

APPEAL NO. 031470
FILED JULY 22, 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 was held on May 7, 2003. With respect to the issues before him, the hearing officer determined that the appellant's (claimant) impairment rating (IR) is 11% as certified by the designated doctor selected by the Texas Workers' Compensation Commission (Commission) pursuant to 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) (fourth edition), and that the claimant is not entitled to supplemental income benefits (SIBs) for the first quarter because he does not meet the threshold requirement of having an IR of at least 15%. In his appeal, the claimant argues that his IR should be 15%, the IR the designated doctor assigned using the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association (third edition), and that he is entitled to SIBs for the first quarter. In its response to the claimant's appeal, the respondent (carrier) urges affirmance.

DECISION

Affirmed.

The parties stipulated that the claimant sustained a compensable injury to his lumbar spine on _____; that he reached maximum medical improvement (MMI) on November 10, 2001; that he did not commute his impairment income benefits; and that if his IR is 15%, then the qualifying period for the first quarter of SIBs ran from June 10 to September 8, 2002. The claimant initially argues that, in accordance with Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.1(c)(2)(B)(ii) (Rule 130.1(c)(2)(B)(ii)), his IR should be 15%, as certified by the designated doctor under the third edition because the initial examination to determine his MMI and IR was conducted prior to October 15, 2001. However, the only doctor that examined the claimant for purposes of determining MMI and IR prior to October 15, 2001, certified that the claimant had not yet reached MMI. We cannot agree with the claimant's assertion that the fact that he was examined for the purpose of determining MMI and IR prior to October 15, 2001, mandates that the third edition of the AMA Guides be used to determine his IR. By their very terms, Rules 130.1(b)(3) and 130.1(c)(2)(B)(ii) would require a written finding by a doctor that the injured employee had reached MMI prior to October 15, 2001, in order for the third edition to be applicable in this case. See Texas Workers' Compensation Commission Appeal No. 021860-s, decided September 11, 2002, and Texas Workers' Compensation Commission Appeal No. 031165-s, decided June 30, 2003. There was no certification of MMI in this case until November 16, 2001, when the carrier's required medical examination doctor certified that the claimant reached MMI as of that date with an 11% IR. Thus, the hearing officer correctly determined that the designated doctor properly used the fourth edition to determine the claimant's IR. While

it is unfortunate that the Commission incorrectly had the designated doctor recalculate the claimant's IR using the third edition, that does not create a basis for us to ignore the plain language of the rule, which establishes that the claimant's IR was to be calculated using the fourth edition.

To the extent that the claimant's argument that it is "unfair" to "jump back and forth as to my [IR]" can be viewed as a contention that Rule 130.1(c)(2) is arbitrary and capricious in determining when the third or the fourth editions of the AMA Guides are to be used to determine an IR, we note that administrative rules are presumed to be valid, that the burden of proving invalidity is on the party asserting invalidity, and that the courts are the proper forum for deciding the validity of agency rules. Texas Workers' Compensation Commission Appeal No. 980673, decided May 18, 1998.

The claimant also argues that the carrier has waived the right to contest the 15% IR because it paid the first two quarters of SIBs. Rule 130.102(g) provides that "[i]f there is no pending dispute regarding the date of [MMI] or the [IR] prior to the expiration of the first quarter, the date of [MMI] and the [IR] shall be final and binding." In this instance, as the hearing officer noted, the carrier filed a Request for Benefit Review Conference (TWCC-45) on August 21, 2002, disputing the use of the third edition to determine the claimant's IR. As noted above, the parties stipulated that if the claimant's IR was 15%, the qualifying period for the first quarter was June 10 to September 8, 2002. Thus, the dates of the first quarter were September 22 to December 21, 2002, and the record reflects that there was a pending dispute of the IR as of August 21, 2002, well before the expiration of the first quarter. Accordingly, Rule 130.102(g) is inapplicable in this instance and the 15% IR is not final and binding.

Given our affirmance of the hearing officer's determination that the claimant's IR is 11%, we likewise affirm the determination that the claimant is not entitled to SIBs for the first quarter. Section 408.142(a)(1) provides that an employee is entitled to SIBs if on the expiration of the impairment income benefits period, the employee "has an [IR] of 15 percent or more as determined by this subtitle for the compensable injury." The claimant does not satisfy the threshold requirement of having a 15% IR in this case; thus, the hearing officer did not err in determining that he is not entitled to SIBs.

The hearing officer's decision and order are affirmed.

The true corporate name of the insurance carrier is **PACIFIC EMPLOYERS INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**MARCUS CHARLES MERRITT
6600 CAMPUS CIRCLE DRIVE EAST, SUITE 200
IRVING, TEXAS 75063.**

Elaine M. Chaney
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Edward Vilano
Appeals Judge