

APPEAL NO. 132734
FILED JANUARY 9, 2014

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 October 15, 2013, in [City], Texas, with [hearing officer] presiding as hearing officer. The hearing officer resolved the disputed issues by deciding that: (1) the compensable injury of [date of injury], does not extend to the left hip/groin, sacroiliac malalignment, and depression; (2) the appellant (claimant) had disability beginning November 20, 2012, and continuing through the date of the CCH; and (3) the claimant reached maximum medical improvement (MMI) on November 19, 2012, with a 12% impairment rating (IR).

The claimant appealed the hearing officer's extent of injury and MMI/IR determinations, contending that the hearing officer's determinations are so against the great weight and preponderance of the evidence as to be manifestly unjust. The claimant also contends that the hearing officer erred in failing to admit Claimant's Exhibit No. 1 and pages one and two of Claimant's Exhibit No. 2. The respondent (self-insured) responded, urging affirmance of the hearing officer's determinations. The hearing officer's determination that the claimant had disability beginning November 20, 2012, and continuing through the date of the CCH has not been appealed and has become final pursuant to Section 410.169.

DECISION

Affirmed in part and reversed and rendered in part.

The parties stipulated that the claimant sustained a compensable injury on [date of injury], and that [Dr. C] is the designated doctor appointed by the Texas Department of Insurance, Division of Workers' Compensation (Division) to determine MMI and IR. The claimant, a police officer for the employer, testified that his right leg was crushed between two cars when he was attempting to apprehend a fleeing criminal.

EVIDENTIARY RULING

At the CCH the claimant sought to admit a medical report from [Dr. G] dated October 4, 2013, and received on October 14, 2013, as well as a medical report from [Dr. Cr], dated October 11, 2013, and received on October 14, 2013, the day before the CCH. The self-insured objected on the grounds that the reports had not been timely exchanged. The hearing officer denied the exhibits, finding no good cause for the untimely exchange. To obtain a reversal of a judgment based on the hearing officer's abuse of discretion in the admission or exclusion of evidence, an appellant must first

show the admission or exclusion was in fact an abuse of discretion, and also that the error was reasonably calculated to cause and probably did cause the rendition of an improper judgment. Hernandez v. Hernandez, 611 S.W.2d 732 (Tex. Civ. App.-San Antonio 1981, no writ). In determining whether there has been an abuse of discretion, the Appeals Panel looks to see whether the hearing officer acted without reference to any guiding rules or principles. Appeals Panel Decision (APD) 043000, decided January 12, 2005; APD 121647, decided October 24, 2012; Morrow v. H.E.B., Inc., 714 S.W.2d 297 (Tex. 1986). We hold that the hearing officer did not abuse his discretion in denying the claimant's exhibits.

EXTENT OF INJURY AND MMI

The hearing officer's determinations that the compensable injury does not extend to the left hip/groin, sacroiliac malalignment, and depression, and that the claimant reached MMI on November 19, 2012, are supported by sufficient evidence and are affirmed.

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.

Dr. C, the designated doctor appointed by the Division to determine MMI and IR, examined the claimant on November 21, 2012, and in a Report of Medical Evaluation (DWC-69) dated December 5, 2012, certified that the claimant reached MMI on November 19, 2012, with an 8% 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 an attached narrative report Dr. C noted 100° of flexion of the right knee and 10° of extension/flexion contracture of the right knee. Using Table 41 on page 3/78, of the AMA Guides, Dr. C assessed 4% for flexion and 8% for extension/flexion, which he stated resulted in an 8% whole person impairment (WPI). The hearing officer noted in the Background Information section of his decision that:

[The] [c]laimant correctly argued [Dr. C's] rating is mathematically incorrect. He pointed out based on Table 41 of the [AMA Guides] [Dr. C's] [award] for loss of range of motion [ROM] 4% for flexion and 8% for extension/flexion contracture. These are whole

person values and should have been added together using the combined values chart for an [IR] of 12%.

The hearing officer found that mathematically a 4% WPI for flexion and an 8% WPI for extension/flexion contracture result in a 12% IR using the Combined Values Chart of the AMA Guides. The hearing officer corrected Dr. C's 8% IR to a 12% IR.

In APD 110741, decided July 25, 2011, the hearing officer rejected the designated doctor's MMI/IR certification solely on the basis that in his opinion, the ROM loss for the different angles of loss of ROM for a single joint of the lower extremity cannot be added. The Appeals Panel stated that "Section 3.2e entitled '[ROM],' page 3/77, of the AMA Guides, provide that '[e]valuating 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 the most severe impairment for an individual direction of motion within the same table [Tables 40 through 43]." The Appeals Panel noted that there are no specific directions in the AMA Guides which prohibit addressing loss of motion in the different directions of motions or vectors of motion in assessing impairment for a single joint, and reversed the hearing officer's determination that the designated doctor's methodology in rating the claimant's injury was not in accordance with the AMA Guides.

The case on appeal presents the opposite situation; that is, whether the AMA Guides require that ROM loss for the different angles of loss of ROM for a single joint must be combined. The hearing officer applied a mathematical correction to Dr. C's 8% IR because he believed the ROM loss for the different angles of loss of ROM for the claimant's right knee must be combined. However, there is no specific provision in the AMA Guides in the Lower Extremity section that requires ROM deficits in multiple directions be combined to increase the impairment for a single joint, and it was within Dr. C's discretion as a matter of medical judgment to not combine the different angles of loss of ROM for the claimant's right knee. Therefore, the hearing officer erred in applying a mathematical correction to Dr. C's 8% IR. Accordingly, we reverse the hearing officer's determination that the claimant's IR is 12%.

Dr. C's December 5, 2012, MMI/IR certification is the only certification in evidence. It was undisputed at the CCH that the self-insured has accepted a right tibia/fibula fracture, and the self-insured contended that Dr. C rated the claimant's entire compensable injury. Dr. C's narrative report lists diagnoses of a right knee/leg injury and fracture of the tibia and fibula, and as discussed above Dr. C assessed an 8% WPI based on loss of ROM of the claimant's right knee. We note that although Dr. C states in his narrative report that the claimant's IR is 10%, Dr. C's December 5, 2012, DWC-69 certified the claimant's IR is 8%. Based on the noted ROM measurements used by Dr.

C and Table 41 on page 3/78, of the AMA Guides, the 10% IR in Dr. C's narrative report is clearly a typographic error. We have affirmed the hearing officer's determination that the compensable injury does not extend to left hip/groin, sacroiliac malalignment, and depression as being supported by the evidence. Therefore, the evidence established that Dr. C has rated the claimant's entire compensable injury, and that Dr. C's 8% IR was made in accordance with the AMA Guides. Accordingly, we render a new decision that the claimant's IR is 8%.

The true corporate name of the insurance carrier is **(a self-insured governmental entity)** and the name and address of its registered agent for service of process is

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

Carisa Space-Beam
Appeals Judge

CONCUR:

Cristina Beceiro
Appeals Judge

Margaret L. Turner
Appeals Judge