

APPEAL NO. 990375

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 28, 1999. The hearing officer determined that the appellant's (claimant) correct impairment rating (IR) was five percent as certified by Dr. W, a designated doctor selected by the Texas Workers' Compensation Commission (Commission). The claimant appeals this determination, contending that Dr. W incorrectly applied the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association (AMA Guides), in arriving at this IR. The appeals file contains no response from the respondent (carrier).

DECISION

We affirm.

The claimant sustained a compensable right ankle injury on _____. A pre operative diagnosis on July 29, 1997, by Dr. T, the treating doctor, was right ankle inversion sprain with peroneal tendinitis, ligamentous laxity and loose bodies. He performed arthroscopic surgery with excision of the loose fragments and repair of the peroneal tendon. On February 9, 1998, he completed a Report of Medical Evaluation (TWCC-69) in which he certified maximum medical improvement (MMI) as of that date and assigned an 11% IR.¹ The IR consisted of four percent lower extremity impairment for loss of plantar flexion and because the claimant had "residual functional instability" Dr. T assigned an additional 25% lower extremity IR from Table 33 of the AMA Guides under the category of "ankle instability due to lateral collateral ligament loss." This resulted in an 11% whole body IR.

Dr. W was then appointed designated doctor. In a TWCC-69 of May 26, 1998, he assigned a five percent whole body IR. This IR consisted of two percent lower extremity for loss of range of motion. He disagreed with Dr. T's assignment of 25% lower extremity IR for ankle instability because, based on his examination, Dr. W felt there was some functional instability, but no "gross instability." He therefore did not believe the full 25% lower extremity IR was appropriate in this case, and instead assigned a 10% lower extremity IR for the degree of instability he found.

Section 408.125(e) provides that the report of a designated doctor is entitled to presumptive weight on the issue of IR. Any IR must be assigned in accordance with the AMA Guides. Section 408.124. The provision of Table 33 of the AMA Guides applicable in this case simply states:

Ankle instability due to lateral collateral ligament loss -- 25%

The hearing officer in her decision and order commented that neither Dr. T nor Dr. W found that there was no ankle instability and that this was "primarily a difference of opinion regarding how the [AMA] Guides are applied." She then found the great weight of the other

¹This date of MMI is not disputed.

medical report was not contrary to Dr. W's report and found that the claimant's correct IR was five percent whole body as certified by Dr. W.

The claimant appeals this determination arguing that AMA Guides do "not allow for any percentage to be taken from" the 25% in Table 33. The question is thus presented on an agreed upon set of medical findings (some loss of stability) and requires an interpretation of the meaning of the AMA Guides when applied to this fact situation. The AMA Guides themselves provide no guidance. We do not believe that the quoted portion of Table 33 is limited to those cases where there is total lateral collateral ligament loss of stability. If there is some loss, but that loss is less than total, a designated doctor may apply clinical judgement and assign some lesser lower extremity IR to the partial loss. This is precisely what Dr. W has done. His report is in substantial compliance with the AMA Guides and was entitled to statutory presumptive weight. The further finding of the hearing officer that the great weight of the other medical evidence was not contrary to the report of the designated doctor has ample evidentiary support in the record. See Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986).

One final comment is required. The claimant introduced into evidence without objection pages 62 to 70 of the Guides to the Evaluation of Permanent Impairment, Third Edition (Revised). This is not the edition of the AMA Guides mandated by the 1989 Act for use by the Commission. No assertion was made that this edition was identical in all pertinent essentials with the mandated version. Our opinion in this decision is based on the mandated version of the AMA Guides. Care should be taken in all cases to ensure that the mandated version is used to resolve IR disputes.

For the foregoing reasons, we affirm the decision and order of the hearing officer.

Alan C. Ernst
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

CONCUR IN RESULT:

Robert W. Potts
Appeals Judge