APPEAL NO. 030693
FILED APRIL 23, 2003

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 February 20, 2003. The hearing officer resolved the disputed issues by deciding that the appellant's (claimant) impairment rating (IR) is 3% and that the claimant's strained back, neck, shoulders, arms, and legs injury after _____, is not a result of the compensable injury sustained on _____. The claimant appealed, and the respondent (self-insured) responded.

DECISION

Affirmed in part and reversed and rendered in part.

The claimant sustained a compensable injury on _____, when a student assaulted her at her workplace. The claimant said that her whole body was injured in that incident. The medical reports reflect that the claimant's primary complaints were back pain with radiculopathy to the lower extremities and neck pain with radiculopathy to her upper extremities.

In a Report of Medical Evaluation (TWCC-69) dated December 22, 1998, the claimant's initial treating doctor reported that the claimant reached maximum medical improvement (MMI) on September 28, 1998, with a 3% IR. The hearing officer found that the claimant was notified of the initial treating doctor's assessment no later than January 30, 1999, and that the claimant did not dispute that IR until October 3, 2002.

There was no stipulation regarding MMI at the CCH and the hearing officer made no determination as to when the claimant reached MMI (the hearing officer simply made a finding that the date of statutory MMI is October 13, 1999). However, the benefit review conference (BRC) report reflects that the disputed issue of MMI was resolved at the BRC because "The parties agreed at the [BRC] that the date of [MMI] is 10-13-99, the statutory date." Statutory MMI occurs at the expiration of 104 weeks from the date on which income benefits begin to accrue. Section 401.011(30)(B). The record does not contain a response to the BRC report. Since the BRC report reflects that the parties agreed that the date of MMI is October 13, 1999, that is the date of MMI that will be used in addressing the issues on appeal.

On October 28, 2002, the Texas Workers' Compensation Commission (Commission) appointed a designated doctor to determine the claimant's IR, and the Commission told the designated doctor that if IR is the only issue in dispute, that the designated doctor shall asses an IR assuming MMI was reached on August 28, 1998. The designated doctor examined the claimant on November 15, 2002, and reported in a TWCC-69 that the claimant reached statutory MMI on August 28, 1998, with a 25% IR.

The designated doctor assigned permanent impairment as a result of the compensable injury for the claimant's lumbar and cervical regions.

For a workers' compensation claim based on a compensable injury that occurs before June 17, 2001, Section 408.125(e) provides that if the designated doctor is chosen by the Commission, the report of the designated doctor shall have presumptive weight, and the Commission shall base the IR on that report unless the great weight of the other medical evidence is to the contrary. Section 401.011(23) defines "impairment" as "any anatomic or functional abnormality or loss existing *after* [MMI] that results from a compensable injury and is reasonably presumed to be permanent." (Emphasis supplied). Section 401.011(24) defines IR as "the percentage of permanent impairment of the whole body resulting from a compensable injury." Section 408.121(a) provides in part that an employee's entitlement to impairment income benefits begins on the day *after* the date the employee reaches MMI. (Emphasis supplied). The Appeals Panel has held that an IR is not assessed until MMI is reached. Texas Workers' Compensation Commission Appeal No. 92517, decided November 12, 1992. In Texas Workers' Compensation Commission Appeal No. 960771, decided June 7, 1996, the Appeals Panel affirmed a hearing officer's determination that an IR assigned by a doctor on a date prior to the date the claimant reached MMI was invalid. *See also* Texas Workers' Compensation Commission Appeal No. 021381, decided July 15, 2002, where the Appeals Panel held that the hearing officer could not adopt an IR that was assigned before the claimant reached the stipulated date of MMI.

In Fulton v. Associated Indemnity Corporation, 46 S.W.3d 364 (Tex. App.-Austin 2001, pet. denied), the court held that Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.5(e) (Rule 130.5(e)), which provided that the first IR assigned to an employee is considered final if the rating is not disputed within 90 days after the rating is assigned, was invalid because it impermissibly shortened the statutory time period allotted to an injured worker to achieve MMI.

At the CCH in the present case, the self-insured contended that the 3% IR assigned by the initial treating doctor could not be "revisited" after the statutory date of MMI pursuant to the following language on page 372 of the Fulton decision:

> Under the plain language of the Act, if a worker's condition deteriorates within the two-year period, it may be reevaluated; if it deteriorates more than two years after income benefits begin to accrue, the worker has no recourse.

Apparently, the hearing officer accepted the self-insured's argument because he stated in his decision:

> However, the prevailing jurisprudence, notably the Fulton case, is to the effect that a claimant may not "revisit" his certification after the two-year window marked by the SMMI date.

