APPEAL NO. 061788
FILED NOVEMBER 27, 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 June 6, 2006, with the record held open until July 17, 2006, to obtain clarification from the designated doctor. The hearing officer resolved the disputed issues by deciding that: (1) the respondent's (claimant) impairment rating (IR) is 20%; (2) that the IR assigned by Dr. M, the designated doctor, on December 2, 2004, became final under 28 TEX. ADMIN. CODE § 130.102(g) (Rule 130.102(g)); (3) that the IR assigned by Dr. M, the designated doctor, on December 2, 2004, did not become final by operation of Rule 130.12; and (4) that the claimant is entitled to supplemental income benefits (SIBs) for the second quarter.

The appellant (carrier) appealed the hearing officer's determinations regarding the 20% IR, finality based on Rule 130.102(g), and SIBs entitlement. The file does not contain a response from the claimant. The hearing officer's determination that the IR assigned by Dr. M, the designated doctor, on December 2, 2004, did not become final by operation of Rule 130.12 has not been appealed and has become final. Section 410.169.

DECISION

Affirmed in part and reversed and rendered in part.

The parties stipulated that on _____, the claimant sustained a compensable injury to the L1 through S1 levels of his spine; and that the claimant reached maximum medical improvement (MMI) on September 21, 2004. It is undisputed that the claimant underwent a multilevel fusion at T12, L1 and L2 on February 19, 2004.

Dr. F, acting in place of the treating doctor, examined the claimant on September 21, 2004, and certified that the claimant reached MMI on that same date with a 25% IR 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). Dr. F assessed a 25% IR based on a 10% impairment under Diagnosis-Related Estimate (DRE) Lumbosacral Category III: Radiculopathy, and 15% impairment for sexual dysfunction under Table 19, page 149. Review of the record reflects that the carrier filed a Request for Designated Doctor (DWC-32) on October 18, 2004, disputing Dr. F's assigned IR of 25%. Also, the carrier filed a Notice of Disputed Issue(s) and Refusal to Pay Benefits (PLN-11) on November 30, 2004, stating that it accepted a low back injury, but disputed that the compensable injury extended to include sexual dysfunction.

The evidence reflects that Dr. M was appointed as the designated doctor by the Texas Department of Insurance, Division of Workers' Compensation (Division) on November 9, 2004. Dr. M, examined the claimant on December 2, 2004, and certified that the claimant reached MMI on September 21, 2004, with a 20% IR placing the claimant in DRE Lumbosacral Category IV: Loss of Motion Segment Integrity, based on Advisory 2003-10 signed July 22, 2005, and Advisory 2003-10B signed February 24, 2004 (Advisories). In evidence is a medical report from the carrier's peer review doctor, Dr. B, dated January 21, 2005, in which he disagreed with Dr. M's assigned 20% IR based on the Advisories because preoperative flexion/extension x-rays were performed prior to the claimant's multilevel fusion. The Division sent a letter of clarification to the designated doctor on May 11, 2006, asking him whether he reviewed preoperative flexion/extension x-rays and whether his assigned 20% IR would change, and requested that he provide an IR without the use of the Advisories. Dr. M responded on May 16, 2006, that he amended his report to reflect a 5% IR "because the x-ray study submitted with [the letter of clarification] is not sufficient to justify awarded DRE Category IV" and the claimant's IR excluding the "use of the Advisories would be 5%." At the CCH, the hearing officer held the record open to request a letter of clarification from the designated doctor. On June 22, 2006, the hearing officer sent a letter of clarification to Dr. M stating that "[e]nclosed are the pre-operative x-rays," and to "review them and indicate whether they are or are not the appropriate type of x-rays that would affect an [IR], determination as contemplated by the [advisories and AMA Guides], specifically, whether they include flexion and extension comparison roentgenograms as contemplated on page 98, 99, and 109" of the AMA Guides. In a letter dated June 28, 2006, Dr. M responded that:

> I have reviewed the x-ray films and MRI films that have been forwarded to me. The films do show that [the claimant] sustained a severe fracture at L2 and a fracture at L1. The fracture at L2 appears to be compressed approximately 60% and the fracture at L1 appears to be compressed approximately 40%. This serious of a fracture represents a DRE Category IV for a 20% of the whole person [IR], which is what I had originally awarded [the claimant]. Therefore, after careful review and consideration, the [IR] truly is not representative of [the Advisories], it represents the aforementioned fractures that were sustained at the time of the injury on 12/16/03.

The hearing officer determined that the claimant's IR is 20% per Dr. M's amended Report of Medical Evaluation (DWC-69) and narrative report, and that Dr. M's IR because final under Rule 130.102(g). In addition, the parties stipulated that "*if the claimant's IR is 20%,*" the qualifying period for the second quarter of SIBs is from November 3, 2005, to February 2, 2006. (Emphasis added.) The claimant's theory of entitlement to the second quarter of SIBs was based on a good faith effort to seek employment commensurate with his abilities to work. The hearing officer determined that the claimant was entitled to SIBs for the second quarter from February 15 through May 16, 2006.

ABUSE OF DISCRETION

The carrier contends on appeal that the hearing officer erred in denying its request to keep the record open to present additional evidence that would rebut the designated doctor's amended IR of 20%. The record reflects that a CCH was held on June 6, 2006, and that the hearing officer held the record open to obtain clarification from the designated doctor. On June 22, 2006, the hearing officer sent a letter of clarification to the designated doctor. On June 28, 2006, the designated doctor responded that he amended the claimant's IR to 20%. On July 5, 2006, the hearing officer sent a copy of the designated doctor's response to the parties and requested written closing arguments by 5:00 p.m. on July 17, 2006. On July 7, 2006, the carrier requested that the record be kept open for the carrier's required medical examination (RME) doctor, Dr. A, to review the designated doctor's amended report. The hearing officer denied the carrier's request for admission of additional evidence by order signed on July 13, 2006. The hearing officer closed the record on July 17, 2006.

