APPEAL NO. 052261
FILED DECEMBER 12, 2005

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 commenced on August 16, 2005, and concluded on August 30, 2005. The disputed issues before the hearing officer were:

1. Does the compensable injury of _____, extend to and include reflex sympathetic dystrophy [RSD]/complex regional pain syndrome [CRPS] and an altered gait;
2. Has the [respondent (Claimant)] attained maximum medical improvement [MMI], and if so, on what date; and,
3. What is the Claimant's impairment rating [IR]?

The hearing officer determined that the claimant's compensable injury of _____, extends to and includes RSD/CRPS and altered gait, that the "Claimant attained [MMI] on October 9, 2003" and that the claimant's IR is 34%.

The appellant (carrier) appeals[1] contending that the 34% IR is not supported by the medical evidence, that the October 9, 2003, MMI date is not supported by the treating doctor's report and that the difference between the treating doctor's report and the designated doctor's report was merely "a difference in medical judgment." The carrier requests that we reverse the hearing officer's decision and render a new decision giving the designated doctor's report presumptive weight and adopting the designated doctor's 11% IR with an October 3, 2005, date of MMI. The file does not contain a response from the claimant.

DECISION

Affirmed in part and reversed and remanded in part.

It is undisputed that the claimant sustained a compensable left ankle injury on _____. The carrier stipulated that it accepted a left ankle fracture. The claimant was initially diagnosed with an ankle sprain, a February 2002 MRI showed a hairline fracture and left ankle arthroscopy was performed on April 25, 2002. It is also undisputed that the proper version of 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) (Guides). It is noted that there were several other designated doctors in this case but the designated doctor at this point is (Dr. B). The current treating doctor is (Dr. S).

[1] Although called a "conditional request for review" it appears to be a regular appeal.

EXTENT OF INJURY

As the hearing officer notes, several doctors have diagnosed RSD and/or CRPS including at least one of the prior designated doctors and Dr. S. A peer review doctor and RME doctor noted findings inconsistent with RSD and opined that the claimant does not meet the criteria for RSD/CRPS. A referral doctor, in a July 29, 2002, report finds "no objective findings of [RSD] CRPS I at this time" but comments that RSD "is symptomatic episodically." With the conflicting medical evidence we are unable to say that the hearing officer's determination is so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. The hearing officer's determination on the extent-of-injury issue is affirmed.

THE MMI ISSUE

The hearing officer recites that the parties stipulated on the record that "[MMI] was attained by operation of law on October 9, 2003." The carrier, on appeal, contends that the parties "did **not** enter into an agreement or stipulation that . . . the claimant attained MMI as of the statutory date." (Emphasis in original.) No stipulation on MMI was made at the beginning of the CCH. On pages 17 and 18 of the transcript the parties and the hearing officer discuss when or whether the claimant has returned to work. The hearing officer then said:

THE HEARING OFFICER: You think it'd be about 10/9/03 [MMI]?
[Carrier attorney]: That's what I have as well.

THE HEARING OFFICER: 10/9/03?
[Carrier attorney]: I have that written down in my notes as – 10/9/03 should be statutory MMI.

THE HEARING OFFICER: Can you agree with that date?
[Claimant]: Yes, ma'am.

We do not read that exchange as stipulating that MMI was attained by operation of law on October 9, 2003, but rather that the statutory MMI date (See Section 401.011(30)(B)) would be October 9, 2003.

Dr. S, the treating doctor in his August 6, 2003, report certified clinical MMI on "8/6/03." In rebuttal letters of April 21, 2004, and August 26, 2004, Dr. S does not change his date of MMI.

Dr. B, the designated doctor, in his report of July 7, 2004, checks that he is certifying "statutory" MMI on "10/3/03." No doctor certified MMI on October 9, 2003, as found by the hearing officer. We reverse the hearing officer's determination that the claimant reached MMI on October 9, 2003, as not being supported by the evidence and remand the case for a determination of MMI which may not be after the date of statutory MMI, and which is supported by the evidence.

THE IR

Dr. S, the treating doctor in his August 6, 2003, report assigned a 34% IR. Claimant's exhibit 2, pages 15 and 16 goes into some detail how Dr. S arrived at the IR, based on loss of range of motion (ROM), and sensory and motor deficits. In Dr. S's rebuttal report of April 21, 2004, he notes that page 89 of the Guides instructs how to rate causalgia and RSD. However on the next page (claimant's exhibit 2, page 9) Dr. S discuss another way of evaluating the claimant through use of Table 36 of the Guides entitled "Lower Limb Impairment from Gait Derangement." In another rebuttal letter dated August 26, 2004, Dr. S again references Table 36 on page 76 of the Guides, noting "if this table is used that it is not to be combined with any other deficits such as [ROM], atrophy or [RSD]." Dr. S goes on to state that the most appropriate way to measure the claimant's impairment is the gait derangement table (Table 36). Dr. S, in the August 26, 2004, rebuttal letter concludes that "at the very least this would equal to 20% whole person impairment and today further specified that 50% whole person impairment is most appropriate." Dr. S's 34% IR is not mentioned. Dr. S testified at the CCH and in discussing his rating referenced a "gait assessment" performed on November 19, 2004, by a physical therapist who assessed a 40% impairment, apparently based on Table 36 of the Guides. Dr. S testified:

> And I guess when I saw that, it seemed to confirm my original opinion.
>
> I didn't raise mine from 34 to 40.
>
> I left it at 34. If you look at the gait impairment guides, there's actually a fair range under which you can assign an impairment for a given category. And so my assumption was that this was within same range. And so I didn't change my impairment.

(Page 89 of the transcript.)

