

APPEAL NO. 091437
FILED NOVEMBER 20, 2009

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 July 9, 2009, with the record closing on August 27, 2009. The hearing officer resolved the sole issue by determining that the respondent's (claimant) impairment rating (IR) is 20%. The appellant (carrier) appealed the hearing officer's IR determination. Additionally, the carrier contends that the hearing officer erred in denying its motion for continuance. 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 _____. The claimant testified that she sustained an injury to her right wrist, right knee, and lower back when she slipped and fell to the floor at work on _____. The claimant's treating doctor, (Dr. G), examined the claimant on July 25, 2008, and certified that the claimant reached statutory maximum medical improvement (MMI) on July 21, 2008, with a 15% IR. In evidence is a Request for Designated Doctor (DWC-32) from the carrier requesting that a designated doctor be appointed to determine the claimant's IR. It is undisputed that the date of statutory MMI is July 21, 2008, and that (Dr. R) was appointed as the designated doctor to determine the claimant's IR.

The designated doctor, Dr. R, initially examined the claimant on September 26, 2008, and assigned a 7% IR. In response to a letter of clarification (LOC) dated June 24, 2009, Dr. R amended the claimant's IR from 7% to 20% because the "IR was derived incorrectly." In another response to a LOC dated July 29, 2009, Dr. R states that he stood by this assessment of a 20% IR.

DENIAL OF MOTION FOR CONTINUANCE

On appeal, the carrier states that the hearing officer abused her discretion in denying the carrier's motion for continuance to obtain a post-designated doctor required medical examination (RME) doctor to opine on the designated doctor's amended IR from 7% to 20%. An abuse of discretion occurs when a decision is made without reference to any guiding rules or principles. See Morrow v. H.E.B., Inc., 714 S.W.2d 297 (Tex. 1986).

At the CCH, the hearing officer denied the carrier's motion for continuance to obtain a RME doctor's opinion. In a letter dated August 6, 2009, the hearing officer notified the parties that she was allowing them the opportunity to submit any additional documentary evidence in response to the designated doctor's response to a LOC by

August 20, 2009, and to submit closing arguments by August 27, 2009. The carrier did not request an RME until August 27, 2009, the date the hearing officer set for submitting closing arguments from the parties. The hearing officer closed the record on August 27, 2009. We find no abuse of discretion in the hearing officer denying the carrier's motion for continuance.

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.

The designated doctor, Dr. R, initially examined the claimant on September 26, 2008, and assigned a 7% IR, based on 0% impairment for the low back, 0% impairment for the right knee, and 7% whole person impairment for the right wrist, using 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). In response to a LOC dated June 24, 2009, Dr. R amended the claimant's IR from 7% to 20%. In his response, Dr. R states that the range of motion (ROM) for the right wrist was calculated correctly, "however the IR was derived incorrectly." Using the grip strength findings from his initial report, Dr. R assigned a 30% upper extremity (UE) impairment for "Loss of Strength based on [loss of] grip strength differences measured, and using Table 34 on Page 65 of the [AMA Guides]."

In evidence is a medical report dated July 8, 2009, from (Dr. O), a peer review doctor, in which he reviewed Dr. R's assessment of the claimant's 20% IR. Dr. O states that the 7% impairment for the right wrist due to loss of ROM is correct however, he disagrees with the 30% UE impairment for the right wrist due to loss of strength. Dr. O states that "[i]n conclusion, the ratings awarded for strength loss does not follow [the AMA Guides]. The claimant gave poor effort, which does not qualify her for an [IR] and in addition, [Dr. R] combined [UE] values with whole person values."

The Division sent a LOC dated July 29, 2009, to Dr. R in which he was asked whether there was an error in his initial report that the claimant was giving poor effort on her grip strength test, and if not, whether the grip strength measurements he was relying on "showed maximum effort to correctly assess the claimant's [IR] in compliance with the [AMA Guides]." In a response dated July 29, 2009, Dr. R states that his "original report was not in error," that the claimant did give poor effort. However, Dr. R

explained in his response that based on his examination that the “loss of strength is attributable mainly to her decreased use of her right wrist in the performance of everyday activities” and that there was a “significant loss of strength as compared to her other extremity. I did evaluate the grip strength deficit objectively and take it into consideration in the corrected IR calculation.” Further, Dr. R states that he assessed a 20% IR based on the statutory MMI date of July 21, 2008, and that he stood by this assessment of IR. In the Background Information section of the decision the hearing officer states that she reviewed all of the evidence and considered the relevant portions of the AMA Guides, and concluded that the preponderance of the evidence was not contrary to the opinion of the designated doctor.

