APPEAL NO. 101803-s
FILED MARCH 31, 2011

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 November 3, 2010. With regard to the sole disputed issue, the hearing officer determined that the respondent (claimant) is entitled to lifetime income benefits (LIBs) based on the loss of and/or total and permanent loss of use of both feet at or above the ankle as of April 22, 2010.

Appellant 1 (carrier) appealed, contending that the hearing officer's determination was against the great weight and preponderance of the evidence and that the hearing officer erred in failing to give presumptive weight to the designated doctor's opinion regarding whether the claimant sustained the loss (use) of both feet at or above the ankle. Appellant 2 (Subsequent Injury Fund (SIF)) appealed, contending that the hearing officer erred in failing to give the designated doctor's report presumptive weight and that the designated doctor had not given an opinion on "loss of use" of both feet at or above the ankle. The claimant responded to the carrier and SIF's appeals, urging affirmance.

DECISION

Reversed and remanded.

The parties stipulated that the claimant sustained a compensable injury to his right foot on _____, and that the claimant has a below-the-knee amputation of the left lower extremity unrelated to a compensable injury. It is also undisputed that the claimant is a diabetic.

Section 408.161(a) provides in part that LIBs are paid until the death of the employee for the loss of both feet at or above the ankle. Section 408.161(b) provides that for purposes of Subsection (a), the total and permanent loss of use of a body part is the loss of that body part. In Appeals Panel Decision (APD) 022129, decided October 3, 2002, the Appeals Panel compared Sections 408.161(a) and (b) with the predecessor statutes; took note of the pertinent commentary in 1 MONTFORD, BARBER & DUNCAN, A GUIDE TO TEXAS WORKERS' COMP. REFORM § 4b.31 at 4-135 footnote 468; and held that "total loss of use" of a member of the body means that such member no longer possesses any substantial utility as a member of the body, or the condition of the injured worker is such that the worker cannot get and keep employment requiring the use of such member, which is the test set forth in Travelers Insurance Company v. Seabolt, 361 S.W.2d 204 (Tex. 1962). *See also* APD 100384, decided May 26, 2010. We have also noted that the Seabolt test is disjunctive and that a claimant needed only satisfy one prong of the test in order to establish entitlement to LIBs. *See* APD 100384.

Section 408.162 entitled "[SIF] Benefits" provides that:

> (a) If a subsequent compensable injury, with the effects of a previous injury, results in a condition for which the injured employee is entitled to [LIBs], the insurance carrier is liable for the payment of benefits for the subsequent injury only to the extent that the subsequent injury would have entitled the employee to benefits had the previous injury not existed.
>
> (b) The [SIF] shall compensate the employee for the remainder of the [LIBs] to which the employee is entitled.

It is undisputed that the prior amputation of the below-the-knee left lower extremity constituted the loss of one foot at or above the ankle for purposes of Section 408.161(b). *See* The Second Injury Fund v. Adelina Conrad, 947 S.W.2d 278 (Tex. Civ. App.—1997).

In the instant case, the claimant, a construction superintendent, sustained a compensable injury on _____, when some lumber fell from a truck hitting the claimant's right foot. The claimant sustained a fracture of the right second metatarsal. On October 22, 2008, the claimant had right leg surgery in the form of an open reduction internal fixation with allograft secured by a plate and screws. The claimant was diagnosed with Charcot arthropathy changes and collapsing of the midfoot. The claimant was subsequently referred to (Dr. S), a board certified podiatric surgeon. Dr. S recommended a right midfoot fusion which Dr. S testified would improve the claimant's quality of life but would not increase the function of the right foot. The surgery was denied by the carrier.

(Dr. J), in a report dated March 1, 2010, states that he was appointed as the designated doctor to determine maximum medical improvement (MMI), impairment rating (IR) and return to work ability.[1] In that report Dr. J opined the claimant had reached MMI on March 1, 2010, with an eight percent IR and attached a Texas Workers' Compensation Work Status Report (DWC-73) releasing the claimant to return to work as of March 1, 2010, with restrictions. The restrictions included no standing, kneeling, bending, pushing (etc.) and "[n]o driving/operating heavy equipment" and "[c]an only drive automatic transmission." In a subsequent report dated July 27, 2010, Dr. J stated he "was asked to determine if the [claimant] sustained loss of both feet at or above the ankle." Dr. J diagnosed the claimant with "[s]tatus post left below-the-knee amputation" and "[n]onunion of metatarsals with Charcot arthropathy, right foot." In bold print Dr. J cites the question he was answering as: **"Has the examinee sustained loss of both feet at or above the ankle? The total and permanent loss of use of [a] body part is the loss of that body part."** In his report, Dr. J stated that "[t]he [claimant] has loss of left foot above the ankle (BKA) [below knee amputation]. The [claimant] has not sustained loss of the right foot above the ankle. He has nonunion of

