APPEAL NO. 050020
FILED FEBRUARY 28, 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 was held on December 7, 2004. The hearing officer determined that the respondent's (claimant) impairment rating (IR) is 17% and that the claimant is entitled to supplemental income benefits (SIBs) for the first, second, third, fourth, and fifth quarters.

The appellant (carrier) appeals, contending that the hearing officer erred in finding a 17% IR, that the reports of the designated doctor and treating doctor are invalid, and that the only valid report was a 10% IR of a required medical examination (RME) doctor. The carrier also asserts that because the claimant does not have at least a 15% IR the claimant is not entitled to SIBs. The claimant responded, urging affirmance.

DECISION

Reversed and remanded.

The parties stipulated that the claimant sustained a compensable (low back) injury on _____, and that he reached maximum medical improvement (MMI) on July 13, 2001. The claimant testified, and the medical records support, that the claimant had spinal surgery in the form of decompressive laminectomy at L4-5 on October 15, 1999. The parties agreed and stipulated that the claimant reached statutory MMI (*see* Section 401.011(30)(B)) on July 13, 2001.

Subsequently, on January 30, 2002, the claimant had a second spinal surgery in the form of an anterior lumbar diskectomy at L4-5 with fusion and hardware. The hardware was adjusted on July 2, 2002. On November 6, 2002, the claimant had a third spinal surgery for removal of the hardware and regrafting of the L4-5 fusion.

Dr. H, the claimant's treating doctor, on a Report of Medical Evaluation (TWCC-69) dated January 10, 2003, certified clinical MMI on that date with a 21% 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 fourth edition). In a progress note Dr. H states that the IR is:

> . . . for surgically treated, multiple operations, failed back surgery, with residual symptoms, gives him 10%, plus 2% for the anterior procedure gives him 12%, plus 2% for additional surgery gives him 16%, plus 6% for chronic residual radiculopathy and neurologic weakness gives him a 21% [IR], according to the Combined Values indices.

The hearing officer comments that Dr. H's "report is insufficient to meet the requirements of the Guides and the [Texas Workers' Compensation Commission (Commission)] rules." Although not mentioned, or stipulated, the parties and the hearing officer used 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).

Subsequently, Dr. D was appointed as the designated doctor. In a report dated April 4, 2003, Dr. D certified MMI as the statutory date and assessed a 16% IR using the AMA Guides third edition. Dr. D based his rating on a 10% impairment from Table 49 line (II) (E), an additional 2% impairment from line (II) (G1) and an additional 1% impairment from Line (II) (G2) for the third surgery for a total 13% impairment from Table 49. Dr. D also found certain sensory loss when combined resulted in a 3% whole person impairment for neurologic deficit combined with the 13% impairment from Table 49 to result in the 16% IR. Dr. D commented that he was unable to perform range of motion (ROM) testing because of the claimant's recent lumbar fusion, that he would have to reexamine the claimant for ROM and that his IR "rendered today" is incomplete. The claimant had a spinal cord stimulation procedure on June 5, 2003. The claimant was reexamined by Dr. D on October 9, 2003. Dr. D certified the statutory MMI date and assessed a 20% IR based on 13% Impairment from Table 49, lines (II) (E), (G1) and (G2). In addition Dr. D assessed 3% impairment each for right and left lateral flexion (6%) and 2% neurologic deficit, using the combined value tables to arrive at the 20% IR.

Subsequently on March 24, 2004, the claimant was examined by the RME doctor who certified MMI on the statutory date and assessed a 10% IR impairment based on Table 49, line (II)(E). The doctor invalidated ROM, both based on the straight leg raise test and that any loss of ROM "would be due to the subsequent fusion surgery" which he attributed to a disease of life progress. The doctor also stated that he found no impairment for muscle weakness or sensory impairment.