Table 36 in pertinent part provides:

Severity	Patient's signs * * * *	Whole-person Impairment (%)
Moderate	e. Requires routine use of cane, crutch, or long leg brace (knee-ankle-foot orthosis [KAFO])	20
	f. Requires routine use of cane or crutch and a short leg brace (AFO)	30

	g. Requires routine use of two canes or two crutches.	40
Severe	h. Requires routine use of two canes or two crutches and a short leg brace (AFO)	50
	i. Requires routine use of two canes or two crutches and a long leg brace (KAFO)	60
	j. Requires routine use of two canes or two crutches and two lower-extremity braces (either AFOs or KAFO's)	70
	k. Wheelchair dependent	80

The hearing officer adopted Dr. S's 34% IR based on the Table 36 gait derangement stating:

> In selecting the gait derangement to evaluate the Claimant's impairment rating as opposed to utilizing the range of motion method or the diagnostic method, [Dr. S] was exercising his professional judgment likewise, he was exercising his professional judgement in assessing a 34% impairment rating, pursuant to Table 36. He testified that that Claimant required more than the use of a cane or crutch and a leg brace (30%), but did not always require the routine use of two canes or two crutches, (40%), so he assessed a 34% impairment rating, believing that this rating accurately reflected the Claimant's overall impairment from the compensable injury.

Dr. S never rated a 34% IR based on gait derangement. The 34% IR was based on his August 6, 2003, Report of Medical Evaluation (TWCC-69) and report where he rated RSD by combining loss of ROM, sensory and motor deficits (to be discussed later). The April 21, 2004, rebuttal report only mentions "table 36 on page 76" and suggests that the impairment could be somewhere between 20% and 80%. Dr. S's August 26, 2004, rebuttal letter also just gives a possible range of "20% whole person impairment and . . . 50% whole person impairment." It is only in Dr. S's testimony that he appears to reference the gait derangement assessment by the physical therapist to bolster his 34% IR based on rating RSD by combining loss of ROM, sensory and motor deficit.

We hold that the hearing officer erred in adopting Dr. S's 34% IR based on gait derangement because there is no report certifying an MMI date and assessing a 34% IR based on the gait derangement table.

Dr. S's 34% IR is based on loss of ROM, sensory and motor deficits. His discussion of gait derangement was just another way to get to the same numerical IR. Dr. S's ROM calculation recites that 12% lower extremity (LE) impairment for left ankle inversion combined with 12% LE impairment for left ankle eversion which is combined with 7% LE impairment for left ankle dorsiflexion. (Using the Combined Values Chart those figures yield a 28% LE loss of ROM rather than the 24% LE impairment found by Dr. S.) Then using the 24% LE impairment, Dr. S combined sensory and motor deficits to arrive at a 42% LE impairment "due to causalgia and [RSD]" which was "combined with the 24% lower extremity impairment secondary to [the] left ankle reduced [ROM]" to arrive at a 56% total LE impairment. "Dr. S then states "56% lower extremity impairment converts to 34% whole person impairment according to the lower extremity to whole person conversion table." There is no table for converting LE impairments to a whole person rating. Dr. S apparently used Table 3, on page 20 of the Guides dealing with "Upper Extremity to Impairment of the whole Person." The proper way to rate LE impairments is to use the whole person impairments. All LE tables have whole person impairments. Section 3.2 page 75 of the Guides comments that "the tables of the section show the impairment percents of the whole person, the lower extremity and the specific part together." See the instruction on page 75 which stated that "whole-person estimates for the impairments are combined" rather than the LE estimates as Dr. S did. The doctor should have used and combined the whole person impairment percentages to arrive at the IR.

The designated doctor, Dr. B, in a report of July 7, 2004, certified MMI and assessed an 11% IR. The IR was based on "3% whole person impairment for 2 cm of left thigh atrophy using Table 27 [sic 37]. Page 77" and an 8% whole person impairment for ROM from Tables 42 and 43 on page 78. Dr. B also assessed 0% for gait derangement "0% for RSD since [claimant] was otherwise rated for [ROM], motor and sensory" and 0% for peripheral nerve injury as well commenting that "[n]o rating can be given in this system for [CRPS] as a diagnostic entity." In a letter of clarification dated September 29, 2004, Dr. B did request a physical therapists evaluation "with specific attention to [claimant's] gait." A physical therapist's assessment dated November 19, 2004, assessed a 40% whole person impairment for gait derangement apparently based on Table 36 of the Guides. Dr. B, in an addendum dated January 13, 2005, considered the physical therapist's assessment, summarized his earlier July 2004 report, and stated that the claimant "was not given any specific rating for chronic regional pain syndrome for two reasons." One reason was that the claimant "was otherwise rated for range of motion, motor and sensory, as required." The second reason apparently was in the reference to section 3.2b of the Guides which stated that a rating under Gait Derangement "does not apply to abnormalities based only on subjective factors, such as pain or sudden giving away. . . ." It appears that Dr. B rated the entire injury properly following the Guides.

We affirm the hearing officer's decision on the extent-of-injury issue and we reverse the hearing officer's decision that the claimant attained MMI on October 9, 2003, and that the claimant's IR is 34%. We remand the case for the hearing officer to

determine an MMI date and an IR that is based on the claimant's condition on the MMI date and properly following the Guides.

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 Texas Department of Insurance, Division of Workers' Compensation, 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* Appeals Panel Decision 92642, decided January 20, 1993.

The true corporate name of the insurance carrier is **VALLEY FORGE INSURANCE COMPANY** and the name and address of its registered agent for service of process is

CT CORPORATION SYSTEM
350 NORTH ST. PAUL STREET
DALLAS, TEXAS 75201.

_____
Thomas A. Knapp
Appeals Judge

CONCUR:

_____
Robert W. Potts
Appeals Judge

_____
Margaret L. Turner
Appeals Judge