

APPEAL NO. 052652
FILED JANUARY 23, 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 21, 2005, with the record closing on October 17, 2005. The disputed issues at the CCH were: (1) whether the respondent (claimant) had disability resulting from the compensable injury from October 18, 2002, through June 10, 2004; and (2) the claimant's impairment rating (IR). The hearing officer resolved the disputed issues by deciding that: (1) the claimant had disability due to her compensable injury from October 18, 2002, through June 10, 2004; and (2) the claimant's IR is 20% as reported by the designated doctor selected by the Texas Department of Insurance, Division of Workers' Compensation (Division) in an amended report of July 18, 2005. The appellant (carrier) appeals the hearing officer's determinations on the issues of disability and IR. The claimant filed a response requesting affirmance.

DECISION

Affirmed in part, and reversed and rendered in part.

The parties stipulated that on ____, the claimant sustained a compensable lumbar and left knee injury, and that the claimant reached statutory maximum medical improvement (MMI) on June 10, 2004.

DISABILITY ISSUE

Disability means the inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage. Section 401.011(16). The claimant worked for some period of time after her compensable injury and then was taken off work by her treating doctor, who noted that the claimant had low back pain with radiculopathy. The hearing officer resolved the disputed issue of whether the claimant had disability from October 18, 2002, through June 10, 2004, by deciding that the claimant had disability due to her compensable injury from October 18, 2002, through June 10, 2004. The hearing officer's determination on the disability issue is supported by sufficient evidence and is not so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. We affirm the disability determination.

IR ISSUE

Prior to the claimant's compensable injury of ____, the claimant had several surgeries on her left knee. The designated doctor examined the claimant on October 8, 2002, and reported that the claimant reached MMI on October 8, 2002, with a 0% IR. The designated doctor's report reflects that he was rating only the claimant's left knee and that he utilized 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). In December 2002 the claimant's treating doctor wrote that, if the claimant could not live with her back and leg pain, then she could consider a fusion at L4-5 and L5-S1. In September 2003 the treating doctor noted that the claimant was trying to get approval for back surgery. A CCH was held on May 24, 2004, on the issue of whether the claimant's compensable injury extends to include the claimant's cervical spine and lumbar spine. The hearing officer determined that the compensable injury extends to the lumbar spine but not to the cervical spine. The carrier appealed the hearing officer's determination that the compensable injury extends to the lumbar spine. In Appeals Panel Decision (APD) 041542, decided August 19, 2004, the Appeals Panel affirmed the hearing officer's determination that the compensable injury extends to the lumbar spine. In July 2004 the treating doctor noted that flexion and extension x-rays of the lumbar spine showed no instabilities.

On July 24, 2004, the designated doctor reexamined the claimant and he reported that the claimant reached statutory MMI on June 10, 2004, with a 5% IR. The designated doctor's report reflects that he evaluated the claimant's left knee and lumbar spine. The designated doctor reported that an EMG revealed no evidence of lumbar radiculopathy. Nothing in the designated doctor's report reflects significant signs of radiculopathy, such as loss of relevant reflexes or unilateral atrophy as stated on page 102 of the AMA Guides. The designated doctor assigned the claimant 5% impairment under Diagnosis-Related Estimate (DRE) Lumbosacral Category II: Minor Impairment. The designated doctor noted that no impairment was awarded for loss of range of motion of the left knee due to symmetrical range of motion on the uninjured right side.

On September 10, 2004, the claimant's request for a fusion at L4-5 and L5-S1 was preauthorized. On October 12, 2004, the claimant underwent lumbar spine surgery, including a fusion at L4-5 and L5-S1.

On May 3, 2005, a doctor selected by the treating doctor to evaluate the claimant reported that the claimant reached MMI on May 3, 2005, with a 25% IR under DRE Thoracolumbar Category V: Radiculopathy and Loss of Motion Segment Integrity.

