APPEAL NO. 060664
FILED JUNE 8, 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 (Date), in (City), Texas, with (Hearing Officer) presiding as hearing officer. The record was held open until March 14, 2006. The hearing officer resolved the disputed issue by deciding that the respondent (claimant) reached maximum medical improvement (MMI) on October 31, 2005, with a 25% impairment rating (IR) per (Dr. W), designated doctor. The appellant (carrier) appealed, arguing that the appointment of a second designated doctor was improper and that it was denied due process because it was not allowed to seek clarification of the second designated doctor's report. The carrier additionally argues that the adoption of the IR of Dr. W was legal error. The claimant responded, urging affirmance.

DECISION

Reversed and remanded.

The parties stipulated that the claimant sustained a compensable injury on ___, and that (Dr. L), the first designated doctor, certified claimant at MMI on May 20, 2004, with a 5% IR. The evidence reflected that the claimant had back surgeries prior to his compensable injury. The claimant testified that he had a fusion to his L5-S1 level in September of 1990 and that on December 6, 2002, he had a fusion to the L4-5 level. The claimant further testified that he returned to work full duty after his 2002 surgery.

The claimant was injured in a fall sustained while in the course and scope of employment. The records reflect that the claimant had flexion/extension x-rays of the lumbar spine taken on February 12, 2004. The claimant was examined by Dr. L on May 20, 2004. Dr. L certified that the claimant reached MMI on that date with a 5% IR, placing the claimant in Diagnosis-Related Estimate (DRE) Lumbosacral Category II, under 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). The claimant's treating doctor assessed an IR of 20%, placing the claimant in DRE Lumbosacral Category IV, based on Advisory 2003-10, signed July 22, 2005. The certification of the treating doctor in evidence does not contain a date of MMI.

A letter of clarification was sent to Dr. L, requesting that she review the July 20, 2004, operative report. In a response dated December 6, 2004, Dr. L requested a re-examination of the claimant. On January 25, 2005, Dr. L again wrote the Texas Department of Insurance, Division of Workers' Compensation (Division) and stated she had reviewed the claimant's files, noted that another doctor opined that the surgery was not work related and confirmed that she did not change her opinion about her previous certification. Correspondence from the Division was sent to Dr. L dated March 10,

2005, specifically asking Dr. L to take the claimant's surgery into consideration and asking if she felt qualified to serve as the designated doctor in this case. Dr. L briefly responded noting she felt qualified and did not change her mind regarding her previous certification.

The CCH regarding the disputed issues of MMI and IR was held on September 20, 2005. Nine days after the CCH, the hearing officer sent a letter of clarification to Dr. L asking whether or not she considered Advisory 2003-10b, signed February 24, 2004, and whether or not her opinion of MMI and IR changed or stayed the same. The carrier objected to the letter primarily because of an injunction issued by a District Court. We note that the injunction has been stayed pending appeal. Apparently due to some problem locating Dr. L, a new designated doctor was appointed. The carrier objected to the appointment of a second designated doctor, arguing that Dr. L was still listed on the website as an approved designated doctor through 2007, and that Dr. L still practiced in the (City) area. The carrier also reiterated their objection to the letter of clarification sent after the CCH, including the fact that there was conflicting evidence as to whether the claimant actually had a multilevel fusion. The newly appointed second designated doctor, Dr. W, examined the claimant on December 6, 2005, and asked the claimant to return on December 13, 2005, for additional diagnostic testing. Dr. W certified that the claimant reached MMI on October 31, 2005, with a 25% IR. Dr. W placed the claimant in Lumbosacral DRE Category V. Dr. W cited Advisory 2003-10 noting the claimant does have a multilevel fusion, stating "[t]here is obvious loss of motion segment and obvious evidence of radiculopathy." In correspondence dated December 19, 2005, the carrier objected to the record closing and the issuance of a decision and order, requesting that the CCH be reconvened to address the additional information and objected to the issuance of a decision which considers any evidence not admitted at the September 20, 2005, CCH.

