APPEAL NO. 052516
FILED JANUARY 11, 2006

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 September 22, 2005. The hearing officer resolved the disputed issues by deciding: (1) that the compensable injury of _____, does extend to psychological/psychiatric problems diagnosed as depression; (2) that the impairment rating (IR) is 13%; (3) that the respondent/cross-appellant (carrier) waived its right to contest the appellant/cross-respondent's (claimant) entitlement to supplemental income benefits (SIBs) for the first quarter by failing to timely request a benefit review conference (BRC); and (4) that the claimant is entitled to SIBs for the first quarter, September 9 through December 18, 2003, as the carrier waived the right to contest entitlement. Both parties appealed. The claimant disputes the hearing officer's determination of the IR. The carrier responded, urging affirmance of the IR determination. The carrier also filed an appeal disputing the extent-of-injury determination; the determination that the carrier waived its right to contest the claimant's entitlement to SIBs for the first quarter; and the determination that the claimant is entitled to SIBs for the first quarter. The appeal file does not contain a response from the claimant.

DECISION

Affirmed in part, reversed and rendered in part, and reversed and remanded in part, as reformed.

The parties stipulated that the claimant sustained a compensable injury on _____, and that he reached maximum medical improvement (MMI) on April 11, 2002. It was undisputed that the claimant had a severe injury to his right knee. The evidence reflected that the claimant had four surgeries to his right knee prior to the date of the CCH and that a total knee replacement was currently being considered. We reform Finding of Fact No. 9 to reflect that the date the designated doctor, certified that the claimant reached MMI by statute was April 11, 2002, rather than May 11, 2002, to conform to the evidence. Additionally, we reform the clerical correction in the stipulation regarding coverage to read that on _____, the employer had workers' compensation coverage with Western Indemnity Company, rather than Western Medical Company.

EXTENT OF INJURY

One of the issues in dispute at the CCH was whether the compensable injury of _____, extended to and included psychological/psychiatric conditions diagnosed as depression. The carrier argues on appeal that the record shows that other stressful circumstances unrelated to the claimant's compensable injury are more logical sources for any depression suffered by the claimant. The carrier further contends that any causal connection to the compensable injury is temporal only and that the hearing

officer's determination that the compensable injury extends to psychological/psychiatric problems diagnosed as depression is against the great weight and preponderance of the evidence.

The Appeals Panel observed in Appeals Panel Decision (APD) 961449, decided September 9, 1996, that the fact that there may be more than one cause of the claimant's psychological condition does not preclude a finding of compensability, provided that there is a causal connection between the compensable injury and the claimant's psychological problems. There was conflicting medical evidence regarding whether the claimant suffered from depression and what the cause of her depression might be.

The Appeals Panel has held that the question of the extent of injury is a question of fact for the hearing officer. APD 93613, decided August 24, 1993. It was for the hearing officer, as the trier of fact, to resolve the conflicts and inconsistencies in the evidence and to determine what facts had been established. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). This is equally true regarding medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). In view of the evidence presented, we cannot conclude that the hearing officer's extent-of-injury determination is so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

WAIVER

One of the disputed issues at the CCH was whether the carrier waived its right to contest the claimant's entitlement to SIBs for the first quarter by failing to timely request a BRC. The carrier appeals the hearing officer's determination that it waived its right to dispute entitlement to SIBs for the first quarter by not timely requesting a BRC.

Section 408.147(b) provides the following:

> If an insurance carrier fails to make a request for a [BRC] within 10 days after the date of the expiration of the impairment income benefit [IIBs] period or within 10 days after receipt of the employee's statement [TWCC-52], the insurance carrier waives the right to contest entitlement to [SIBs] and the amount of [SIBs] for that period of [SIBs].

