APPEAL NO. 101481
FILED DECEMBER 9, 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 September 13, 2010. The hearing officer resolved the disputed issue by deciding that the respondent's (claimant) impairment rating (IR) is 17%. The appellant (carrier) appealed, disputing the hearing officer's determination of a 17% IR. The claimant responded, urging affirmance.

DECISION

Reversed and remanded.

The parties stipulated that the claimant sustained a compensable injury on _____; that the claimant reached maximum medical improvement (MMI) on May 1, 2010; and that (Dr. F) was appointed by the Texas Department of Insurance, Division of Workers' Compensation (Division) as the designated doctor on the issues of MMI, IR and the extent of the compensable injury. Dr. F examined the claimant on May 1, 2010, and certified that the claimant reached MMI on that date with a 17% 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).

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. F noted that the claimant had swelling in her right ankle and foot and gave the following measurements for range of motion (ROM) of the right ankle and hindfoot: ankle dorsiflexion 10°, plantar flexion 30°, inversion 20°, and eversion 10°. Using Table 42 on page 3/78 of the AMA Guides, Dr. F assigned impairment of 3% for loss of ROM "in dorsiflexion" and 2% for loss of ROM of plantar flexion. Using Table 43 on that same page of the AMA Guides Dr. F assigned 0% for inversion and 0% for eversion. However, according to Table 42 of the AMA Guides, 30° for plantar flexion is a normal measurement and would not result in any impairment. Further, 20° for inversion would result in 1% impairment, not the 0% assigned by Dr. F. The impairment assessed for ROM was not done in accordance with the AMA Guides.

Using Table 68 on page 3/89 of the AMA Guides, Dr. F assigned impairment for loss of strength, loss of sensation and dysesthesia involving both the medial and lateral plantar nerves for a combined rating of 12%. Dr. F then combined the 12% with the impairment assessed for loss of ROM for a total IR of 17%. The AMA Guides on page 3/88 state that all estimates listed in Table 68 are for complete motor or sensory loss of the named peripheral nerves and that partial motor loss should be estimated on the basis of strength testing. Dr. F noted in his examination that the claimant's strength testing "appears to be 5/5; 5 on the left, 5- on the right." He further noted that the claimant had "numbness along the plantar surface of the right foot medially and laterally and [had] normal sensation on the left plantar surface of the foot." However, Dr. F does not document results of his physical examination that would justify impairment for dysesthesia or disordered sensation. The carrier correctly notes in its appeal that in his narrative, Dr. F states he is assessing impairment for loss of strength, loss of sensation and dysesthesia involving the **left** medial and plantar nerves (emphasis added).

We hold that the great weight and preponderance of the evidence is contrary to the hearing officer's determination that the claimant's IR is 17%. The preponderance of the medical evidence is contrary to Dr. F's assignment of a 17% IR. Accordingly, the hearing officer's determination that the claimant's IR is 17% is reversed.

Only one other certification of IR is in evidence. (Dr. O) performed a post designated doctor required medical examination on July 22, 2010, and certified that the claimant reached MMI on May 1, 2010, with a 5% IR. Dr. O noted that for ROM the claimant showed a deficit of plantar flexion and extension and assessed a 3% impairment for loss of extension. Dr. O noted that the claimant had "good strength to the abductor hallicus and the flexor digitorum brevis as well as the flexor hallicus brevis. Therefore, she does not have total motor loss." Further, Dr. O stated that the claimant did not have total sensory loss but has a dysesthesia of the medial plantar nerve. Dr. O assessed 2% impairment for dysesthesia of the medial plantar distribution and combined that rating with the 3% assessed for a ROM deficit for a 5% IR. Rule 130.1(c)(3) provides in part that the doctor assigning the IR shall: identify objective clinical or laboratory findings of permanent impairment for the current compensable injury and document specific laboratory or clinical findings of an impairment. While Dr. O noted that the claimant had a ROM deficit, his narrative report did not include measurements of the ROM deficits performed in his physical examination. Therefore, his certification of IR cannot be adopted. *See* Appeals Panel Decision (APD) 100394, decided June 3, 2010.

Further consideration and development of the evidence is necessary to resolve the issue of the claimant's IR. *See* Albertson's, Inc. v. Ellis, 131 S.W.3d 245 (Tex. App.-Fort Worth 2004, pet. denied). Since the hearing officer's determination that the claimant's IR is 17% has been reversed and there is no other assignment of an IR in evidence which we can adopt, we remand the IR issue to the hearing officer.

The designated doctor in this case is Dr. F. The hearing officer is to determine whether Dr. F is still qualified and available to be the designated doctor, and if so,

request that Dr. F rate the compensable injury in accordance with the rating criteria in the AMA Guides based on the claimant's condition as of the stipulated date of MMI of May 1, 2010. The hearing officer should inform the designated doctor of the discrepancy of his ROM measurements and assessment of impairment for ROM and request that the designated doctor specify the clinical findings which would support an assessment of impairment for complete motor or sensory loss for the named peripheral nerves and which would support an assessment of impairment for dysesthesia. 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. F is no longer qualified and 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 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 **FEDERAL INSURANCE COMPANY** and the name and address of its registered agent for service of process is

CT CORPORATION SYSTEM
350 NORTH ST. PAUL STREET
DALLAS, TEXAS 75201.

_____
Margaret L. Turner
Appeals Judge

CONCUR:

_____
Cynthia A. Brown
Appeals Judge

_____
Thomas A. Knapp
Appeals Judge