

APPEAL NO. 110741
FILED JULY 25, 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 (CCH) was held on April 25, 2011, in [City], Texas, with [hearing officer] presiding as hearing officer.

The hearing officer resolved the disputed issues by determining that the appellant (claimant) reached maximum medical improvement (MMI) on October 5, 2009, with a 9% impairment rating (IR). The claimant appealed the hearing officer's MMI and IR determinations, contending that the hearing officer failed to give presumptive weight to the MMI/IR certification of the designated doctor, who properly rated the claimant's bilateral ankle injuries. The respondent (carrier) responded, urging affirmance.

DECISION

Reversed and remanded.

The parties stipulated that the claimant sustained a compensable injury on _____. The claimant testified that he broke both ankles falling from a drilling rig at work. The medical evidence reflected that the claimant had multiple operations for his severe bilateral ankle injuries. It is undisputed that Dr. J, was appointed by the Texas Department of Insurance, Division of Workers' Compensation (Division) as a designated doctor to determine MMI/IR.

The hearing officer adopted the certification of MMI and assigned IR given by Dr. K, the referral doctor acting in place of the treating doctor. In the Background Information section of the decision, the hearing officer stated that the claimant contends that the Guides Casebook, *Cases to Accompany Guides to the Evaluation of Permanent Impairment Fourth Edition* (1999) (AMA Guides Casebook) should not be considered in determining his impairment and asserts that the designated doctor's opinion is entitled to presumptive weight, but the hearing officer disagrees.

Section 401.011(30)(A) defines MMI as "the earliest date after which, based on reasonable medical probability, further material recovery from or lasting improvement to an injury can no longer reasonably be anticipated." Section 408.1225(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 other medical evidence is to the contrary. 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.

Dr. J, the designated doctor, examined the claimant on February 5, 2010, and certified that the claimant reached MMI on December 15, 2009, with a 20% 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). In his narrative report dated February 17, 2010, Dr. J stated that it appeared the claimant had reached a plateau in his recovery. We note that a report dated December 15, 2009, from Dr. Ci, the treating doctor, is the last medical report in evidence documenting a visit by the claimant to his treating doctor. The hearing officer failed to make a specific finding regarding Dr. J's certification of the MMI date.

The hearing officer did make a specific finding that the preponderance of the evidence is contrary to Dr. J's assigned 20% IR and that Dr. J failed to properly apply the AMA Guides in determining the claimant's IR.

Using Tables 42 and 43,¹ page 3/78 of the AMA Guides, Dr. J assessed 12% whole person (WP) impairment for left ankle range of motion (ROM) deficits: 3% WP impairment for 5° dorsiflexion added to 6% WP impairment for 5° plantar flexion added to 2% WP impairment for 2° inversion added to 1% WP impairment for 8° eversion results in 12% WP impairment for the left ankle. Dr. J then assessed 9% WP impairment for the right ankle: 3% WP impairment for 0° dorsiflexion added to 3% WP impairment for 11° plantar flexion added to 2% WP impairment for 8° inversion added to 1% WP for 5° eversion yields 9% WP impairment for the right ankle. Using the Combined Values Chart, page 322 of the AMA Guides, Dr. J then combined 12% WP impairment for the left ankle with 9% WP impairment for the right ankle which results in a 20% IR for the claimant's bilateral ankle injuries.

In Section 3.2 entitled "The Lower Extremity," page 3/75, of the AMA Guides, provide that:

If the patient has several impairments of the same lower extremity part, such as the leg, or impairments of different parts, such as the ankle and a toe, the [WP] estimates for the impairments are *combined* (Combined Values Chart, p. 322). If both extremities are impaired, the impairment of each should be evaluated and expressed in terms of the [WP], and the [2%] should be *combined* (Combined Values Chart, p. 322).

In Section 3.2e entitled "[ROM]," page 3/77, of the AMA Guides, provide that "[ev]aluating permanent impairment of the lower extremity according to its [ROM] is a suitable method." Section 3.2e does not require that a certifying doctor must only use

¹ We note the individual directions of motion under Table 42 include plantar flexion capability, flexion contracture, and extension (dorsiflexion). Those under Table 43 are inversion and eversion.

the most severe impairment for an individual direction of motion within the same table [Tables 40 through 43].

In evidence is a carrier peer review report by Dr. C, dated March 9, 2010, in which he criticizes Dr. J's methodology by stating that an impairment under Table 42 or Table 43 cannot be obtained by combining more than one direction of motion (vector) within the same table and the certifying doctor must only use the most severe impairment for an individual vector within the same table. Dr. C based his opinion in part upon an example of an IR under Section 3.2e ROM, pages 3/77 and 3/78. We note that the said example could be interpreted in more than one way. In the example cited, a woman was stated to have lost half of the ankle flexion and extension motion and had severe permanent stiffness of all toes. The example states that the woman's WP impairments are estimated to be moderate (6%) in terms of ankle motion using Table 42 and severe (2%) in terms of toe impairment. However, no specific figures are given for loss of ankle ROM nor any explanation provided regarding the particular loss of motion considered in arriving at the impairment for loss of ankle motion.

Also, in his peer review report, Dr. C provides "[o]n page 130 of the AMA Guides Casebook, it is stated that in the lower extremity when there is diminished joint motion in more than one direction, only the most severe deficit is rated." We note that Section 408.124(c) provides in part that the commissioner by rule may adopt the fourth edition of the [AMA Guides], or a subsequent edition of those guides, for determining the existence and degree of an employee's impairment. 28 TEX. ADMIN. CODE § 130.1(c)(B)(i) (Rule 130.1(c)(B)(i)) provides that the appropriate edition of the AMA Guides to use for certifying examinations conducted on or after October 15, 2001, is the fourth edition of the AMA Guides. There is no provision in the Act or Rules that adopts the AMA Guides Casebook to determine the existence and degree of an employee's impairment. We note that no portion of the AMA Guides Casebook was offered or admitted into evidence at the CCH nor was there a request by the parties for the hearing officer to take official notice of any portion of the AMA Guides Casebook.

The hearing officer rejected the certification of MMI/IR provided by Dr. J, the designated doctor, solely on the basis that in his opinion the ROM loss for the different angles of loss of ROM for a single joint cannot be added. However, there are no specific directions in the AMA Guides which prohibit adding loss of motion in the different directions of motions or vectors of motion in assessing impairment for a single joint. There is no specific provision in the AMA Guides in the Lower Extremity section that restricts ROM deficits in multiple directions increasing the impairment for a single joint.

Therefore, the hearing officer erred in determining that Dr. J's methodology in rating the claimant's bilateral ankle injuries was not in accordance with the AMA Guides. We note that under the facts of this case, the hearing officer erred in using the AMA Guides Casebook to determine the designated doctor's opinion was not entitled to presumptive weight. As previously discussed above, Dr. J's certification of MMI and IR is entitled to presumptive weight under the Act and the Rules. Accordingly, we reverse

the hearing officer's determination that the claimant reached MMI on October 5, 2009, with a 9% IR and we remand the case to the hearing officer for further consideration of the evidence consistent with this opinion. The hearing officer is to admit no further evidence but is to make findings of fact and conclusions of law consistent with this decision concerning the issues of MMI and IR based on the record developed at the CCH held on April 25, 2011.

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 Appeals Panel Decision 060721, decided June 12, 2006.

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

**CORPORATION SERVICE COMPANY
211 EAST 7TH STREET, SUITE 620
AUSTIN, TEXAS 78701-3232.**

Cynthia A. Brown
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Margaret L. Turner
Appeals Judge