The hearing officer accepted certain portions of Dr. D's October 9, 2003, report stating:

> The appropriate [IR] is 17%. The rating is determined by taking the rating certified by [Dr. D] after the October 9, 2003, examination and disregarding the additional 3% impairment for specific disorders that [Dr. D] assigned for surgeries after July 17, 2001. [Dr. D's] assignments of impairments for neurological loss and for loss of motion in the lumbar spine in right and left lateral flexion are matters of medical judgment on which the [Dr. D] has presumptive weight. [Dr. D's] determination that Claimant has an IR of 17% from the _____, injury is not against the great weight of other medical evidence. [Dr. D's] reports taken together are substantially in compliance with the requirements of the appropriate version of the Guides and are entitled to presumptive weight.

Section 408.125(e) provides that for a compensable injury that occurred before June 17, 2001, the report of the designated doctor chosen by the Commission 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, and that if the great weight of the medical evidence contradicts the IR contained in the report of the designated doctor chosen by the Commission, the Commission shall adopt the IR of one of the other doctors. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.1(c)(3) (Rule 130.1(c)(3)), which became effective March 14, 2004, provides that "[a]ssignment 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." That rule has been interpreted to mean that the IR shall be based on the condition as of the MMI date and is not to be based on subsequent changes, including surgery. *See* Texas Workers' Compensation Commission Appeal No. 040313-s, decided April 5, 2004.

Clearly the reports of Dr. D, including the report of October 9, 2003, include as components of the rating post statutory MMI surgery. The hearing officer attempts to cure the defect by merely "disregarding" the extra 3% impairment given the post statutory MMI surgeries, however that does not take into account the effect of those surgeries (and spinal cord stimulator) might have had on lateral flexion loss of ROM and the neurologic deficit ratings.

We distinguish Texas Workers' Compensation Commission Appeal No. 041413, decided July 30, 2004, from the instant case in that in Appeal No. 041413, the designated doctor recognized that that IR must be assessed at the time of statutory MMI but concluded he could not determine the ROM at that time because the claimant in that case had not been examined then. The designated doctor in Appeal No. 041413, *supra*, then "assessed two IRs based respectfully on the claimant's condition at the time of the certifying examination and at the time of statutory MMI." In the instant case Dr. D in his April 4, 2003, report stated that he was unable to perform ROM testing because of the claimant's recent (post statutory MMI) lumbar fusion and that he would have to reexamine the claimant for ROM. Dr. D's subsequent reexamination on October 9, 2003, clearly considered post statutory MMI surgeries and the effect those surgeries might have on lateral flexion loss of ROM and neurologic deficit. We remand the case for the hearing officer to advise Dr. D that pursuant to Rule 130.1(c)(3) the assignment of an IR for the compensable injury shall be based on the claimant's condition as of the MMI date considering the medical records and the certifying examination. If necessary Dr. D may do as the designated doctor did in Appeal No. 041413.

We also note that Dr. H, the treating doctor used the AMA Guides fourth edition and that his report was after October 15, 2001. *See* Rule 130.1(c)(2) to determine which edition of the AMA Guides should be used. In the remand the hearing officer is to also determine which edition of the AMA Guides should have been used and to ensure that the designated doctor uses the correct version.

One of the eligibility requirements for SIBs is that the claimant has an IR of 15% or more. Section 408.142(a)(1) and Rule 130.102(b)(1). Because an IR has not been determined we also remand the case for a determination whether the claimant meets the eligibility requirements for SIBs.

On remand the hearing officer is to determine which edition of the AMA Guides should be used, then advise Dr. D, the designated doctor of which edition is to be used and request Dr. D to assess an IR based on the claimant's condition as of the MMI date considering the medical records and certifying examination. It may be necessary to conduct separate hearings on remand on these matters. The hearing officer is to allow comment from the parties regarding the correct version of the AMA Guides to be used and to allow comment on the designated doctor's report. The hearing officer is then to make a determination whether the claimant meets the eligibility criteria for SIBs.

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 **ZC INSURANCE COMPANY** and the name and address of its registered agent for service of process is

LEX SMART
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_____
Thomas A. Knapp
Appeals Judge

CONCUR:

_____
Robert W. Potts
Appeals Judge

_____
Margaret L. Turner
Appeals Judge