APPEAL NO. 061479-s
FILED SEPTEMBER 13, 2006

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 June 12, 2006. The hearing officer resolved the sole disputed issue by deciding that the respondent's (claimant) impairment rating (IR) is 20%. The appellant (self-insured) appealed the hearing officer's IR determination, and requested that the 8% IR from the required medical examination (RME) doctor be adopted. The appeal file does not contain a response from the claimant.

DECISION

Reversed and rendered.

The parties stipulated that the claimant sustained a compensable injury on _____, and that the date of maximum medical improvement (MMI) is November 14, 2005. The evidence reflects that the claimant sustained a supracondylar femoral fracture of the left knee when she tripped over a box and fell down. 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) apply to this case. For assessing an IR of the lower extremity, the AMA Guides allows the use of the Diagnostic Based Estimate (DBE) method, the Range of Motion (ROM) method, or other methods. [1]

The designated doctor, Dr. W, examined the claimant on December 3, 2005, and he certified that the claimant reached MMI on November 14, 2005, with a 28% IR. Dr. W's narrative report indicates that he assessed an IR for the lower extremity using the DBE method. Dr. W measured 48 degrees of angulation of the left distal femur and he assessed a 20% whole person impairment (20 degrees plus angulation) under Table 64 and 10% whole person impairment (10 to 19 degrees angulation) under Table 64, for a combined value of 28% IR. Dr. W's narrative report also indicates that he assessed an IR using the ROM method; however he states that he "will select only the [DBE] as the basis for [the claimant's IR]. I am not able to use the [ROM] loss."

The RME doctor, Dr. B, examined the claimant March 8, 2006, and he certified that the claimant reached MMI on November 14, 2005, and assessed an 8% IR under Table 41 using the ROM method. Dr. B stated in his report that he disagreed with the designated doctor's 28% IR stating that he was "unclear where [Dr. W] derived 48 [degrees] of angulation. This is not apparent in the bilateral long-leg alignment examination reviewed." Dr. B stated that the bilateral long-leg alignment report by Dr.

[1] The AMA Guides, Section 3.2 The Lower Extremity on page 3/75 states: "Anatomic, diagnostic, and functional methods are used in evaluating permanent impairments of the lower extremity. While some impairments may be evaluated appropriately by determining the [ROM] of the extremity, others are better evaluated by the use of the [DBE] or according to test criteria."

WH "clearly demonstrates a 3 [degree] difference between the limbs." Additionally, Dr. B explained why he used the ROM method, using Table 41, rather than the DBE method, using Table 64. Dr. B indicated that he did not assess an impairment under Table 64 because the claimant had 3 degrees of angulation and that Table 64 required at least 5 degrees of angulation to assess an impairment. Dr. B stated that he was "limited to [ROM] about the knee."

On January 12, 2006, the Texas Department of Insurance, Division of Workers' Compensation (Division) sent a letter of clarification (LOC) to Dr. W asking him to explain how he assessed a 28% IR under Table 64, when the AMA Guides provides that an angulation over 20 degrees for a supracondylar displaced fracture results in a maximum whole person impairment of 20%. On January 17, 2006, Dr. W responded that Table 64 can be interpreted in two manners:

> One manner would be that you can interpret that a patient with enough angulation would only get a maximum of 20% impairment of whole person. That would be the 19 degrees of angulation for which the patient got 10% impairment of whole person and then there would be another 10 degrees of angulation at 01% per degree. Adding 10 and 10 is 20 so you 20% impairment of whole person. The other way to interpret this is that you get the 10% for up to 19 degrees of angulation and then for any angulation greater than 20 degrees you can get up to another 20% in which case you can combine the 20% impairment of whole person and the 10% for a 28% impairment of whole person. That is the way I looked at it.

Additionally, Dr. W stated that the AMA Guides did not provide instructions for combining impairments greater than 20 degrees of angulation with impairments between 10 to 19 degrees of angulation, however that the AMA Guides was "open to individual interpretation." Dr. W stood by his 28% IR.

On March 16, 2006, the Division sent another LOC to Dr. W asking him to review the RME's narrative report in which Dr. B disagreed with the 28% IR. On March 30, 2006, Dr. W responded that he "personally measured the angulation of the distal fracture fragment of the left femur and I compared it to the noninjured right femur" and that the claimant "had a significant angulation of the distal femoral condyles, (the distal fracture fragment) and on both films I personally measured 48 degrees of angulation." Dr. W stood by his 28% IR.

At the CCH, Dr. C, the peer review doctor, testified that he disagreed with the designated doctor's 28% IR. Dr. C stated that Dr. W's assessment of a 48 degree angulation is not supported by the medical evidence and that he misapplied the AMA Guides under Table 64 by assigning an impairment over the maximum 20% whole person allowed under Table 64 for angulations above 20 degrees.