28 TEX. ADMIN. CODE § 130.108(c) (Rule 130.108(c)) provides the following:

> Insurance Carrier Dispute; First Quarter. If a carrier disputes a commission finding of entitlement to, or amount of, [SIBs] for the first quarter, the insurance carrier shall request a [BRC] as provided by § 141.1 of this title (relating to Requesting and Setting a [BRC]) within 10 days

> after receiving the commission determination of entitlement. A carrier waives the right to contest the commission's determination of entitlement to, or amount of, [SIBs] for the first quarter if the request is not received by the commission within 10 days after the date the insurance carrier received the determination.
>
> Section 402.061 provides the following:
>
> The commission shall adopt rules as necessary for the implementation and enforcement of this subtitle.

The carrier argues on appeal that the claimant failed to prove facts upon which waiver of the first quarter of SIBs could be based. Rule 130.108(c) specifically provides that it is receipt of the "Commission's" initial determination of entitlement which triggers the carrier's obligation to request the BRC in order to avoid waiver. The hearing officer found that "the carrier had notice of the claimant's initial determination of eligibility for [SIBs] as of June 29, 2005." In evidence was a Texas Department of Insurance, Division of Workers' Compensation (Division) record entitled "Supplemental Income Benefits Review SIBS Initial Determination" which reflected that the initial determination of entitlement was mailed on June 29, 2005. The carrier correctly points out that there is no evidence that the Division's initial determination was placed in the carrier's _____ representative's box in _____, Texas. Rule 102.5(d) provides that for purposes of determining the date of receipt for those written communications sent by the Division which require the recipient to perform an action by a specific date after receipt, unless the great weight of evidence indicates otherwise, the Division shall deem the received date to be the earliest of: 5 days after the date mailed via Untied States Postal Service regular mail; the first working day after the date the written communication was placed in the carrier's _____ representative's box; or the date faxed or electronically transmitted. The hearing officer's finding that "the carrier had notice of the claimant's initial determination of eligibility for [SIBs] as of June 29, 2005" is against the great weight and preponderance of the evidence. It is undisputed that the carrier requested a BRC regarding the claimant's eligibility for SIBs on July 13, 2005. Since there is no evidence that the initial determination was placed in the carrier's _____ representative's box or that the notice was faxed or electronically transmitted, the carrier's deemed receipt of the notice would be July 5, 2005. We note that Independence Day, July 4 is listed as a national holiday in Texas Government Code Section 662.003. Since the 5th day of the deemed receipt period fell on a nonworking day, the notice is considered received on the next working day, which was Tuesday, July 5, 2005. *See* Rule 102.3(a)(3), which provides that unless otherwise specified, if the last day of any period is not a working day, the period is extended to include the next day that is a working day. Therefore, the BRC request regarding the claimant's eligibility was timely. The hearing officer's determination that the carrier waived its right to contest the claimant's entitlement to SIBs for the first quarter is reversed and a new decision rendered that the carrier did not waive its right to contest the claimant's entitlement to SIBs for the first quarter by failing to timely request a BRC.

IMPAIRMENT RATING

There are three certifications from the Division-selected designated doctor in evidence and an IR assigned by the treating doctor. The designated doctor in his original report, assessed a 13% IR which was comprised of 8% for loss of range of motion (ROM) combined with 5% for loss of strength. In a response dated April 12, 2005, to a letter of clarification the designated doctor amended his rating to 17%. In his response, the designated doctor explained that he was adding 4% for a partial medial and lateral meniscectomy. The doctor further explained that he would likely place the claimant in Class Two or Class Three due to his depression but 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) do not provide guidance to the percentages that should be used. The designated doctor went on to state that in the event a percentage needs to be applied to the mental and behavioral component, the claimant would need to be evaluated by a psychiatrist well-versed in IRs. On June 8, 2005, a referral doctor recommended a rating of 10% for the claimant's psychiatric condition (depression). In a second amended Report of Medical Evaluation (TWCC-69), the designated doctor amended the claimant's IR to 25%. The designated doctor adopted the rating for depression from the referral doctor and combined it with the previous rating he had assessed for the claimant's right knee.

