APPEAL NO. 100510
FILED JUNE 24, 2010

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 March 31, 2010. The hearing officer resolved the disputed issue by deciding that the appellant's (claimant) impairment rating (IR) is 12%. The claimant appealed, disputing the hearing officer's IR determination. The respondent (carrier) responded, urging affirmance.

DECISION

Reversed and remanded.

The sole issue before the hearing officer was the claimant's IR. The parties stipulated that the claimant sustained a compensable injury on _____, and that the claimant reached maximum medical improvement (MMI) on October 23, 2007. In evidence were assessments of impairment from both the designated doctor, (Dr. G) and a carrier post-designated doctor required medical examination doctor, (Dr. H). The hearing officer found that Dr. H evaluated the claimant on September 8, 2008, certified that the claimant reached MMI on October 23, 2007, and assigned a 12% IR. There were two Reports of Medical Evaluation (DWC-69) from Dr. H in evidence. Both DWC-69s assigned a 12% IR but certified different dates of MMI. One of the DWC-69s certified that the date of MMI was September 8, 2008. Since the parties stipulated that the date of MMI was October 23, 2007, the certification with the MMI date of September 8, 2008, cannot be adopted. There was another DWC-69 in evidence that certified the MMI date of October 23, 2007, and assigned an IR of 12%. However, that DWC-69 was not signed by Dr. H. The reporting requirements of 28 TEX. ADMIN. CODE § 130.1(d)(1) (Rule 130.1(d)(1)) provide that a certification of MMI and assigning IR for the current compensable injury requires the "completion, signing and submission of the [DWC-69] and a narrative report." Rule 130.1(d)(1)(A) states that the DWC-69 "must be signed by the certifying doctor." That rule goes on to state that the signature may be "a rubber stamp signature or an electronic facsimile signature." *See* Appeals Panel Decision (APD) 042044-s, decided October 8, 2004, and APD 061017, decided July 14, 2006. Because the DWC-69 with the correct MMI date was not signed by Dr. H, it was error for the hearing officer to adopt his certification. Consequently, we reverse the hearing officer's determination that the claimant's IR is 12%.

The designated doctor, Dr. G, examined the claimant on October 23, 2007, and certified that the claimant reached MMI on that date with an 18% 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). The IR was based on a 2% whole person impairment for loss of range of motion of the left shoulder and a right lower extremity impairment of 15% for the claimant's fracture of the os calcis (intra-articular fracture with displacement

of the subtalar bone), using Table 64, page 3/86; a lower extremity impairment of 10% for the peripheral nerve injury involving the medial and lateral plantar nerves; and a lower extremity impairment of 20% for atrophy of the claimant's right calf and thigh. The claimant's right lower extremity impairment was combined (15%, 10%, and 20%) and then converted to a 16% whole person impairment. The 16% whole person impairment for the right lower extremity was then combined with the 2% whole person impairment for the left shoulder to arrive at the 18% IR.

The AMA Guides provide on page 3/76 that diminished muscle function should be estimated under *only one* of several parts of this chapter, relating to gait derangement, muscle atrophy, manual muscle testing, or perhipheral nerve injury. Further on page 3/88, the AMA Guides provide that "[e]stimates for peripheral nerve impairments may be combined with those for other types of lower extremity impairments, except those for muscle weakness and atrophy, using the Combined Values Chart (p. 322)."

A letter of clarification (LOC) was sent to Dr. G and he responded on March 24, 2008, stating that he was not:

> 'double dipping' in giving a rating for a sensory peripheral nerve deficit and muscle atrophy. These conditions have two different etiologies. The atrophy of the lower extremity is secondary to the fractures involving the femur and the tibia and has nothing to do with a peripheral nerve injury as there was no weakness noted of any of the peripheral nerves. The sensory deficit would be unrelated to the impairment given for the muscle atrophy.

Two additional LOCs were sent to Dr. G but he did not change his opinion. The hearing officer noted in the Background Information portion of her decision and order that "[n]othing in the [AMA] Guides appears to allow for this combination were it to be shown that the cause of the muscle atrophy stems from a different source." We agree.

No other assignment of IR is in evidence. Therefore, we remand this case back to the hearing officer. On remand the hearing officer is to determine whether Dr. G is still qualified and available to be the designated doctor, and if so, request Dr. G rate the claimant's compensable injury as of the date of MMI, informing him that impairment for a peripheral nerve injury, specifically, the medial and lateral plantar nerve of the right lower extremity cannot be combined with impairment for atrophy of the right lower extremity. The hearing officer is to provide the designated doctor's response to the parties and allow the parties an opportunity to respond and then make a determination regarding the IR. If Dr. G is no longer qualified or available to serve as the designated doctor, then another designated doctor is to be appointed pursuant to Rule 126.7(h) to determine the claimant's IR.

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 Texas Department of Insurance, Division of Workers' Compensation, 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 **MITSUI SUMITOMO INSURANCE USA, INC.** and the name and address of its registered agent for service of process is

PRENTICE-HALL CORPORATION SYSTEM, INC.
211 EAST 7TH STREET, SUITE 620
AUSTIN, TEXAS 78701.

_____
Margaret L. Turner
Appeals Judge

CONCUR:

_____
Thomas A. Knapp
Appeals Judge

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Veronica L. Ruberto
Appeals Judge