

APPEAL NO. 100234
FILED APRIL 27, 2010

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 February 1, 2010. The hearing officer resolved the disputed issue by deciding that the respondent's (claimant) impairment rating (IR) is 28%. The appellant (carrier) appealed, disputing the hearing officer's IR determination. The appeal file does not contain a response from the claimant.

DECISION

Reversed and rendered.

The sole issue before the hearing officer was the claimant's IR. The parties stipulated that the claimant sustained a compensable injury on _____, and that the Texas Department of Insurance, Division of Workers' Compensation (Division) appointed (Dr. S) as the designated doctor to determine the claimant's IR. It was undisputed that the claimant reached maximum medical improvement (MMI) on November 5, 2007. There were two assignments of IR in evidence, one from Dr. S, the designated doctor and one from a required medical examination doctor, (Dr. B).

The medical records in evidence state that the claimant sustained a low back injury on _____, when he was bending over to pick up an item. The claimant had spinal surgery, had an infection, and subsequently had other surgeries in an attempt to remove the infection. Medical records in evidence reflect that the claimant developed L3-4 discitis and osteomyelitis.

Dr. S examined the claimant on October 14, 2008, and noted that the claimant "has no sensation in his lower leg and his lateral foot which would be L4-5 and L5-S1." Dr. S noted that the claimant had a severe altered gait and uses a cane to walk. Additionally, Dr. S noted that the claimant has radiculopathy with atrophy in his left leg which is the area that causes him the most pain from his foot to his back. The only diagnosis listed by Dr. S in his narrative report was "[s]tatus post lumbar fusion." Dr. S documented a 2 centimeter difference between the claimant's right and left leg, measured 10 centimeters above the patella. Dr. S certified that the claimant reached MMI statutorily on November 5, 2007, with a 28% IR 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). Dr. S placed the claimant in Diagnosis-Related Estimate (DRE) Lumbosacral Category III: Radiculopathy, assessing 10% impairment for the lumbar spine. Dr. S additionally assessed 20% impairment for moderate gait derangement under Table 36, Lower Limb Impairment from Gait Derangement, page 3/76, noting the claimant had to use a cane all the time for his lower extremity. Dr. S then combined the 10% assessed for the lumbar spine and the 20% assessed for gait

derangement which resulted in a 28% impairment. Dr. S explained that “this is a large impairment but [the claimant] has had [a] severe back injury and has to use a cane to walk so therefore, his lower extremity and his lumbosacral spine would be two different [IRs] for the severity of the injury and the complications (infections, etc.) that he has had.” In a response dated February 10, 2009, to a letter of clarification (LOC) Dr. S stated that after reviewing Dr. B’s report he did not see a need to alter his original assessment. Another LOC was sent to Dr. S dated March 30, 2009, along with a surveillance video and questioning the use of Table 36 in assessing the claimant’s IR. Dr. S responded in a letter dated April 14, 2009, stating that after he reviewed the surveillance video of the claimant he did not change his opinion.

Dr. B examined the claimant on December 11, 2008, certifying that the claimant reached MMI on November 5, 2007, with a 10% IR, using the AMA Guides. Dr. B noted a 2 centimeter difference between the claimant’s left and right leg, measured 10 centimeters above the patella. Dr. B’s diagnosis was “status post multiple lumbar surgeries and fusions with a failed back syndrome.” Dr. B assessed 10% impairment, placing the claimant in DRE Lumbosacral Category III: Radiculopathy. Dr. B noted that using the strict criteria from Table 36, the claimant does not qualify for impairment for gait derangement.

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 § 130.1(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 hearing officer found that the IR assigned by Dr. S is supported by a preponderance of the evidence and determined that the claimant’s IR is 28%. There was no allegation at the CCH that the claimant injured either of his lower extremities as a result of the compensable injury. The medical evidence indicated that the claimant had atrophy and loss of sensation in his lower extremities due to his lumbar spine injury. The AMA Guides on page 3/75 state gait derangement is a component of many different types of lower extremity impairments and specify that impairment for gait derangement does not apply to abnormalities based only on subjective factors, such as pain or sudden giving-way, as with, for example, a patient with low-back discomfort who chooses to use a cane to ease walking. Dr. S noted that the claimant had an altered gait but related that condition to the claimant’s injury to his lumbar spine. No diagnosis was given for a lower extremity condition.

We hold that the hearing officer erred in adopting the IR assessed by Dr. S, the designated doctor, because Dr. S assigned impairment for gait derangement although the compensable injury was to the lumbar spine. Both Dr. B and Dr. S agree that the

claimant's impairment for the lumbar spine was 10% under Lumbosacral DRE Category III: Radiculopathy. The only other IR in evidence was the 10% assigned by Dr. B. We reverse the hearing officer's determination that the claimant's IR is 28% and render a new decision that the claimant's IR is 10%.

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

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

Margaret L. Turner
Appeals Judge

CONCUR:

Veronica L. Ruberto
Appeals Judge

Carisa Space-Beam
Appeals Judge