We find no merit in the carrier's contention that the designated doctor did not himself "certify" a psychological rating. The hearing officer correctly noted that the designated doctor's subsequent modifications and amendments involved post statutory MMI condition or involved an improper calculation of IR. In correspondence dated July 19, 2005, the designated doctor stated that he increased the rating to 17% based on the surgery that was done after the MMI date on December 15, 2004. Rule 130.1(c)(3) provides that the "[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. The preamble of Rule 130.1(c)(3) clarifies that IR assessments "must be based on the injured employee's condition as of the date of MMI." 29 Tex. Reg. 2337 (2004). *See also* APD 040313-s, decided April 5, 2004; and APD 040583-s, decided May 3, 2004. The 4% increase in the rating assessed for the claimant's right knee was included in both the 17% and 25% IRs assessed by the designated doctor and expressly included a rating for a surgery that occurred after the date of the claimant's MMI.

We note that the designated doctor indicated in his initial evaluation of the claimant, dated July 3, 2002, that he did not have the records of the claimant's second surgery, which was performed on January 17, 2001. The claimant's second surgery was performed prior to the date of the claimant's MMI and the operative report is in evidence. The operative report dated January 17, 2001, indicates that in addition to other procedures performed, the claimant underwent partial medial and lateral

menisectomies. Impairment assessed for a partial medial and lateral meniscectomy is from Table 64, page 3/85 of the AMA Guides and represents a diagnosis-based estimate. The impairment assessed for loss of ROM and loss of strength represents examination based estimates. The AMA Guides provide on page 3/84 that "[t]he evaluating physician must determine whether diagnostic or examination criteria best describe the impairment of a specific patient. *The physician, in general, should decide which estimate best describes the situation and should use only one approach for each anatomic part*." The AMA Guides provide on page 3/75 that "[i]n general, only one evaluation method should be used to evaluate a specific impairment." The AMA Guides further provide that there may be instances in which elements from both diagnostic and examination approaches will apply to a specific situation. However, under the factual circumstances at issue rating the knee under both diagnosed-based estimates and examination based estimates is precluded. Division Advisory 2003-10 signed July 22, 2003, references a cross-index grid which was developed as a visual tool to summarize the information contained in 3.2 of the AMA Guides. The cross-index grids provide that diagnostic based estimates cannot be combined with ROM and indicate that diagnostic based estimates cannot be combined with muscle strength. Further, the comment following the example given on page 3/84 of the AMA Guides provides that muscle weakness or atrophy is included in the diagnosis-related estimate.

Additionally, there was a TWCC-69 in evidence from the claimant's treating doctor assigning a 24% IR. However, the TWCC-69 does not include a MMI date although statutory is checked. Further, it appears the treating doctor's impairment impermissibly combined ratings for the claimant's meniscectomy with abnormal motion measurements, muscle atrophy, and muscle weakness.

Neither the treating doctor's 24% IR, the designated doctor's 17% IR nor the designated doctor's 25% may be adopted because the applicable provisions of the AMA Guides were not followed. Although the claimant disagreed with the initial rating assessed by the designated doctor, no evidence was presented regarding the validity of the 13% impairment assessed by the designated doctor.

The designated doctor's job is to rate the entire compensable injury. *See* APD 980996, decided June 22, 1998. The hearing officer found that the compensable injury of _____, does extend to psychological/psychiatric problems diagnosed as depression. In his Background Information section, the hearing officer stated that "there are various difficulties involved in applying impairment for that condition [depression] to the claimant's IR, principally because the condition was not definitively diagnosed as an injury in its own right until January 2003…." There is some evidence in the record to indicate that the claimant suffered from symptoms of depression as early as 2001. The hearing officer applied the wrong legal standard in requiring that a definitive diagnosis had to be made before impairment could be assessed. What is required is an examination review of medical records and any further testing of the injured worker by the certifying doctor to determine with medical probability what injurious conditions that were part of the compensable injury existed on the MMI date. Then, based on those

conditions and objective clinical or laboratory findings of permanent whole person impairment, an IR is assigned based on the AMA Guides.