The hearing officer believed that the designated doctor’s explanation regarding the claimant’s “poor effort” during the grip strength test was due to the loss of strength in the claimant’s right wrist rather than “less than maximal effort.” The AMA Guides state on page 3/66, Section 3.1o Summary of Steps for Evaluating Impairments of the UE:

II. Wrist Region

Determine [UE] impairments due to *loss of motion* (Section 3.1h, p. 35) and *other disorders* (Section 3.1m, p. 58) and *combine* the values to determine the [UE] impairment related to the wrist region.

* * *

X.

Convert the [UE] impairment to a whole-person impairment (Table 3, p. 20).

Dr. R states in his response to LOCs dated June 24, 2009, and July 29, 2009, respectively, that he combined the 30% UE impairment for the right wrist due to loss of strength with the 4% “impairment” for the right wrist for a 33% UE impairment using the Combined Values Chart on page 322, then converted the 33% UE impairment for the UE to a 20% whole person impairment using Table 3, page 3/20. Although Dr. R specifically states in his response dated July 29, 2009, that he did not combine a 4% “whole person impairment” with a 30% UE impairment, the evidence shows that this is exactly what Dr. R did.

We have previously stated that, where the designated doctor’s report provides the component parts of the rating that are to be combined in accordance with the Combined Values Chart, the act of combining those numbers is a mathematical correction which does not involve medical judgment or discretion. Thus, we have recalculated the correct IR from the figures provided in the designated doctor’s report and rendered a new decision as to the correct IR. See Appeals Panel Decision (APD) 950472, decided May 8, 1995. In APD 041413, decided July 30, 2004, the Appeals Panel recalculated the correct IR from the figures provided in the designated doctor’s report and rendered a new decision as to the correct IR.

Dr. R's narrative report dated September 26, 2008, notes objective clinical findings for the claimant's right wrist. Based on Dr. R's findings, the claimant's IR is comprised of 7% UE impairment for the right wrist due to loss of ROM¹ and 30% UE impairment for the right wrist due to loss of strength.² Dr. R had improperly applied the AMA Guides by converting the 7% UE impairment to 4% whole person impairment for the right wrist due to loss of ROM; then he combined the 4% whole person impairment with 30% UE impairment for the right wrist due to loss of strength, for a 20% IR. The AMA Guides provide that the UE impairments be combined, then converted to a whole person impairment. Accordingly, using the Combined Values Chart on page 322, the 7% UE impairment is combined with 30% UE impairment for a 35% UE impairment. Using Table 3 on page 3/20, 35% UE impairment converts to 21% whole person impairment.

Based on Dr. R's findings in his narrative report dated September 26, 2008, and LOC dated July 29, 2009, we have recalculated the correct IR to be 21%. See APD 041413, *supra*. Accordingly, 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 21%.

¹ Dr. R noted objective clinical findings for the right wrist due to loss of ROM as: 4% UE impairment due to loss of flexion; 3% UE impairment due to loss for extension; 0% UE impairment for loss of radial deviation; and 0% UE impairment due to loss of ulnar deviation. Impairments for flexion, extension, radial and ulnar are added (4% + 3% + 0% + 0%) for 7% UE impairment of the right wrist.

² Dr. R noted objective clinical findings for the right wrist due to loss of strength (repeated three times with each hand) as: left hand 60 lbs/ 60 lbs/ 60 lbs and right hand 5 lbs/ 5 lbs/ 5 lbs. An index of loss of strength is calculated using a formula on page 3/65 ($60 - 5/60 = 92\%$). According to Table 34, page 365 92% strength of loss index is converted to 30% UE impairment of the right wrist.

The true corporate name of the insurance carrier is **AMERICAN CASUALTY COMPANY OF READING, PENNSYLVANIA** 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.**

Veronica L. Ruberto
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Margaret L. Turner
Appeals Judge