APPEAL NO. 022327
FILED OCTOBER 29, 2002

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 August 12, 2002. The hearing officer determined that the appellant's (claimant) date of maximum medical improvement (MMI) is April 7, 2000; that his impairment rating (IR) is 14%; and that there is no proper grounds to appoint a new designated doctor to determine the date of MMI and IR. The claimant appealed, asserting that the designated doctor's MMI and IR certifications are against the great weight of the medical evidence, that the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association (AMA Guides) were not properly applied, and that a new designated doctor should be appointed due to bias. The respondent (carrier) responded, urging affirmance.

DECISION

We reverse and remand.

The parties stipulated that the claimant sustained a compensable injury from falling from the cab of his truck on _____, which involved "chronic compartment syndrome" of the left leg; and that the injury caused damage to his left common peroneal nerve, affecting the left calf and ankle. Compartment syndrome was described as swelling to the point of damaging nerves. Due to his compensable injury, the claimant underwent multiple surgeries, the last occurring on February 8, 2000. The treating doctor was Dr. M. Dr. M released the claimant to restricted work on November 20, 2000.

Prior to this surgery mentioned above, however, there was a dispute that arose over MMI and IR, apparently a 20% IR from a referral doctor which is not in evidence. Dr. C, an orthopedic surgeon, was appointed as designated doctor.

On November 10, 1999, Dr. C examined the claimant; he performed range of motion (ROM) evaluation with a goniometer according to his report. (The claimant disputed at the CCH that he was even examined and said that he went by the field office of the Texas Workers Compensation Commission (Commission) the day of that examination to complain.) Dr. C noted that the claimant had already had two surgeries. He noted sensory and strength deficits. Dr. C combined IRs for sensory and strength loss, as well as a smaller (4% upper extremity impairment) IR for ROM deficit. The resulting whole body IR was 14%. He certified that MMI had been reached on November 10, 1999. There is nothing in his report which attributes the ROM deficits to sensory loss or muscle weakness that was otherwise rated.

On January 24, 2000, the claimant underwent nerve conduction testing showing recurrence of his compartment syndrome, in accordance with findings attributed to the common peroneal and posterior tibial nerves, although the report is not entirely clear to the lay reader. Surgery followed the next month, as noted above, on the left calf. The claimant continued to report pain and burning.

On July 28, 2000, a benefit review officer (BRO) sent along the surgical notes to the designated doctor and asked if they would change his previous report. Without a new examination, Dr. C changed his opinion and filed a Report of Medical Evaluation (TWCC-69) that stated that the claimant had not reached MMI as of August 11, 2000. The report also included a 14% IR. Dr. C was recontacted, with the BRO apparently reading the TWCC-69 as a certification of MMI as of August 11, 2000. The BRO ordered a reexamination.

Dr. C. reexamined the claimant on September 13, 2000, and submitted a third TWCC-69 dated October 5, 2000. (The claimant said he took a witness with him in case he was not examined a second time.) The claimant said he had been told by Dr. C that he would be found at MMI as of the examination date. However, Dr. C certified the claimant as having reached MMI on April 7, 2000, with a 23% IR. Dr. C noted that the claimant had no active ankle motion which he noted resulted from loss of strength, so he assessed an IR from Table 11 then carried forward through Table 45. Although he refers to "L-5 and S-1" nerve roots when he also assessed loss of strength under Table 45 of the AMA Guides, it is clear that he continued to rate the lower left extremity and not the spine. No separate ROM rating was given or combined into an overall 23% IR. (We note that a diagram on page 68 of the AMA Guides shows the common peroneal and tibial nerves as rooting in a complex from L-4 to S-3.) The carrier nevertheless disputed this report arguing that there was no injury to the spinal nerve roots.

As support for its dispute, the carrier had obtained a peer review report from a doctor whose specialty was occupational medicine. The peer review doctor also testified at the CCH. He did not examine the claimant. Arguing that no compromise of the spinal nerve roots was shown, he undertook to recompute the IR based upon Dr. C's findings, using Table 47 of the AMA Guides (entitled "Specific Unilateral Spinal Nerve Impairment Affecting the Lower Extremity"). The peer review doctor's computations assumed only that the peroneal nerve was injured; no allowance was made for the tibial nerve, perhaps because the peer review doctor did not list the January 2000 nerve conduction test as a report he was given. (The record was not favored with the EMG reports that the peer review doctor <u>did</u> have.)

The BRO contacted the designated doctor again because of "questions" which had come up during a December 2000 benefit review conference. (We observe that at this point, there was no required medical examination report in evidence nor countervailing evidence based upon an examination of the claimant.) Specifically, Dr. C was asked to explain in more detail why he found MMI on April 7, 2000, and then asked

as to whether the claimant had had a back injury or any "direct compromise" of the nerve roots.

In response, Dr. C conceded he was in error in using the tables relating to spinal nerve roots. No new examination was conducted. Dr. C then assessed ROM IR, assuming a 10 degree plantar flexion ankle join loss (although his previous report had noted that there was "no" active ankle motion and the foot was sitting passively at 10 degrees of plantar flexion). He used Table 47 to assess IRs for peroneal and tibial nerve involvement in loss of function, and used these percentages in combination with Table 47 figures. He then calculated sensory and strength loss and ROM. Dr. C calculated a 24% IR. In this report, MMI was certified as being February 9, 2001. The peer review doctor was again supplied with the report and medical records; this time, the January 24, 2002, nerve conduction test report was also included.