On July 13, 2005, the Division informed the designated doctor that the claimant underwent back surgery, sent him the operative report and other medical records, and asked him whether his IR would change. The Division's letter informed the designated doctor that the IR is to be based on the claimant's condition at MMI and that the claimant reached statutory MMI on June 10, 2004. In a report dated July 18, 2005, the designated doctor reported that the claimant reached statutory MMI on June 10, 2004, with a 20% IR. The designated doctor noted the medical reports he reviewed, including the operative report of October 12, 2004, and wrote "[t]he claimant has a two-level lumbar fusion at L4-5 and L5-S1 after my designated doctor evaluation. Her [IR] should be changed to DRE IV, with a 20% whole person [IR]."

It is undisputed that the claimant reached MMI statutorily on June 10, 2004. The hearing officer found that the preponderance of the medical evidence is not contrary to the designated doctor's July 18, 2005, report and that it has presumptive weight on the issue of IR. The hearing officer concluded that the claimant's IR is 20% per the designated doctor's July 18, 2005, report. The hearing officer noted that the delay in the claimant's lumbar surgery was due to the carrier's dispute of compensability and denials of payment for surgery. The carrier asserts that the IR must be based upon the injured employee's condition as of the date of MMI irrespective of whether a claimant has post-statutory MMI surgery, and that the claimant's IR is 5%.

Advisory 2003-10 signed July 22, 2003, and Advisory 2003-10B signed February 24, 2004, note that for spinal fusion, the IR is determined by the preoperative x-ray tests for motion segment integrity, and that if preoperative x-rays were not performed, the rating may be determined using the following criteria: b. Multilevel fusion meets the criteria for DRE Category IV, Structural Inclusions, as this multilevel fusion is equivalent to "multilevel spine segment structural compromise" per DRE IV. In the instant case, preoperative flexion and extension x-rays were performed and the treating doctor noted no instability. Consequently, since preoperative flexion and extension x-rays were performed, Advisories 2003-10 and 2003-10B regarding a DRE IV category for a multilevel fusion would not apply. APD 041429-s, decided August 4, 2004.

28 TEX. ADMIN. CODE § 130.1(c)(3) (Rule 130.1(c)(3)) provides that the assignment 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. In APD 040313-s, decided April 5, 2004, it was noted that the preamble to Rule 130.1(c)(3) clarified that an IR must be based on the injured employee's condition as of the date of MMI. The fact that back surgery was delayed due to the carrier's dispute of compensability of the lumbar spine does not provide an exception to Rule 130.1(c)(3). As was noted in APD 042270, decided November 2, 2004, "Rule 130.1(c)(3) does not contain any exceptions for cases where the carrier denies or delays diagnostic testing." In addition, in APD 040583-s, decided May 3, 2004, the Appeals Panel wrote that "[w]e retreat from [APD 033128-s, decided January 28, 2004], to the extent that it holds that IR assessments need not be based on the injured employee's condition as of the date of MMI." APD 010065-s, decided February 13, 2001, which allowed an IR to be based on post-MMI back surgery because the back surgery was delayed due to a delay in a carrier's approval of diagnostic testing, is no longer applicable because Rule 130.1(c)(3) clarified that an IR must be based on the injured employee's condition as of the date of MMI.

In this case, it is clear that the 20% IR assigned by the designated doctor on July 18, 2005, was based on the claimant's two-level lumbar fusion performed on October 12, 2004, which was after the undisputed MMI date of June 10, 2004, which was the stipulated date of statutory MMI. The hearing officer erred in adopting the designated doctor's 20% IR because it is based on the post-MMI back surgery. The referral doctor's 25% IR, based in part on loss of motion segment integrity, cannot be adopted because there are no preoperative flexion and extension x-rays that document loss of

motion segment integrity (AMA Guides page 98) and the post-MMI back surgery cannot be considered in the IR. We reverse the hearing officer's determination that the claimant's IR is 20% and we render a decision that the claimant's IR is 5% as certified in the designated doctor's second report.

We affirm the hearing officer's decision that the claimant had disability from October 18, 2002, through June 10, 2004. We reverse the hearing officer's decision that the claimant's IR is 20% and we render a decision that the claimant's IR is 5%.

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

**CORPORATION SERVICE COMPANY
701 BRAZOS, SUITE 1050
AUSTIN, TEXAS 78701.**

Robert W. Potts
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Margaret L. Turner
Appeals Judge