the claimant’s IR is 12%.

We note that Dr. B’s IR also contains another error. As previously discussed, Dr. B assigned 10% impairment for the claimant’s left ankle based on ROM deficits. Dr. B noted the following left ankle ROM measurements in his report: 30° of flexion, -10° of extension, 5° of inversion, and 8° of eversion. Using Tables 42 and 43 on page 3/78, Dr. B assigned 0% WPI for flexion, “6% (contracture)” WPI for extension, 2% WPI for inversion, and 2% WPI for eversion, for a total 10% impairment based on ROM deficits. However, Table 43 provides that 8° of eversion results in 1% impairment, not 2% impairment as assigned by Dr. B.

The Appeals Panel has held it is within the certifying doctor’s discretion as a matter of medical judgment to use or not use the different angles of loss of ROM in a single joint. See APD 132734, decided January 9, 2014; APD 190166, decided March 27, 2019. In the case on appeal Dr. B did use the different angles of loss of ROM to assess impairment for the left ankle, but he did not accurately reflect the impairment assessed for the eversion ROM he measured.

There are multiple other certifications in evidence, including those of (Dr. E), a previously appointed designated doctor, and (Dr. D), an RME doctor. However, none of these certifications certified an MMI date of July 1, 2020, which is the date of MMI in this case, and none of these certifications can be adopted. Because there is no other IR in evidence that is based on the July 1, 2020, date of MMI, we remand the issue of IR to the ALJ for further action consistent with this decision.

REMAND INSTRUCTIONS

Dr. B is the designated doctor in this case. On remand the ALJ is to determine whether Dr. B is still qualified and available to be the designated doctor. If Dr. B is still qualified and available to be the designated doctor, the ALJ is to inform Dr. B that the compensable injury in this case is a left ankle sprain, left ankle contusion, left posterior tibial tendon dysfunction, and left lower extremity CRPS, and that the compensable injury does not extend to left ruptured tendon, left posterior tibial tendonitis, tendonitis

left peroneal tendon, or left pes planus. The ALJ is also to inform Dr. B that the claimant's date of MMI is July 1, 2020.

The ALJ is to inform Dr. B that Section 3.2l page 3/89 provides that CRPS of the lower extremity should be evaluated as for the UE under Section 3.1k on page 3/56 of the AMA Guides, "Causalgia and RSD." The ALJ is also to notify Dr. B of his error in calculating 2% impairment for 8° of eversion in the claimant's left ankle. The ALJ is to request Dr. B to rate the entire compensable injury based on the claimant's condition as of July 1, 2020, the date of MMI, in accordance with Rule 130.1(c)(3) and considering the medical records, the certifying examination, and rating criteria in the AMA Guides.

If Dr. B is no longer qualified or available, then another designated doctor is to be appointed to determine the claimant's IR. The ALJ is to inform the designated doctor that the compensable injury in this case is a left ankle sprain, left ankle contusion, left posterior tibial tendon dysfunction, and left lower extremity CRPS, and that the claimant's date of MMI is July 1, 2020. The ALJ is to request the designated doctor to rate the entire compensable injury based on the claimant's condition as of July 1, 2020, the date of MMI, in accordance with Rule 130.1(c)(3) and considering the medical records, the certifying examination, and rating criteria in the AMA Guides.

The parties are to be provided with the ALJ's letter of clarification to Dr. B or Presiding Officer's Directive to Order Designated Doctor Examination if another designated doctor is assigned, as well as the designated doctor's report. The ALJ is to give the parties an opportunity to respond prior to closing the record and issuing a decision on the claimant's IR.

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 ALJ, 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 Government Code § 662.003 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 **(a certified self-insured)** and the name and address of its registered agent for service of process is

**NAME
ADDRESS
CITY, STATE ZIP CODE.**

Carisa Space-Beam
Appeals Judge

CONCUR:

Cristina Beceiro
Appeals Judge

Margaret L. Turner
Appeals Judge