The peer review doctor responded that the IR was still incorrect, because results for the tibial nerve on the January 2000 were "essentially normal" and because ROM should not be combined with specific nerve IRs that already account for loss of ROM. The peer review doctor recomputed a 14% IR based on maximum strength loss of the peroneal nerve, but not including Dr. C's observed findings relating to sensory loss, even though the peer review doctor testified that the claimant had a total loss of his peroneal nerve. He suggested that the designated doctor be asked the cause of the claimant's ROM restrictions (which, according to page 66 of the AMA Guides, is relevant to determining whether separate ROM figures can be combined with peripheral nerve impairments). Yet again, the designated doctor was asked by the BRO to address both the February 9, 2001, date of MMI (for which no examination had been conducted) and the peer review report was sent with no questions asked.

Dr. C responded but did not send a new TWCC-69. In this, he noted that his November 19, 1999, report had assessed the peroneal nerve but that he had "mistakenly" included some loss of ROM in that report. He noted that he was "not sure" where the "TWCC-60" (sic) certifying the February 9, 2001, MMI date came from, although he speculated this date was near the statutory date and that it was "more likely" that he was at MMI two months past the date of surgery, or around April 7, 2000, as previously certified.

This narrative does not itself recalculate an IR, however. Rather, noting that his previous 14% had erroneously included some ROM, Dr. C goes on to say that "I basically agree with [the peer review doctor's] evaluation and percentage, dismissing range of motion. It seems to be a fair value." The peer review doctor testified that even though "some guys" in his experience computed IRs incorrectly, they would amazingly hit upon a "number" that was correct, and he so characterized Dr. C's 14% IR as one of those correct percentages even if the underlying method of calculation was wrong.

The final word on MMI and IR was that of the treating doctor, who in a July 2, 2002, letter stated that the claimant had not reached MMI until September 13, 2000,

with a 23 or 24% IR. The treating doctor stated that another examination should be performed to resolve the situation.

While we appreciate the dilemma that the hearing officer faced in trying to resolve the varying reports of IR and MMI, we believe that under these facts, a simple adoption by the designated doctor of a peer review doctor's percentage, which was not based upon an examination, was neither a certification of MMI or IR based upon the designated doctor's independent examination nor was it a "clarification" of the designated doctor's own findings that was entitled to presumptive weight. We would also note that while it is the peer review doctor's interpretation that there was no injury to the tibial nerve and that the EMG results were "essentially normal," this would appear to fall within the zone of medical opinion, especially in light of the EMG doctor's report that there were distal latencies at the left posterior tibial nerve (and latencies were also noted in the secondary sural nerve branch). The designated doctor's final letter avoids, rather than concedes, the peer review doctor's opinion on this point.

Table 44 of the AMA Guides lists the various peripheral nerve branches and their functions. Many of the listed tibial and peroneal nerves involve both sensory and motor functions for various muscle groups or the skin over the lower leg. We do agree that the AMA Guides, on page 68, caution the evaluator to determine whether lower extremity deficits have their genesis in the spinal nerve roots, lumbosacral plexus, or peripheral nerves. Page 66 states that unless restricted motion is due to a cause other than sensory involvement or muscle weakness, it should not be combined with IR derived from peripheral nerve lesions. This is likely why the peer review doctor stated that Dr. C should be asked what he felt was the cause of ROM deficits.

The hearing officer characterized the designated doctor's performance as "less than optimal" but a more accurate characterization might be "work in progress." We cannot agree that a designated doctor's letter, with no accompanying TWCC-69, that is nothing more than adoption of the peer review doctor's "fair value," qualifies as a certification of MMI and IR based upon an examination, as required by Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.1 (Rule 130.1). Contrary to what the peer review doctor stated, IR under the 1989 Act is not to be based upon a "number" that strikes a reviewing doctor as correct, but upon objective clinical or laboratory evidence of impairment. Section 408.122(a). The IR must be determined in accordance with the AMA Guides. Section 408.124(a).

We note that after his second examination on September 13, 2000, the designated doctor apparently found tibial nerve involvement in his strength and sensory testing since he revised his IR away from the spinal nerve roots and in favor of the tibial and peroneal peripheral nerves. While the peer review doctor assails this based upon his opinion about what the EMG showed in January 2000, this is nothing more than another medical opinion of the results of one test performed prior to the surgery which necessitated reexamination. Of further concern is the fact that Dr. C has certified MMI on April 7, 2000; however, when he reviewed the claimant's surgical records in August 2000, he then stated that he was not at MMI. He had also certified a February 2001

date without examination and then voiced some confusion as to where that TWCC-69 originated.

For these reasons, according presumptive weight to the 14% IR and MMI date mentioned in the designated doctor's "clarification" response is against the great weight of the contrary medical evidence as found in the results of the examination which followed surgery.

We reverse and remand. While the hearing officer may chose to have the claimant reexamined by the designated doctor, he may also conclude that the numerous IRs and admitted errors in this case reflect an unfamiliarity with assessment of lower extremity IRs such that a second designated doctor should be appointed. Because amendments to the 1989 Act (and counterpart rules amendments) make clear that the independence of the designated doctor is paramount, and attempts to unduly influence the designated doctor are prohibited, scrutiny should be made to ensure that requests for "clarification" are true inquiries seeking to resolve ambiguities or lack of clarity in the report, and not solicitation of amendments by the designated doctor to alternative theories of how the AMA Guides are to be applied.

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 Commission's Division of Hearings, 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* Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

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. RUSSELL R. OLIVER, PRESIDENT
221 WEST 6TH STREET
AUSTIN, TEXAS 78701.

_____
Susan M. Kelley
Appeals Judge

CONCUR:

_____
Elaine M. Chaney
Appeals Judge

_____
Michael B. McShane
Appeals Judge