The hearing officer concluded that "The [IR] is 3%, as the claimant failed to dispute that rating timely." The claimant contends that the 3% IR is invalid.

While we agree that the claimant has "no recourse" with regard to extending her MMI date, because the claimant reached MMI on the statutory date, 104 weeks after income benefits began to accrue, and the extension of MMI for spinal surgery provided for in Section 408.104 does not apply, we do not agree that the claimant has "no recourse" with regard to the 3% IR assigned by the initial treating doctor. The problem with the reasoning of the self-insured and the hearing officer regarding the IR issue is that the claimant in the instant case did not reach MMI until the statutory date of MMI, October 13, 1999, as was agreed to by the parties at the BRC. Thus, the 3% IR assigned by the initial treating doctor in his TWCC-69 dated December 28, 1998, which was almost 10 months before the claimant reached MMI, is invalid. Appeal Nos. 960771 and 021381. Consequently, there was no valid IR for the claimant to "revisit."

Additionally, Section 408.125(a) of the 1989 Act provides a method for the resolution of IR disputes through the appointment of a designated doctor. The designated doctor's report on the IR has presumptive weight, and the Commission must base the IR on that report, unless the great weight of the other medical evidence is to the contrary. In the instant case, the Commission appointed a designated doctor to assess the claimant's IR after the claimant reached MMI, and the hearing officer found that the great weight of the other medical evidence is not contrary to the designated doctor's assessment.

Since the initial treating doctor's 3% IR is invalid as having been assigned prior to the date the claimant reached MMI, and since the only other IR in evidence is the 25% IR assigned by the designated doctor after the claimant reached MMI, which rating the hearing officer found was not contrary to the great weight of the other medical evidence, presumptive weight is given to the designated doctor's 25% IR. We reverse the hearing officer's decision that the claimant's IR is 3% and we render a decision that the claimant's IR is 25% as assigned by the designated doctor.

The second issue at the CCH was "Is the claimant's strained back, neck, shoulders, arms and legs injury, after _____, a result of the compensable injury sustained on _____?" _____, is a date the claimant went to an emergency room complaining of back pain. The hearing officer determined that "The claimant's strained back, neck, shoulders, arms and legs injury after _____, is not a result of the compensable injury sustained on _____."

Because the designated doctor has reported that the claimant has a 25% IR due to permanent impairment of her cervical and lumbar regions as a result of the compensable injury, and that IR has been found not to be contrary to the great weight of the other medical evidence, we reverse that portion of the hearing officer's determination that attempts to exclude the claimant's back and neck from the compensable injury after _____.

Because it is unclear from the evidence whether the claimant actually "strained" her shoulders, arms, and legs in the incident in which she sustained her compensable injury, and because the medical evidence reflects that the claimant's upper extremity pain is due to cervical radiculopathy and her lower extremity pain is due to lumbar radiculopathy, we affirm that portion of the hearing officer's determination that the claimant's "strained" shoulders, arms, and legs after _____, are not a result of the compensable injury. However, we note that under Section 408.021(a), an employee who sustains a compensable injury is entitled to all health care reasonably required by the nature of the injury as and when needed, and that the employee is specifically entitled to health care that: (1) cures or relieves the effects naturally resulting from the compensable injury; (2) promotes recovery; or (3) enhances the ability of the employee to return to or retain employment. Thus, the claimant would be entitled to health care for her compensable neck and back injury, which would include any radiculopathy that results from her compensable injury to her neck and back.

We reverse the hearing officer's decision that the claimant's IR is 3% and we render a decision that the claimant's IR is 25% as reported by the designated doctor. We reverse the hearing officer's decision that the claimant's strained back and neck after _____, are not a result of her compensable injury, and we render a decision that the claimant's back and neck are part of her compensable injury. We affirm the hearing officer's decision that the claimant's "strained" shoulders, arms, and legs after _____, are not a result of her compensable injury.

The true corporate name of the insurance carrier is **LUFKIN INDEPENDENT SCHOOL DISTRICT, a governmental entity self-insured either individually or collectively through DEEP EAST TEXAS SELF INSURANCE FUND** and the name and address of its registered agent for service of process is

TOM LANG
314 HIGHLAND MALL BOULEVARD, SUITE 202
AUSTIN, TEXAS 78752.

_____
Robert W. Potts
Appeals Judge

CONCUR:

_____
Gary L. Kilgore
Appeals Judge

_____
Michael B. McShane
Appeals Panel
Manager/Judge