[1] There is no Request for Designated Doctor (DWC-32) in evidence.

fractures with Charcot arthropathy." There is no dispute that Dr. J was asked to give an opinion whether the claimant has lost the use of both feet at or above the ankle.

The hearing officer in the Background Information portion of her decision writes:

> [Dr. J's] opinion regarding the loss of both feet at or above the ankle is a credible medical opinion, however, it does not carry presumptive weight pursuant to [Section] 408.0041. Additionally, [Dr. J] did not give an opinion on "loss of use" of both feet at or above the ankle.

Section 408.0041(e) provides, in part, that the report of the designated doctor has presumptive weight unless the preponderance of the evidence is to the contrary. Section 408.0041(a) provides the Texas Department of Insurance, Division of Workers' Compensation (Division) may order a medical examination to resolve *any* question about: (1) the impairment caused by the compensable injury; (2) the attainment of [MMI]; (3) the extent of the employee's compensable injury; (4) whether the injured employee's disability is a direct result of the work-related injury; (5) the ability of the employee to return to work; or (6) issues similar to those described by Subdivisions (1) - (5). *See also* 28 TEX. ADMIN. CODE § 126.7(d) (Rule 126.7(d)).[2]

While the cited list does not specifically provide for appointment of a designated doctor to resolve the question of loss of use of both feet at or above the ankle, we hold that subsection 408.0041(a)(6) which provides for appointment of a designated doctor for "issues similar to those described by Subdivisions (1) - (5)" can include a question to determine loss of use of both feet at or above the ankle. More specifically if the Division appoints a designated doctor to perform a medical examination to resolve any question listed in Section 408.0041(a) Subsections (1) through (6) the designated doctor's opinion has presumptive weight unless the preponderance of the medical evidence is to the contrary. Section 408.0041(e) and Rule 126.7(d). The hearing officer does not make a finding that Dr. J's opinion was contrary to the preponderance of the medical evidence and, in fact, comments that Dr. J's opinion regarding the loss of both feet at or above the ankle "is a credible medical opinion" but does not carry presumptive weight. We hold that the hearing officer erred in failing to give presumptive weight to Dr. J's opinion.

The hearing officer also erred when she stated in the Background Information that Dr. J "did not give an opinion on 'loss of use' of both feet at or above the ankle." As previously noted, Dr. J, in bold print, defined the question that he was answering and noted that the total and permanent loss of use of a body part is the loss of that body part. It was Dr. J's opinion, using the cited definition, that the claimant had not sustained the total and permanent loss of use of the right foot at or above the ankle.

[2] We note that this provision is now found in Rule 127.1 of the new designated doctor rules effective February 1, 2011.

There was conflicting medical and testimonial evidence regarding what physical activity the claimant could perform using his right foot. The hearing officer is the sole judge of the weight and credibility to be given to the evidence. Section 410.165(a).

We reverse the hearing officer's determination that the claimant is entitled to LIBs based on the loss and/or total and permanent loss of use of both feet at or above the ankle as of April 22, 2010, because the hearing officer failed to give presumptive weight to the designated doctor's report. We remand the case for the hearing officer to give presumptive weight to the designated doctor's report, determine if the preponderance of the other medical evidence is to the contrary of the designated doctor's report, and then determine if the claimant is entitled to LIBs based on the loss of use of both feet at or above the ankle, and if so, as of what date.

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

MR. RON O. WRIGHT, PRESIDENT
6210 EAST HIGHWAY 290
AUSTIN, TEXAS 78723.

_____
Thomas A. Knapp
Appeals Judge

CONCUR:

_____
Cynthia A. Brown
Appeals Judge

_____
Margaret L. Turner
Appeals Judge