APPEAL NO. 121695
FILED OCTOBER 24, 2012

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 20, 2012, in [City], Texas, with [hearing officer] presiding as hearing officer. The hearing officer resolved the disputed issue by deciding that the appellant's (claimant) impairment rating (IR) is 7%. The claimant appealed, disputing the hearing officer's determination of IR. The respondent (carrier) responded, urging affirmance of the disputed IR determination.

DECISION

Reversed and remanded.

The parties stipulated that: (1) the claimant sustained compensable injury on [date of injury]; (2) the Texas Department of Insurance, Division of Workers' Compensation (Division) selected [Dr. K] to serve as the designated doctor with regard to maximum medical improvement (MMI) and IR; (3) the carrier has accepted a [date of injury], compensable injury that includes left Achilles tendon rupture and left ankle internal derangement; and (4) the claimant reached MMI on February 13, 2012, as certified by the designated doctor, Dr. K, and the post-designated doctor required medical examination doctor, [Dr. Ke]. The claimant testified that he was injured when he stepped in a pothole and twisted his left ankle. The claimant had surgery for repair of his Achilles tendon on October 28, 2010.

The sole issue in dispute was the claimant's IR. The hearing officer adopted the assessment of IR from Dr. Ke. Dr. Ke examined the claimant on May 25, 2012, and certified that the claimant reached MMI on February 13, 2012, with a 7% 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. Ke assessed impairment for the claimant's left ankle under Grade 4 plantar flexion of Table 39, page 3/77 of the AMA Guides. Dr. Ke noted that the claimant had 2 cm of atrophy but that would only result in 3% impairment and the claimant is significantly impaired beyond this.

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.

Dr. K, the designated doctor for MMI/IR, examined the claimant on February 17, 2012, and assessed an IR of 15%, using the AMA Guides. Dr. K noted that the claimant underwent a reconstruction of the left Achilles tendon due to a complete rupture and would require the use of a brace for the rest of his life. Dr. K obtained range of motion (ROM) measurements of the claimant's left ankle and noted that after careful review, analysis of the claimant's diagnoses and treatment and comparison between the injury and ROM models he determined that the IR should be based upon the lower extremity impairment for gait derangement. Dr. K stated in his examination notes that the claimant walks with a brace and had a mild antalgic gait favoring the left leg. Dr. K, using Table 36, page 3/76, of the AMA Guides placed the claimant in the mild category because he required the routine use of a short leg brace (ankle-foot orthosis [AFO]). Under Table 36, 15% is the whole person impairment assessed for a claimant that requires routine use of short leg brace (AFO). Dr. K correctly documented in his narrative report that the AMA Guides state that impairment for gait derangement should stand alone and not be combined with any other method of impairment. Dr. K additionally stated that when an individual qualifies for more than one impairment, the evaluator should choose the higher of the two.

The AMA Guides provide on page 3/75 that the lower limb impairment percents shown in Table 36 (gait derangement) should stand alone and should not be combined with those given in other parts of Section 3.2. The AMA Guides further provide that whenever possible, the evaluator should use the more specific methods of those other parts in estimating impairments. However, the AMA Guides discuss an example on page 3/84 which states a patient with a femoral neck fracture with nonunion, who requires one crutch, should be rated either for use of the crutch or for the nonunion plus the ROM restriction, whichever is greater.

The carrier contended at the CCH that because there were other methods available under the AMA Guides to assessment impairment for the claimant's compensable injury, the designated doctor could not use gait derangement to assess impairment. The hearing officer was persuaded by this argument. The hearing officer noted that Dr. K measured impairment based on loss of ROM of the claimant's left ankle but still chose to assess impairment for the compensable injury on gait derangement and therefore concluded that the IR of the designated doctor cannot be adopted.

The fact that Dr. K measured ROM in the claimant's left ankle but decided to assess impairment based on gait derangement does not preclude the hearing officer

from considering his certification of impairment. The AMA Guides specifically provide gait derangement as a method for assessing impairment for lower extremity injuries. The hearing officer's finding that the IR of Dr. K was not performed in accordance with the AMA Guides is not supported by the evidence.

Because the hearing officer rejected the certification of Dr. K on the basis that he could have assessed impairment for the claimant's injury based on loss of ROM of the left ankle, or another method more specific than gait derangement as provided by the AMA Guides, we reverse the hearing officer's determination that the claimant's IR is 7%. As previously noted, there are two certifications of IR in evidence with the stipulated date of MMI. We remand the IR issue to the hearing officer for consideration of both the certification of IR from Dr. K and the certification of IR from Dr. Ke. No new evidence shall be admitted and no hearing shall be held on remand.

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 **[SELF-INSURED]** and the name and address of its registered agent for service of process is

[CA]
[ADDRESS]
[CITY], TEXAS [ZIP CODE].

Margaret L. Turner
Appeals Judge

CONCUR:

Cynthia A. Brown
Appeals Judge

Thomas A. Knapp
Appeals Judge