

APPEAL NO. 043188
FILED FEBRUARY 11, 2005

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 October 21, 2004, with the record closing on November 23, 2004. The hearing officer determined that the respondent's (claimant) impairment rating (IR) is 20% as assessed by the designated doctor in an amended report.

The appellant (carrier) appeals, contending that the designated doctor's amended report was based on improper application of Texas Workers' Compensation Commission (Commission) Advisory 2003-10 signed July 22, 2003, and that the hearing officer erred by providing the designated doctor with an outdated Advisory. The file does not contain a response from the claimant.

DECISION

Reversed and remanded.

The parties stipulated that the claimant sustained a compensable (low back) injury on _____, and that the claimant reached statutory maximum medical improvement (MMI) (See Section 401.011(30)(B)) on March 24, 2003, as certified by (Dr. G), the designated doctor.

The claimant sustained a low back injury, had conservative treatment and on December 7, 2001, had a lumbar laminectomy at L4-5. The claimant was seen by Dr. G, the designated doctor on December 20, 2002. In a report of that date, Dr. G certified MMI on December 20, 2002, with a 5% IR based on Diagnosis-Related Estimate (DRE) Lumbosacral Category II: Minor Impairment of 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). Dr. G commented that MMI "is reached unless he elects to undergo lumbar fusion surgery in the future, at which time, we would be happy to review this file again." The claimant continued to have complaints, he had two lumbar epidural steroid injections under IV sedation in February 2003. The claimant by stipulation reached statutory MMI on March 24, 2003.

Subsequently, the claimant had additional spinal surgery in the form of a redo discectomy at L4-5 and posterolateral L4-5 fusion on May 6, 2003. Dr. G reevaluated the claimant and in a report dated June 25, 2003, noted the lumbar fusion and commented that the claimant "has reached [MMI], as far as a statutory date is concerned" but that he was not at medical (or clinical) MMI. Dr. G further stated that the IR "itself would not change, as he was evaluated due to the DRE model" where the IR "is based upon the time of injury." (Dr. E) the doctor who performed the second spinal surgery, in a report dated August 11, 2003, stated that since the claimant "has a fusion,

he now is defined as fulfilling the criteria for loss of structural integrity” and rated the claimant at DRE Lumbosacral Category V with a 25% IR.

The Commission by correspondence dated October 31, 2003, sent Dr G “new medical reports and letters” and asked if that changed his opinion. Dr. G replied by letter dated November 7, 2003, stating:

While [Dr. E] is theoretically correct, that if [the claimant] had loss of structural integrity and radiculopathy, that he would be in DRE category V. The DRE categories are in fact not related to his current situation, but is what is known as the injury model. Hence, the patient must be evaluated as of the time of the injury, not as of his result post-surgery, and this is the reason why whether this patient is totally cured or paralyzed after the surgery, he would still have the same [IR].

(Dr. G is clearly of the opinion that the injury is rated at the date of injury rather than at the date of MMI). A lumbar CT spine without contrast performed on May 14, 2004, had an impression of minimal degenerative changes, post operative changes, and “a mild disc bulge at L4-5.”

The CCH was held on October 21, 2004. The hearing officer reopened the record and wrote Dr. G by letter dated October 28, 2004, commenting that a carrier doctor had noted numbness in claimant’s right foot in 2001 and “an EMG of February 10, 2003, showed right L5 radiculopathy.” The hearing officer also forwarded a copy of Commission Advisory 2003-10 (but not Commission Advisory 2003-10B signed February 24, 2004) asking Dr. G to review the advisory, if the information “and/or the Advisory” changed the doctor’s opinion and to “explain your decision.” Dr. G responded stating:

Given the news about this advisory, of which I am well aware, the Commission had elected to override the AMA Guide to Evaluation of Permanent Impairment, Fourth Edition, and for a person such as, [the claimant], as of October of 2003, he would be entitled a DRE Category IV evaluation.

I also bring your attention to Comment #4 of the TWCC-Advisory 2003-10. As you are probably aware, the Fourth Edition AMA Guide specifically utilizes the DRE model at this [sic] time of the patient injury and not at the time of maximum medical improvement, and this too has been overridden by the Commission, in effect, rendering the use of the AMA Guide Fourth Edition essentially ineffective, and returning to the Third Edition Guide principals.

Commission Advisories 2003-10 and 2003-10B in paragraph 4 and Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.1(c)(3) (Rule 130.1(c)(3)) provide that an assignment of an IR for the compensable injury "shall be based on the injured employee's condition as of the MMI date." In Texas Workers' Compensation Commission Appeal No. 040313-s, decided April 5, 2004, the Appeals Panel referred to the preamble to Rule 130.1(c)(3) in noting that if the MMI date is changed due to a post MMI change in the injured employee's conditions, there should be a reevaluation of the IR as of the new MMI date. An MMI date may not be after the date of statutory MMI unless there is an extension of statutory MMI pursuant to Section 408.104. Rule 130.1(c)(3) has been interpreted to mean that the IR shall be based on the injured employee's condition as of the MMI date (statutory or otherwise) and not based on subsequent changes, including surgery. See also Texas Workers' Compensation Commission Appeal No. 040583, decided May 3, 2004.

In Texas Workers' Compensation Commission Appeal No. 042521, decided December 6, 2004, the Appeals Panel referenced Texas Workers' Compensation Commission Appeal No. 032399-s, decided November 3, 2003, and Texas Workers' Compensation Commission Appeal No. 042108-s, decided October 20, 2004, holding that the Appeals Panel, after referring to Advisories 2003-10 and 2003-10B, did not have the authority to overrule those advisories and then stated:

Under these Commission advisories, a certifying doctor has the option to assign an [IR] based on DRE Category IV to an injured employee with a multi-level fusion. Rather than stripping the certifying doctor of the ability to exercise his or her independent medical judgment in assigning an appropriate IR in each individual case, the two Commission advisories merely give the certifying doctor this additional option.

In the instant case, the claimant reached stipulated statutory MMI on March 24, 2003, and the second spinal surgery was on May 6, 2003. Further Dr. G is clearly of the opinion that the claimant should be rated at the date of injury however he also recognized that Commission Advisory 2003-10 (and we also note Advisory 2003-10B) and Rule 130.1(c)(3) require that the claimant be rated at the time of MMI.

Without addressing the problem of whether the claimant's May 6, 2003, surgery amounted to the multilevel fusion to qualify for DRE IV under the Advisories and whether the hearing officer erred in sending Dr. G Advisory 2003-10 but not Advisory 2003-10B or referencing the fact that under the advisories the doctor has an option of whether or not to apply them, we remand the case back to the hearing officer to seek further clarification from Dr. G. Dr. G, if he is still qualified to act as the designated doctor, should be asked to determine the claimant's IR as of the date of statutory MMI (which was stipulated to be March 24, 2003, before the May 6, 2003, second surgery took place). While that determination will no doubt be a difficult one to make, it is required under Rule 130.1(c)(3). If Dr. G will not assign an IR as of the date of statutory

MMI, then the Commission will have to appoint another designated doctor that will certify an IR based upon the claimant's condition on the date of MMI. After the designated doctor's report is received the parties should be allowed the opportunity to comment on the report. The hearing officer is then to make a determination of the IR not inconsistent with this decision.

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 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 **TRAVELERS INDEMNITY COMPANY OF CONNECTICUT** and the name and address of its registered agent for service of process is

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

Thomas A. Knapp
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Margaret L. Turner
Appeals Judge