The hearing officer determined that the designated doctor, Dr. W, correctly measured the claimant's angulation at 48 degrees and that Dr. W explained and

clarified that the claimant's IR is 20%, rather than 28%. The hearing officer stated in her discussion that Dr. W's responses indicated, "there were two ways to interpret Table 64, page 85 of the AMA Guides. He used one method and [Dr. C] used the other method. Nevertheless, he conceded that [Dr. C] could be correct. He said with angulation more than 20 [degrees] the person would get 10% for up to 19º and 1% for each extra degree up to a maximum of 20% if that person had enough angulation. That interpretation is reasonable, logical, and correct."[2] Additionally, the hearing officer stated in her discussion that the designated doctor reviewed the medical evidence and that Dr. W stated that there was "a significant degree of angulation of the distal fracture femoral fragment and that 48 [degrees] was correct." The hearing officer found:

> Finding of Fact No. 3. In January and March 2006, Dr. W, designated doctor, explained and clarified his certification of Claimant's impairment rating:
>
> a. He said he correctly measured Claimant's angulation.
>
> b. He conceded that using one of two methods to interpret the AMA Guides, Claimant's [IR] would be 20% and not 28%.
>
> Finding of Fact No. 4. Dr. W's clarification as designated doctor that Claimant's IR could be 20% is due presumptive weight.

The self-insured appealed the hearing officer's IR determination arguing that the designated doctor's measured 48 degrees of angulation is not supported by the medical evidence. The self-insured requested that the RME doctor's 8% IR be adopted.

For CCH's which are held on or after September 1, 2005, Section 408.125(c) provides that the report of the designated doctor shall have presumptive weight, and the Division shall base the IR on that report unless the preponderance of the other medical evidence is to the contrary, and that if the preponderance of the medical evidence contradicts the IR contained in the report of the designated doctor chosen by the Division, the Division shall adopt the IR of one of the other doctors. 28 TEX. ADMIN. CODE § 130.6(i) (Rule 130.6(i)) provides that the designated doctor's response to a Division request for clarification is considered to have presumptive weight as it is part of the doctor's opinion.

The hearing officer erred in determining that the claimant's IR is 20% because there is no certification by any doctor that the claimant's IR is 20%. The evidence reflects that Dr. W did not amend his IR from 28% to 20%. Dr. W's responses to the LOCs indicate that he acknowledged that there were two different ways to interpret Table 64, however he indicated that he would not change his interpretation of Table 64 and he did not change the claimant's IR from 28% to 20%. On January 17, 2006, Dr. W responded that he would not be opposed "to changing the [IR] if I have clear cut

[2] We note that the hearing officer incorrectly states that Dr. W conceded that Dr. C could be correct. Dr. W's response dated March 30, 2006 references Dr. B's report, not Dr. C's report.

evidence by an authoritative body who has the authority to make and render an opinion in this manner. If that authoritative body carries the full weight and letter of the law, it tells me that the interpretation is that you can only get a maximum 20% and I will be happy to change the rating, but until I receive such, I have interpreted this, the way I have interpreted this, as outlined in my [IR] and I see no reason to change my interpretation." On March 30, 2006, Dr. W responded that he personally measured 48 degrees of angulation and that Dr. B's report did not alter his opinion regarding MMI or IR. In both responses dated January 17, 2006 and March 30, 2006, Dr. W stood by his 28% IR using his interpretation of Table 64.

The AMA Guides provide, in part, under Table 64, the following:

| **Region and condition** | **Whole-person (lower extremity) Impairment (%)** |
|---|---|
| **Knee** | |
| Supracondylar or intercondylar fracture | |
| Undisplaced fracture | 2(5) |
| Displaced fracture<br>5º-9º anglulation<br>10º-19º anglulation<br>20º+ anglulation | <br>5 (12)<br>10(25)<br>+1(2) per degree up to 20%(50%) |

We read Table 64 to indicate that between 5 to 9 degrees of angulation results in 5% whole person impairment, between 10 to 19 degrees of angulation results in 10% whole person impairment, and that 20 degrees or more of angulation results in plus 1% whole person impairment per degree up to 20% whole person impairment. The plain language of the AMA Guides indicates that a measurement of 20 degrees or more of angulation results in 10% whole person impairment plus 1% whole person impairment per degree of angulation up to 20% maximum whole person impairment.

Given that the designated doctor did not amend his IR certification from 28% to 20% and that there is no certification by any doctor that claimant's IR is 20%, we reverse the hearing officer's determination that the claimant's IR is 20%.

Under section 408.125(c) the report of the designated doctor shall have presumptive weight unless the preponderance of the other medical evidence is to the contrary. The evidence reflects that the designated doctor misapplied the AMA Guides in assessing a 28% IR under Table 64. The designated doctor's narrative report and subsequent responses indicate that he improperly combined values and assigned an IR over the maximum 20% whole person impairment allowed under Table 64 for angulations above 20 degrees. The 1989 Act requires that the determination of an IR be based on the applicable edition of the AMA Guides. Section 408.124.

The only other certification in evidence that can be adopted is from Dr. B, the RME doctor. Dr. B certified that the claimant's IR is 8% under Table 41 and his certification is supported by the preponderance of the medical evidence.

We reverse the hearing officer's determination that the claimant's IR is 20% and we render a new decision that the claimant's IR is 8% as certified by Dr. B, the RME doctor.

The true corporate name of the insurance carrier is **(a self-insured governmental entity)** and the name and address of its registered agent for service of process is

**JE**
**(ADDRESS)**
**(CITY), TEXAS (ZIP CODE)**.

_____
Veronica L. Ruberto
Appeals Judge

CONCUR:

_____
Thomas A. Knapp
Appeals Judge

_____
Margaret L. Turner
Appeals Judge