

APPEAL NO. 081182
FILED SEPTEMBER 29, 2008

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 July 17, 2008. With regard to the two issues before him the hearing officer determined that the appellant (claimant) reached maximum medical improvement (MMI) on August 31, 2007, and that the claimant's impairment rating (IR) is 4%.

The claimant appeals contending, among other matters, that the designated doctor failed to correctly rate the entire compensable injury and that the correct date of MMI is March 4, 2008, with a 7% IR as assigned by Dr. P, a doctor selected by the treating doctor acting in place of the treating doctor. The respondent (carrier) responds, urging affirmance.

DECISION

Affirmed in part and reversed and remanded in part.

The parties stipulated that on _____, the claimant sustained a compensable injury. It is undisputed that the compensable injury is a left foot/ankle injury. The parties also stipulated that Dr. Dr. N is the properly appointed designated doctor to address MMI and IR.

MMI

The hearing officer's determination that the claimant reached MMI on August 31, 2007, is supported by sufficient evidence and is affirmed.

IR

Section 408.125(c) provides that the report of the designated doctor shall have presumptive weight, and the Texas Department of Insurance, Division of Workers' Compensation (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 § 130.1(c)(3) (Rule 130.1(c)(3)) provides that the assignment of an IR for the current compensable injury shall be based on the injured employee's condition as of the MMI date considering the medical record and the certifying examination.

Dr. P, acting in place of the treating doctor, examined the claimant on March 7, 2007, and certified the claimant was not at MMI.

Dr. N, the designated doctor, examined the claimant on March 16, 2007, and certified the claimant at clinical MMI on March 16, 2007, with a 3% IR based on Table 42, entitled Ankle Motion Impairments, 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) (AMA Guides). Dr. N diagnosed a "Crushed Ankle strain."

The claimant was again examined by Dr. N on August 31, 2007. Dr. N certified clinical MMI on August 31, 2007, and again assessed a 3% IR. Dr. N noted the left ankle has a 10° dorsiflexion (extension) with 60° plantar flexion, and 25° inversion, and 8° eversion. Dr. N again applied Table 42 of the AMA Guides in assessing the 3% IR.

Dr. P, re-examined the claimant on March 4, 2008, certified clinical MMI on that date and assessed a 7% IR using Tables 42 and 43 of the AMA Guides.

In a letter of clarification (LOC) dated April 3, 2008, Dr. N, the designated doctor, was asked about his IR and it was pointed out to Dr. N that Table 42 of the AMA Guides "does not address 'Eversion.' Table 43, page 78 does address Hindfoot Impairments and addresses 'Eversion.' Please explain, which is the correct table for [the claimant's] impairment?" Dr. N responds the same day stating "It is for the Table 43 on page 78, address eversion, injuries according to the [AMA Guides]."

Dr. C, a peer review doctor, in a report dated May 15, 2008, stated that "[i]t appears that [Dr. N] misread the [range of motion] charts." In reviewing Dr. N's report of August 31, 2007, Dr. C noted the 10° dorsiflexion would result in a 3% whole person impairment according to Table 42, page 78 of the AMA Guides. With regard to the 8° of eversion found by Dr. N, Dr. C states that according to Table 43, page 78 that "would result in a 1% impairment" and when added to the 3% whole person impairment for 10° dorsiflexion according to Table 42, page 78, would result in a total 4% IR.

The hearing officer, in his Background Information, notes Dr. N's measurements and comments that "Claimant's eversion was 8 degrees which under Table 43, page 78 would be a 1% rating." The hearing officer found that Dr. N "made a miscalculation by not adding the 1% impairment for eversion deficit. This 1% should be added to the 3% to correctly calculate Claimant's [IR] to 4% whole person." In effect the hearing officer treated Dr. N's failure to add a 1% impairment for eversion from Table 43 as "a simple calculation error as noted by [Dr. C] and not a misapplication of the [AMA Guides]." We disagree.

The Appeals Panel has held that a hearing officer may apply a mathematical correction to a certification of IR when doing so merely corrects an obvious mathematical error and does not involve the exercise of judgment as to what the proper figures were. Appeals Panel Decision (APD) 040863, decided May 24, 2004. An error made by the doctor in using the Combined Values Chart (CVC) of the AMA Guides may also constitute an error which may be corrected as a mathematical error. APD 041424, decided July 21, 2004. However, the present case does not constitute the correction of

a mathematical error or the use of the CVC. Here the hearing officer imputed an impairment from Table 43 based on his (and Dr. C's) interpretation of Dr. N's measurements for eversion. The LOC to Dr. N was inartfully worded in that it was interpreted to ask which table in the AMA Guides rates eversion, to which Dr. N answered that Table 43 addresses eversion injuries. Dr. N did not assess a 1% impairment for eversion in his IR. The hearing officer adopted an IR not certified by any doctor.

Accordingly, we reverse the hearing officer's determination that the claimant's IR is 4% in that no doctor has assessed a 4% impairment (Dr. N has assessed a 3% IR and Dr. P has assessed a 7% IR). We remand the case to the hearing officer to determine whether Dr. N is still qualified and available to be the designated doctor, and if so, request clarification of his IR. Dr. N is to be asked if in addition to his measurement of 10° of dorsiflexion or extension yielding a 3% impairment from Table 42, he intended from his measurement of 8° of eversion to rate a 1% impairment from Table 43 and if so whether the impairments could be combined using the CVC to arrive at a 4% IR. If Dr. N does not believe that to be correct he should explain his failure to rate eversion. If Dr. N is no longer available or qualified to serve as the designated doctor then another designated doctor is to be appointed pursuant to Rule 126.7(h) to determine the claimant's IR as of the August 31, 2007, date of MMI.

Because we have affirmed the August 31, 2007, date of MMI we cannot adopt Dr. P's IR because Dr. P certified a March 4, 2008, date of MMI. Rule 130.1(c)(3) provides that the assignment of an IR for the current compensable injury shall be based on the injured employee's condition as of the MMI date considering the medical record and certifying examination. APD 040313-s, decided April 5, 2004.

SUMMARY

We affirm the hearing officer's determination that the claimant reached MMI on August 31, 2007. We reverse the hearing officer's determination that the claimant's IR is 4% and remand the case to the hearing officer for action as directed in this opinion.

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 Division, 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 APD 060721, decided June 12, 2006.

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

**CORPORATION SERVICE COMPANY
701 BRAZOS STREET, SUITE 1050
AUSTIN, TEXAS 78701.**

Thomas A. Knapp
Appeals Judge

CONCUR:

Veronica L. Ruberto
Appeals Judge

Margaret L. Turner
Appeals Judge