

APPEAL NO. 040789
FILED JUNE 2, 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 was held on September 18, 2003, November 17, 2003, and March 10, 2004. The hearing officer determined that there is not an impairment rating (IR) in accordance with 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) on which an IR can be assigned. The appellant (claimant) appealed and the respondent (carrier) responded, urging affirmance of "the portion of the [h]earing [o]fficer's [d]ecision and [o]rder that the great weight of the contrary medical evidence did not overcome the presumptive weight afforded the designated doctor's opinion." We note that the appeal file does not contain a separate appeal from the carrier, and to the extent that the response was somehow intended to be an appeal seeking the adoption of the designated doctor's certification of IR, while timely as a response, it is untimely as an appeal.

DECISION

Affirmed in part, reversed and rendered in part, and reversed and remanded in part.

It is undisputed that the claimant sustained a compensable injury on _____. The sole issue in this case involved a determination of the claimant's IR. We note that while the carrier accepted a right foot injury, the compensability of the claimant's right knee injury has not yet been resolved. In evidence, related to the injury currently before us, are three IR certifications from three different doctors. On May 1, 2003, the designated doctor certified that the claimant's IR is 5% based upon impairment to the right foot. His IR consisted of 3% for loss of ankle motion, 1% for neurological IE numbness of the medial forefoot, and 1% cosmetic due to skin grafting. On May 5, 2003, the claimant's treating doctor certified that the claimant's IR is 35%. His IR consisted of 29% for the right knee medial and lateral meniscectomy and cruciate ligament laxity, 4% for moderate rocker bottom deformity of the right foot, and 4% for ligamentous instability of the right ankle. On June 5, 2003, the Texas Workers' Compensation Commission (Commission) sent a letter of clarification to the designated doctor and enclosed a copy of the treating doctor's report and an "op report" from the referral doctor. On June 10, 2003, the designated doctor responded, indicating that his opinion remained unchanged. On June 11, 2003, the claimant's referral doctor certified that the claimant's IR is 40%. In so doing, the referral doctor adopted the treating doctor's 35% IR, and added 8% for medial and lateral plantar nerve sensory deficits and dysesthesia.

The hearing officer determined that the designated doctor's certification was not in "substantial compliance" with the AMA Guides because his report does not delineate

the comparison of his medical evaluation results to the criteria in the AMA Guides, and it does not reference the tables used in assigning loss of motion in the ankle or for assigning neurological impairment. He further determined that the treating doctor's and referral doctor's certifications were not in compliance with the AMA Guides for much the same reasons. As such, the hearing officer determined that there were no IR certifications in the record upon which an IR could be assigned. The hearing officer sent the matter back to the Commission to obtain a medical report on which an IR can be assigned, with no further guidance as to how this should be done.

To the extent that the hearing officer determined that there were no valid certifications in evidence upon which an IR could be assigned, we affirm. To the extent that the hearing officer found that the designated doctor's IR certification was not contrary to the great weight of the other medical evidence, we reverse and render a decision that the designated doctor's IR certification is contrary to the great weight of the other medical evidence. A certification of IR which is not done in compliance with the AMA Guides is not a valid certification. If a certification is not valid, it cannot be adopted by the Commission and is, by definition, contrary to the great weight of the other medical evidence. This is so because Section 408.125(e), in effect on _____, provides that the certification of IR by a designated doctor chosen by the Commission shall have presumptive weight and be adopted by the Commission, unless it is contrary to the great weight of the other medical evidence. In the instant case, the designated doctor's IR certification cannot be adopted so it must be found to be contrary to the great weight of the other medical evidence.

We next turn to the hearing officer's determination to return this matter to the Commission to obtain a medical report on which an IR can be assigned. We are troubled by the lack of guidance given by the hearing officer. The hearing officer has the duty to fully develop the record. Section 410.163(b). We are unable to determine what the hearing officer envisions happening in this matter. The Commission may appoint a second designated doctor if the hearing officer believes that the first designated doctor is unwilling or unable to comply with the AMA Guides or requests from the Commission or if he feels that the designated doctor's impartiality has been compromised. The hearing officer gives no indication if this is the case. The Commission may send a letter of clarification to the designated doctor or ask for a reexamination. This would be difficult since the fact finder is the one that knows what questions he needs answered, and again he has given no guidance.

For the above reasons, we remand this matter back to the hearing officer to give specific guidance to the Commission as to how this "medical report" is to be obtained. In determining the proper route to take in this matter, the hearing officer should consider the very obvious distrust the claimant has for the current designated doctor, and his unwillingness to be reexamined by the designated doctor. We note that there is no evidence before us to determine if there is any basis for that distrust, and we decline to make any such determination. Likewise, the claimant's appeal is replete with allegations of individual and systemic racism, yet this issue was never raised at any of the three sessions held on this matter, and no evidence has been offered to support

such allegations. Should a second designated doctor be appointed, the new designated doctor shall be advised that the certification of IR must be based upon the claimant's condition as of the date of maximum medical improvement. See Texas Workers' Compensation Commission Appeal No. 040313-s, decided April 5, 2004, and Texas Workers' Compensation Commission Appeal No. 040583-s, decided May 3, 2004. We note that the claimant extent of injury was still in dispute at the time the hearing officer issued his decision and order. If that is still the case when this matter is considered on remand, the designated doctor should issue two certifications, one rating the right foot injury only, and one rating the right foot and right knee.

We affirm the hearing officer's determination that there is no IR in accordance with the AMA Guides on which an IR can be assigned. We reverse the hearing officer's determination that the designated doctor's certification of IR is not contrary to the great weight of the other medical evidence, and render a decision that the designated doctor's certification of IR is contrary to the great weight of the other medical evidence. We remand the matter back to the hearing officer to give the Commission specific instruction as to how to obtain a medical report on which an IR can be assigned, consistent with this decision. The parties are to be apprised of the hearing officer's instructions. Once an appropriate medical report is received and disseminated to the parties, both parties shall be allowed to submit responsive medical evidence or reports.

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.

The true corporate name of the insurance carrier is **TEXAS PROPERTY & CASUALTY INSURANCE GUARANTY ASSOCIATION** for **Reliance National Indemnity Company, an impaired carrier** and the name and address of its registered agent for service of process is

**MARVIN KELLY, EXECUTIVE DIRECTOR
9120 BURNET ROAD
AUSTIN, TEXAS 78758.**

Daniel R. Barry
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Veronica L. Ruberto
Appeals Judge