

APPEAL NO. 033288
FILED FEBRUARY 12, 2004

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 December 1, 2003. With respect to the issues before him, the hearing officer determined that pending certification by the Texas Workers' Compensation Commission (Commission)-selected designated doctor using the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association (AMA Guides, third edition), the date of maximum medical improvement (MMI) and an impairment rating (IR) cannot be determined. The hearing officer also determined that claimant had disability for the periods beginning May 29, 2001, through July 18, 2001, and again for the period beginning July 30, 2002, through September 20, 2002, the last day of claimed disability.

Appellant/cross-respondent (carrier) appeals the disability determination asserting that it is against the great weight and preponderance of the evidence, and that any determination regarding disability is premature, as MMI has not been established. Carrier appeals the hearing officer's determination to send this matter back to the designated doctor, asserting that the April 23, 2001, certification of MMI and IR issued by the treating doctor of the respondent/cross-appellant (claimant) should be adopted. The appeal file does not contain a response from claimant.

Claimant appealed the hearing officer's disability determination on two grounds. First, claimant asserts that the hearing officer's determination that he did not have disability from July 19, 2001, through July 29, 2002, is against the great weight and preponderance of the evidence. Second, the claimant asserts that the hearing officer erred in not determining the issue of disability from the date of the injury, _____, through April 23, 2001. The claimant asserts that there has never been a dispute over the period of the claimant's disability prior to April 23, 2001, but because the hearing officer did not address it in his decision, the carrier is now asserting an overpayment of temporary income benefits (TIBs) paid between _____, and April 23, 2001. The appeal file does not contain a response from carrier.

DECISION

We affirm in part and reverse and remand in part.

The parties stipulated that claimant sustained a compensable injury on _____, and the date of statutory MMI was September 21, 2002. In evidence is a Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) dated February 28, 2001, which indicates that claimant was paid TIBs from September 21, 2000, through February 25, 2001. The record reflects that claimant underwent a laminectomy with diskectomy on December 2, 2000. On April 23, 2001, claimant's

treating surgeon certified that claimant had reached MMI as of that date with a 13% IR pursuant to the AMA Guides, third edition. It is undisputed that carrier has paid claimant the entire amount of impairment income benefits (IIBs) based upon his treating surgeon's certification that claimant had a 13% IR. On April 29, 2002, claimant's treating surgeon stated that his prior certification of MMI and IR was premature. On June 4, 2002, claimant was examined by the designated doctor and was certified as being at MMI as of that date with a 25% IR. The designated doctor issued his IR utilizing 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, fourth edition). On July 30, 2002, claimant underwent a second surgical intervention in the form of a fusion as a result of his compensable injury.

Carrier asserts that the overwhelming evidence supports the initial, and valid, certification from claimant's treating surgeon. We conclude that the hearing officer did not err in deciding to send the issue of MMI and IR back to the designated doctor with instructions to rate the claimant utilizing the AMA Guides, third edition. We recognize that Section 408.125(e) states that "[i]f the great weight of the medical evidence contradicts the impairment rating contained in the report of the designated doctor chosen by the commission, the commission shall adopt the impairment rating of one of the other doctors." However, the intent of the statute and rules appears to be that a designated doctor shall be selected to decide the IR issue when there is a dispute. The designated doctor's report was invalid because he erroneously used the AMA Guides, fourth edition and had not yet been directed to consider the IR based on the correct version of the AMA Guides. It is apparent that the designated doctor did not know he was using the wrong version of the AMA Guides. We have previously stated that where a question exists as to whether the designated doctor used the statutorily mandated version of the AMA Guides to determine the IR, the preferred course of action is to inquire of the designated doctor and to ensure that the IR was assigned in accordance with the correct version of the AMA Guides. Texas Workers' Compensation Commission Appeal No. 951922, decided December 28, 1995; Texas Workers' Compensation Commission Appeal No. 941237, decided October 31, 1994; Texas Workers' Compensation Commission Appeal No. 94055, decided February 22, 1994; Texas Workers' Compensation Commission Appeal No. 93045, decided March 3, 1993. We perceive no reversible error.

We next turn to the issue of disability. The hearing officer stated that claimant credibly established that he had disability for the period beginning May 29, 2001, through July 18, 2001, and beginning July 30, 2002, and continuing "at least up to statutory [MMI] (September 21, 2002), when he no longer claims disability." The hearing officer determined that claimant did not have disability from July 19, 2001, through July 29, 2002, because claimant failed to establish that he earned less than his average weekly wage during that period. The issue of disability presented a question of fact for the hearing officer to resolve. Conflicting evidence was presented regarding the disputed disability issue. The hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). As the finder of fact, the hearing officer

resolves the conflicts in the evidence and determines what facts have been established. We conclude that the hearing officer's determination in this regard is supported by sufficient evidence and that it is not so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986). Carrier asserts that a determination regarding any period of disability was premature because the actual date of MMI has not yet been determined, carrier's main concern appears to be that because the MMI date is unknown, so too is the cutoff date for TIBs. We construe the hearing officer's decision as an order to pay TIBs for the periods of disability found, if any were due. We perceive no error.

While we have affirmed the hearing officer's determination regarding disability for the period of time after April 23, 2001, we must remand the case back to the hearing officer for a determination regarding disability for the time period of _____, through April 22, 2001. The majority of the testimony and evidence regarding disability focused on the time period following claimant's treating surgeon's initial MMI and IR certification of April 23, 2001. However, the issue at the hearing was, "Did the [c]laimant have disability as a result of his compensable injury of _____, and if so, for what period(s)?" There was no stipulation regarding this period of time and claimant, on appeal, specifically asks that the period from _____, through April 22, 2001, be addressed. In his decision and order, the hearing officer stated that claimant worked at this old job until May 2001, when he quit. The hearing officer may not have been referencing the period in question, _____, through April 22, 2001, but to the extent he found that claimant was working during that period, there is no evidence to support that. Claimant said he was not working at all during the time period from _____, until January 2001. He said he returned to work in January and worked until May 2001 when he quit because he was unable to do the work. Because: (1) the disability issue covered all periods after _____; (2) there was no stipulation regarding the period following _____; (3) claimant specifically testified that he was not working at all for a period after _____; and (4) claimant raises on appeal the issue of disability from _____, through April 22, 2001, we must remand this case for the hearing officer to determine whether claimant had disability from _____, through April 22, 2001. We remand the case back to the hearing officer solely to make the appropriate findings of fact and conclusions of law regarding what period of time, if any, claimant had disability between _____, and April 22, 2001.

The hearing officer's determinations that pending certification by the designated doctor using the AMA Guides, third edition, the date of MMI and an IR cannot be determined, and that claimant had disability beginning on May 29, 2001, through July 18, 2001, and again for the period beginning July 30, 2002, through September 20, 2002, are affirmed. The case is remanded back to the hearing officer for the sole purpose of making findings of fact and conclusions of law consistent with this decision.

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 Commission's Division of Hearings, 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 Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

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

**JOSEPH KELLEY-GRAY, PRESIDENT
6907 CAPITOL OF TEXAS HIGHWAY NORTH
AUSTIN, TEXAS 78755.**

Judy L. S. Barnes
Appeals Judge

CONCUR:

Chris Cowan
Appeals Judge

Edward Vilano
Appeals Judge