

APPEAL NO. 040593
FILED MAY 6, 2004

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 February 12, 2004. The hearing officer resolved the disputed issue by deciding that the appellant's (claimant) impairment rating (IR) is 4%. The claimant appealed, arguing that the correct IR is 31% as determined by the designated doctor utilizing 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 4th edition). The respondent (carrier) responded, urging affirmance of the hearing officer's decision.

DECISION

Reversed and rendered.

The facts in this case are largely undisputed. The claimant sustained a compensable injury on _____, to his left ankle and foot. The claimant testified that his treating doctor, Dr. B, removed himself as the claimant's treating doctor in March of 2000. Further, the claimant testified that he moved to California at the end of March 2000, and did not see Dr. B after that time. The evidence reflects that Dr. B certified the claimant reached maximum medical improvement (MMI) on December 26, 2000, with a 0% IR in a Report of Medical Evaluation (TWCC-69) dated December 26, 2000. Subsequently, the Texas Workers' Compensation Commission (Commission) appointed Dr. M as the designated doctor in this case. Dr. M initially certified that the claimant had a 31% IR utilizing the AMA Guides 4th edition. The Commission sent correspondence to Dr. M noting that Dr. M had incorrectly stated the date of statutory MMI and directed Dr. M to assign an IR utilizing the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association (AMA Guides 3rd edition). In a TWCC-69 dated September 11, 2003, Dr. M certified the claimant reached statutory MMI on April 10, 2001, with a 4% IR, using the AMA Guides 3rd edition. Dr. M noted that the AMA Guides 3rd edition did not provide a way to rate impairment documented by brace or abnormal gait pattern as provided in the AMA Guides 4th edition.

We note that the benefit review conference report reflects that the parties resolved the date of MMI by agreement that the claimant reached statutory MMI on April 10, 2001. The date of MMI was not a disputed issue at the CCH.

The dispute at the CCH was based on the interpretation of Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.1(c)(2)(B) (Rule 130.1(c)(2)(B)). Rule 130.1(c)(2)(B) states, in relevant part:

The appropriate edition of the AMA Guides to use for certifying examinations conducted on or after October 15, 2001 is:

- (i) the fourth edition of the AMA Guides . . . ; or
- (ii) the third edition, second printing, dated February, 1989 if, at the time of the certifying examination, there is a certification of MMI by a doctor pursuant to subsection (b) of this section made prior to October 15, 2001 which has not been previously withdrawn through agreement of the parties or previously overturned by a final decision.

The claimant contended that the AMA Guides 4th edition was the appropriate edition to use because Dr. B did not examine the claimant to determine MMI and assess an IR and in fact had not seen the claimant for several months prior to his certification and therefore Dr. B's certification was not valid. The carrier argued that Rule 130.1 does not require a valid certification but simply requires that a certification exist on October 15, 2001, to determine which edition of the AMA Guides should be used. The carrier maintains that the hearing officer properly concluded that the IR determined by Dr. M using the AMA Guides 3rd edition was the claimant's IR.

The importance of an actual examination for purposes of certifying MMI and IR has been recognized in prior Appeals Panel decisions. See Texas Workers' Compensation Commission Appeal No. 941640, decided January 13, 1995; Texas Workers' Compensation Commission Appeal No. 982463, decided December 3, 1998; and Texas Workers' Compensation Commission Appeal No. 982621, decided December 21, 1998. Further, Rule 130.1(b)(4) provides in part that to certify MMI, the certifying doctor shall review medical records; perform a complete medical examination of the injured employee for the explicit purpose of determining MMI (certifying examination); and assign a specific date at which MMI was reached. In a letter dated November 28, 2000, Dr. B stated he had not seen the claimant since March 7, 2000, and "would assume that [the claimant] has reached [MMI] from this injury since there was nothing [he] could do for him surgically." Dr. B went on in the letter to conclude the claimant had a 0% IR. A TWCC-69 dated December 26, 2000, certifying MMI with a 0% IR was in evidence. Rule 130.1(c)(2)(B) requires that the appropriate edition of the AMA Guides to use for certifying examinations after October 15, 2001, is the 3rd edition if there is a certification of MMI by a doctor pursuant to subsection (b). Rule 130.1(b) describes the procedure required for certification of MMI. Since it is undisputed that Dr. B failed to examine the claimant for the purpose of determining MMI he did not perform a certifying examination as required by the Rules. Therefore, the appropriate edition to be utilized to determine IR was the AMA Guides 4th edition. The hearing officer erred in concluding that the claimant's IR was 4% as assessed by Dr. M utilizing the AMA Guides 3rd edition.

The decision that the claimant's IR is 4% is reversed and a new decision rendered that the claimant has an IR of 31%.

The true corporate name of the insurance carrier is **HIGHLANDS CASUALTY COMPANY** and the name and address of its registered agent for service of process is

**CHARLIE MILLER
10200 RICHMOND AVENUE, SUITE 175
HOUSTON, TEXAS 77042.**

Margaret L. Turner
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Gary L. Kilgore
Appeals Judge