APPEAL NO. 111353
FILED NOVEMBER 4, 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 August 16, 2011. The hearing officer resolved the disputed issues by deciding that the appellant's (claimant) compensable (date of injury), extends to the lumbar spine and the claimant's impairment rating (IR) is 9% per the report of (Dr. H), the respondent's (carrier) required medical examination (RME) doctor. The claimant appealed, disputing the hearing officer's determination that his IR is 9%. The carrier responded, urging affirmance of the IR determination.

The hearing officer's determination that the claimant's compensable (date of injury), injury extends to the lumbar spine was not appealed and has become final pursuant to Section 410.169.

DECISION

Reversed and remanded.

The parties stipulated that: on (date of injury), the claimant sustained a compensable right ankle injury while in the course and scope of employment; the claimant reached maximum medical improvement (MMI) on the statutory date of December 6, 2010, per the reports of the Texas Department of Insurance, Division of Workers' Compensation (Division)-appointed designated doctor, (Dr. K), and the post-designated doctor RME, Dr. H; and Dr. K is the designated doctor in this case on the issues of extent of injury, MMI and IR.

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 narrative report accompanying the Report of Medical Evaluation (DWC-69) from Dr. K is dated December 21, 2010, and notes that Dr. K examined the claimant on that date. However, both the date of the certification and the date of the certifying exam

noted on the DWC-69 in evidence is November 21, 2010. Dr. K certified that the claimant reached MMI on December 6, 2010, the date the parties stipulated the claimant reached MMI with a 15% IR. Dr. K assessed the claimant's 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. K assessed 10% impairment for the lumbar spine under Diagnosis-Related Estimate (DRE) Lumbosacral Category III: Radiculopathy. Dr. K's narrative then states that the claimant "would qualify for 6% whole person impairment for moderate loss of range of motion [(ROM)] per Table 42 and 2% whole person impairment for moderate loss of [ROM] of the right ankle for a total of 8% whole person impairment." Dr. K then states that per the Combined Values Chart (CVC), this yields 15%.[1] We note that 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. *See* Appeals Panel Decision (APD) 110741, decided July 25, 2011.

The hearing officer found that the preponderance of the medical evidence is contrary to Dr. K's assignment of impairment for lumbar radiculopathy and did not adopt the 15% IR assigned by Dr. K. That finding is supported by sufficient evidence and is affirmed.

At the CCH, Dr. H testified that he would assign a 5% IR for DRE Lumbosacral Category II: Minor Impairment, however, there was no DWC-69 in evidence or narrative report from Dr. H which discussed any impairment assigned for the lumbar spine. The only other certification in evidence is the 9% IR assigned by Dr. H. Dr. H examined the claimant on February 23, 2011, and certified the claimant reached MMI on the statutory date stipulated to by the parties (December 6, 2010), and assessed a 9% impairment using the AMA Guides. Dr. H assessed 5% impairment for loss of ROM of the right ankle; 2% impairment for the sensory abnormalities of the medial plantar nerve; and 2% impairment for the sensory abnormalities of the lateral plantar nerve. Dr. H opined that the compensable injury did not include an injury to the lumbar spine and stated any IR directed "toward the lumbar spine is inappropriate." The hearing officer acknowledged in the Background Information section of her Decision that Dr. H assigned the claimant a 9% IR solely for the right ankle.

As previously noted, the determination that the claimant's compensable (date of injury), injury extends to the lumbar spine was not appealed. Therefore, the claimant's compensable injury includes the lumbar spine. Dr. H did not assign impairment for the

[1] We note that using Dr. K's assessment of an 8% whole person impairment for the right ankle, when combined with a 10% DRE Lumbosacral Category III: 10%, the whole person impairment after applying the CVC would be 17%, not the 15% IR assessed by Dr. K.

lumbar spine; therefore, Dr. H did not consider the entire compensable injury when assessing the IR. Accordingly, the hearing officer's determination that the claimant's IR is 9% is reversed. *See* APD 101567, decided December 20, 2010.

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).

We reverse the hearing officer's determination that the claimant's IR is 9% as being so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust. Because there is no report in evidence which can be adopted, we remand the issues of MMI and IR to the hearing officer for further consideration and action consistent with this decision.

REMAND INSTRUCTIONS

Dr. K is the most recently appointed designated doctor to determine MMI and IR. On remand, the hearing officer is to determine if Dr. K is still qualified and available to be the designated doctor, and if so, the hearing officer is to advise the designated doctor that it has been administratively determined that the compensable injury includes the lumbar spine but does not result in ratable radiculopathy and that the date of MMI is December 6, 2010. The designated doctor should be requested to clarify the date of his examination and correct his DWC-69 and explain whether or not the ROM he assessed for the claimant's right ankle was 6% or 8% explaining how the measurements result in the impairment assessed. Additionally, the designated doctor should explain whether the claimant sustained nerve damage to his right ankle which should be rated under the AMA Guides. The designated doctor is then to be requested to rate the entire compensable injury. If Dr. K is no longer qualified or available to serve as the designated doctor, another designated doctor is to be appointed to determine MMI and IR for the compensable injury. The parties are to be provided with the hearing officer's letter to the designated doctor, the designated doctor's response and are to be allowed an opportunity to present evidence and respond.

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 **ZURICH AMERICAN 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 78701-3218.

Margaret L. Turner
Appeals Judge

CONCUR:

Cynthia A. Brown
Appeals Judge

Thomas A. Knapp
Appeals Judge