On December 28, 2005, the hearing officer sent additional correspondence to the first designated doctor, Dr. L, asking for her response to the letter of clarification dated September 29, 2005, which asked if Advisory 2003-10b was considered and whether her opinion regarding the claimant's MMI and IR had changed. On December 30, 2005, the carrier filed its response to the second designated doctor's report Dr. W. The carrier argued that Dr. W was prematurely appointed and that his report is invalid and against the AMA Guides. An amended Report of Medical Evaluation (TWCC-69) from Dr. L was filed with the Division on January 9, 2006, which reflected that based on the examination of May 20, 2004, Dr. L changed her mind as to both the claimant's date of MMI and IR, certifying MMI on July 20, 2004, with a 25% IR. Dr. L noted in attached correspondence that she had reviewed the operative report and Advisory 2003-10b. Dr. L stated "as per Advisory 2003-10b, Clarification of Rating for Spinal Fusions, multilevel fusion meets the criteria for DRE Category IV." The carrier objected noting that Dr. L assigned a 25% rather than 20% for Lumbosacral DRE Category IV, that Dr. L was not advised that application of the Advisory is not mandatory and that a multilevel fusion was not performed. The carrier requested that additional clarification be sent to Dr. L, enclosing a peer review which critiqued Dr. W's report. A letter of clarification dated February 8, 2006, was sent from the hearing officer to Dr. L, enclosing the peer review

report furnished by the carrier, and informing Dr. L that a reexamination is required since the MMI date was changed. The hearing officer notes in her decision that on March 2, 2006, Dr. L left a telephone message which stated she is no longer able to see the claimant due to a change in her facilities and would refer the claimant to Dr. W. The hearing officer noted that since no reexamination would take place Dr. L's revision of the MMI date to July 20, 2004, and IR to 25% is invalid.

The records reflect that on July 20, 2004, the claimant underwent spinal surgery. The operative report lists the following procedures as being performed: exploration of fusion anteriorly, fusion L4-5, diskectomy L4-5, and instrumentation L4-5. The operative report notes that the fusion of L5-S1 was explored and noted to be solid in nature. Additionally, the records reflect that preoperative flexion/extension x-rays were taken. Therefore, Advisories 2003-10 and 2003-10b do not apply in the instant case. Appeals Panel Decision (APD) 041429-s, decided August 4, 2004. Both the rating of Dr. W and the treating doctor are based on Advisory 2003-10. The hearing officer correctly noted that Dr. L's amended rating is invalid as she changed the date of MMI without a reexamination. The initial rating of Dr. L placed the claimant at MMI prior to his date of surgery and there is no indication that Dr. L has examined the claimant after he had surgery.

MMI is defined in Section 401.011(30) as the earlier of:

(A) the earliest date after which, based on reasonable medical probability, further material recovery from or lasting improvement to an injury can no longer reasonably by anticipated;

(B) the expiration of 104 weeks from the date on which income benefits begin to accrue; or

(C) the date determined as provided by Section 408.104.

The claimant testified that after the July 20, 2004, surgery and rehabilitation he was returned to work at light duty. Additionally, in a response to a letter of clarification, Dr. L seems to indicate she does not believe the July 20, 2004, surgery was work related and requests to reexamine the claimant but never does so. The hearing officer states in the Background Information portion of her decision that the claimant was reexamined by [Dr. L] and immediately refers to a written response dated January 25, 2005. Dr. L stated in her January 25, 2005, response that she reviewed the claimant's files but does not indicate she performed a reexamination. Further as noted previously, Dr. L's amended report specifies that the date of examination upon which the certification was based is May 20, 2004. The initial certification of Dr. L (MMI of May 20, 2004, with a 5% IR) is not supported by a preponderance of the evidence. The subsequent rating of Dr. L changed the MMI date without reexamining the claimant and the certifications of both the treating doctor and Dr. W are based on Advisories 2003-10 and 2003-10b which are not applicable in this case. Dr. L has refused to reexamine the claimant due to her change in circumstances.

Since there is no certification of MMI/IR that is in accordance with the AMA Guides we have no choice but to remand this case back to the hearing officer. Dr. L has stated that she is no longer willing to serve in the capacity of designated doctor. Therefore, Dr. W is the current designated doctor for this case. If on remand, Dr. W is no longer qualified or is unwilling to serve as designated doctor, another designated doctor will have to be appointed. We note that 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. On remand the hearing officer shall: (1) inform Dr. W that Advisories 2003-10 and 2003-10b do not apply to this case; (2) request that Dr. W certify MMI and IR without reference to Advisories 2003-10 and 2003-10b; (3) give the parties an opportunity to respond to the additional certification of Dr. W, including the submission of additional medical evidence; and (4) render a determination of MMI and IR.

We reverse the hearing officer's determination that the claimant reached MMI on October 31, 2005 with a 25% IR per Dr. W, designated doctor, 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 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* APD 92642, decided January 20, 1993.

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

ROBIN M. MOUNTAIN
6600 CAMPUS CIRCLE DRIVE EAST, SUITE 300
IRVING, TEXAS 75063.

_____
Margaret L. Turner
Appeals Judge

CONCUR:

_____
Thomas A. Knapp
Appeals Judge

_____
Robert W. Potts
Appeals Judge