

APPEAL NO. 101896
FILED FEBRUARY 17, 2011

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 November 29, 2010.

The hearing officer resolved the disputed issues before him by determining that the first certification of maximum medical improvement (MMI) and impairment rating (IR) assigned by (Dr. B) on March 9, 2010, did become final under Section 408.123 and that the appellant's (claimant) IR is 5%.

The claimant appealed the hearing officer's determinations on finality and IR. The respondent (carrier) responded, urging affirmance.

DECISION

Reversed and rendered.

FACTUAL BACKGROUND

The parties stipulated that the claimant sustained a compensable injury on _____; the claimant reached MMI on March 9, 2010; and that the Texas Department of Insurance, Division of Workers' Compensation (Division) appointed Dr. B as a designated doctor to determine MMI and IR.

The claimant testified that while using a lawnmower at work, he sustained an injury to his right hand, which included an amputation to his middle finger at the "second joint." In evidence is the operative report dated August 24, 2009, in which the surgical procedure is described as an amputation of the right middle finger at the proximal interphalangeal (PIP) joint. In evidence are medical reports documenting the claimant's complaints of pain and movement difficulty in his injured fingers.

FINALITY UNDER SECTION 408.123

The hearing officer's findings that: Dr. B's assigned IR is a valid rating; Dr. B's certification of MMI and assigned IR was provided to the claimant by verifiable means on March 31, 2010; and that the claimant did not dispute Dr. B's certification of MMI and assigned IR within 90 days of receipt are supported by sufficient evidence.

The hearing officer's finding that compelling medical evidence does not exist of a significant error by Dr. B in applying the appropriate American Medical Association (AMA) Guides under Section 408.123(f)(1)(A), or of any of the other exceptions as provided by Section 408.123(f) is error.

Section 408.123(f)(1)(A) provides that an employee's first certification of MMI or assignment of an IR may be disputed after the period described in subsection (e) if compelling medical evidence exists of a significant error by the certifying doctor in applying the appropriate AMA guidelines or in calculating the IR.

In the instant case, distinguishable from Appeals Panel Decision 050378, decided April 19, 2005, there is compelling medical evidence from a doctor specifically setting out the error in the calculation of the claimant's IR under 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. B assigned a 5% IR based on the following: an "[a]mputation right middle finger 2/3 loss[;] [d]ecreased [range of motion (ROM)] index and middle fingers[;] [and] [h]ypersensitivity (pain) index and middle fingers" and because Dr. B provided no work sheets or explanation to his narrative report attached to his Report of Medical Evaluation (DWC-69) as to his methodology for a 5% IR, the 5% IR is contrary to the AMA guidelines, for the claimant's amputated finger.

(Dr. P), a referral doctor, in a narrative report dated September 1, 2010, stated that he could not find the calculations utilized by Dr. B to assign a 5% IR. Also, Dr. P correctly stated that an amputation of the middle finger at the PIP joint according to the AMA guidelines, results in an 8% whole person impairment (WPI). Dr. P explained that the 8% WPI for the amputation of the right middle finger at the PIP joint is calculated as follows: an 80% finger impairment (Figure 17, page 3/30) converts to a 16% hand impairment (Table 1, page 3/18) which converts to a 14% upper extremity impairment (Table 2, page 3/19) which converts to an 8% WPI (Table 3, page 3/20).

In reviewing a "great weight" challenge, we must examine the entire record to determine if: (1) there is only "slight" evidence to support the finding; (2) the finding is so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust; or (3) the great weight and preponderance of the evidence supports its nonexistence. See Cain v. Bain, 709 S.W.2d 175 (Tex. 1986).

Under the facts of this case, the hearing officer's determination that compelling medical evidence does not exist of a significant error by Dr. B in applying the appropriate AMA Guides or of any of the other exceptions as provided by Section 408.123(f) is so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust. We reverse the hearing officer's decision that the first certification of MMI and IR assigned by Dr. B on March 9, 2010, did become final under Section 408.123(f) and we render a new decision that the first certification of MMI and IR assigned by Dr. B on March 9, 2010, did not become final pursuant to Section 408.123(f)(1)(A).

IR

Section 408.125(c) provides that the report of the designated doctor has presumptive weight, and the Division shall base its determination of whether the employee has reached MMI on the report of the designated doctor unless the preponderance of the 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.

Given that we have reversed the hearing officer's determination that the first certification of MMI and IR assigned by Dr. B on March 9, 2010, did become final under Section 408.123(f) and we rendered a new decision that the first certification of MMI and IR assigned by Dr. B on March 9, 2010, did not become final, we reverse the hearing officer's determination that Dr. B's assigned IR is supported by a preponderance of the medical evidence because that determination is so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust due to compelling medical evidence of a significant error by Dr. B in the calculation of the claimant's IR. Accordingly, we reverse the hearing officer's decision that the claimant's IR is 5%.

A review of the record shows that there is only one other certification of MMI/IR in evidence that can be adopted with the stipulated MMI date of March 9, 2010. Dr. P examined the claimant on September 1, 2010, and assigned an IR of 18%, based on the amputation of the claimant's middle finger at the PIP joint and on deficits in the ROM of the index and middle fingers. Dr. P used the ROM measurements obtained by Dr. B on March 9, 2010, the date of MMI. For the deficits in the ROM for the claimant's index finger, Dr. P assigned a 27% finger impairment at the distal interphalangeal (DIP) (Figure 19, page 3/32); a 56% finger impairment at the PIP (Figure 21, page 3/33); and a 38% finger impairment at the metacarpophalangeal (MP) joint (Figure 23, page 3/34). Dr. P then combined the finger impairments of 56%, 38%, and 27% using the Combined Values Chart, page 323, resulting in an 80% finger impairment, which converts into a 16% hand impairment (Table 1). Dr. P then calculated the impairment for the claimant's right middle finger. Dr. P assigned an 80% finger impairment for an amputation at the PIP joint (Figure 17) and a 22% finger impairment at the MP joint (Figure 23). Dr. P then combined the 80% finger impairment for the amputation with the 22% finger impairment, resulting in an 84% finger impairment, which converts to 17% hand impairment (Table 1). Dr. P then added the 16% hand impairment for the index finger with the 17% hand impairment for the middle finger, resulting in a 33% hand impairment. The 33% hand impairment converts to a 30% upper extremity impairment (Table 2), which converts to a 18% WPI (Table 3).

Dr. P rated the entire compensable injury and properly calculated an IR for the injuries to the claimant's index and middle fingers according to the AMA Guides. The only assigned IR which can be adopted is the assigned IR of 18% by Dr. P. Accordingly, given that we have reversed the hearing officer's decision that the claimant's IR is 5%, we render a new decision that the claimant's IR is 18%.

SUMMARY

We reverse the hearing officer's decision that the first certification of MMI and IR assigned by Dr. B on March 9, 2010, did become final under Section 408.123(f), and we render a new decision that the first certification of MMI and IR assigned by Dr. B on March 9, 2010, did not become final under Section 408.123(f)(1)(A).

We reverse the hearing officer's decision that the claimant's IR is 5% and we render a new decision that the claimant's IR is 18%.

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

**ROBERT BRADFORD HENDERSON III
501 SHELLY DRIVE, SUITE 160
TYLER, TEXAS 75701.**

Cynthia A. Brown
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Carisa Space-Beam
Appeals Judge