The hearing officer's determination that the claimant's IR is 13% is reversed. The case is remanded back to the hearing officer for a determination of whether the claimant suffered from depression on the date of MMI. Whether the claimant had depression on the MMI date is a threshold extent-of-injury issue that must be determined by the hearing before the IR may be determined. In the event the hearing officer determines that the claimant suffered from depression on the date of MMI, a letter of clarification should be sent to the designated doctor requesting an IR be assessed of the entire compensable injury as it existed on the MMI date, April 11, 2002, consistent with the principles stated herein. The hearing officer is to make the designated doctor's response available to the parties for comment and argument. After giving the parties an opportunity to respond the hearing officer will review the record and issue a new decision and order.

If the hearing officer determines that the claimant did not suffer from depression on the date of MMI, no further hearing on remand is necessary.

SIBS ENTITLEMENT

The hearing officer found that the claimant's unemployment was a direct result of the impairment from the compensable injury and that "during the 13 weeks preceding September 13, 2003," the claimant was not employed and did not seek any employment or vocational retraining. We note that the issue tested is the hearing officer's Decision and Order identifies the SIBs quarter at issue as beginning on September 19, 2003, and ending on December 18, 2003. However, the Finding of Fact and Conclusion of Law that refer SIBs quarter by date as well as the decision identify the SIBs quarter beginning September 13, 2003, rather than September 19, 2003. No specific finding was made regarding the claimant's ability to work. The hearing officer's determination that the claimant is entitled to SIBs is premised on the determination that the carrier waived its right to contest entitlement. Since the waiver determination was reversed and a new decision rendered that the carrier did not waive its right to contest the claimant's entitlement to first quarter SIBs, and since the IR determination has been remanded the SIBs determination is therefore reversed and remanded back to the hearing officer. Rule 130.101(2) defines the first quarter as the 13 weeks beginning on the day after the last day of the impairment income benefits period. Further, Rule 130.101(4) defines the qualifying period as a period of time for which the employee's activities and wages are reviewed to determine eligibility for SIBs. The qualifying period ends on the 14th day before the beginning date of the quarter and consists of the 13 previous consecutive weeks. This time period cannot be established until a determination has been made regarding the claimant's IR. Based upon the IR determined by the hearing officer on remand, the hearing officer then is to make appropriate findings of facts as to the claimant's eligibility for SIBs to address the following: Section 408.142(a)(1 through 4). Because under Section 410.203(c), the Appeals Panel is precluded from another remand, the hearing officer should make

appropriate findings of facts as to the claimant's eligibility for SIBs to address Section 408.142(a) for all of the valid IR's in evidence.

We affirm the hearing officer's determination that the compensable injury extends to psychological/psychiatric problems diagnosed as depression. We reverse the determination that the carrier waived its right to contest the claimant's entitlement to SIBs for the first quarter by failing to timely request a BRC and render a determination that the carrier did not waive its right to contest the claimant's entitlement to SIBs for the first quarter by failing to timely request a BRC. We reverse the determinations that the IR is 13% and that "the claimant is entitled to [SIBs] for the first quarter, September 13, 2003, through December 18, 2003, as the carrier waived the right to contest entitlement" and remand back to the hearing officer, for actions consistent 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 Division, pursuant to Section 410.202, as amended effective June 17, 2001, to exclude Saturdays and Sundays and holidays listed in Section 662.003 of the Texas Government Code in the computation of time in which a request for appeal or a response must be filed.

The true corporate name of the insurance carrier is **TEXAS PROPERTY & CASUALTY INSURANCE GUARANTY ASSOCIATION for Western Indemnity Company, an impaired carrier** and the name and address of its registered agent for service of process is

MR. MARVIN KELLY, EXECUTIVE DIRECTOR
9120 BURNET ROAD
AUSTIN, TEXAS 78758.

_____
Margaret L. Turner
Appeals Judge

CONCUR:

_____
Thomas A. Knapp
Appeals Judge

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Robert W. Potts
Appeals Judge