We have frequently held that to obtain reversal of a judgment based upon the hearing officer's abuse of discretion in the admission or exclusion of evidence, an appellant must first show that the admission or exclusion was in fact an abuse of discretion, and also that the error was reasonably calculated to cause and probably did cause the rendition of an improper judgment. Appeals Panel Decision (APD) 92241, decided July 24, 1992; *see also* Hernandez v. Hernandez, 611 S.W.2D 732 (Tex. Civ. App.-San Antonio 1981, no writ). It also has been held that reversible error is not ordinarily shown in connection with rulings on questions of evidence unless the whole case turns on the particular evidence admitted or excluded. Atlantic Mutual Insurance Company v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.). In determining whether there has been an abuse of discretion, the Appeals Panel looks to see whether the hearing officer acted without reference to any guiding rules or principles. APD 951943, decided January 2, 1996; Morrow v. H.E.B., Inc., 714 S.W.2d 297 (Tex. 1986).

We hold that it was error for the hearing officer to deny the carrier's request to keep the record open to present additional evidence that would rebut the designated doctor's amended IR of 20%, given that the designated doctor changed the basis of his IR assessment. However, as noted, it is not reversible error unless the whole case turns on the particular evidence that was excluded. We have considered the rebuttal report dated July 10, 2006, from the carrier's RME doctor, Dr. A, that was included in the carrier's appeal. Our review of Dr. A's report indicates that he believes that any multilevel motion segment compromise was "Pre-existent" and that any deformity at the L1 and L2 levels was preexisting. The evidence reflects that this is the same position that Dr. A took in his reports of July 7, 2005 (Carrier's Exhibit T) and May 16, 2006 (Carrier's Exhibit H). As such we hold that Dr. A's July 10, 2006, report is not such a crucial piece of evidence on which the whole case turns. Although the hearing officer should have allowed the carrier the opportunity to present additional evidence, we hold that failure to do so, in this case, does not constitute reversible error.

FINALITY UNDER RULE 130.102(g)

Rule 130.102(g) provides that if there is no pending dispute regarding the date of MMI or the IR prior to the expiration of the first quarter, the date of MMI and the IR shall be final and binding. First, the carrier argues on appeal that the Rule 130.102(g) is invalid and unenforceable. The Appeals Panel has long held that it does not have the authority to decide on the validity of Division rules and that the courts are the proper forums for deciding those matters. APD 010160 decided March 8, 2001; APD 030484, decided April 16, 2003.

Second, the carrier argues that the claimant's assigned IR had been in dispute prior to the expiration of the first quarter of SIBs. The record reflects that the first quarter of SIBs was from November 16, 2005, through February 14, 2006. Dr. F, acting in place of the treating doctor, examined the claimant on September 21, 2004, and certified that the claimant reached MMI on September 21, 2004, with a 25% IR. Dr. M, the designated doctor, examined the claimant on December 2, 2004, and certified that the claimant reached MMI on September 21, 2004, with a 20% IR. The evidence reflects that prior to the expiration of the first quarter of SIBs, the carrier filed a DWC-32 on October 18, 2004, disputing Dr. F's assigned IR of 25%. After the expiration of the first quarter of SIBs, the carrier filed a Request for Benefit Review Conference (DWC-45) on February 17, 2006, disputing claimant's IR. The DWC-45 states that the "carrier still questions and disputes IR." Also in evidence are Dispute Resolution Information System (DRIS) notes that indicate that both the 25% IR assigned by Dr. F and the 20% IR assigned by Dr. M were in dispute prior to the expiration of the first quarter of SIBs. In a DRIS note dated October 29, 2004, the claimant called "regarding disagreement with carriers disputing impairment," and another DRIS note dated May 26, 2005, states that the Division contacted the claimant's attorney and "asked her if any dispute reflected in her file" and the attorney responded "that IC is con't dispute of DD."

The hearing officer, in the Background Information section of her decision stated that "any dispute over [Dr. F's] rating was resolved by the assessment by [Dr. M]" and that at the "time of the expiration of the first quarter on February 14, 2006, there was no pending dispute of [Dr. M's] certification of MMI and IR; therefore, [Dr. M's] certification of [20%] became final on February 14, 2006." We disagree. The appointment of Dr. M as the designated doctor did not resolve the carrier's dispute of the claimant's IR assigned by Dr. F. In APD 041597, decided August 23, 2004, the claimant's IR had not become final and binding under Rule 130.102(g) because the Division records indicated that the self-insured disputed the IR assigned by the RME doctor by filing a DWC-32 one day prior to the end of the first quarter of SIBs. In the instant case, the claimant's IR, regardless of either the 25% IR assigned by Dr. F or 20% IR assigned by Dr. M, was in dispute prior to the expiration of the first quarter of SIBs. The evidence is supported by the DWC-32 filed by the carrier on October 18, 2004, that it was disputing the claimant's IR prior to the expiration of the first quarter of SIBs, therefore Dr. M's assigned IR of 20% did not become final and binding under Rule 130.102(g).

We reverse the hearing officer's determination that the IR assigned by Dr. M on December 2, 2004, became final under Rule 130.102(g) and render a new decision that the IR assigned by Dr. M did not become final under Rule 130.102(g).

IR

For CCH's which are held on or after September 1, 2005, Section 408.125(c) provides that the report of the designated doctor shall have presumptive weight, and the Division shall base the IR on that report unless the preponderance of the other medical evidence is to the contrary, and that if the preponderance of the medical evidence contradicts the IR contained in the report of the designated doctor chosen by the Division, the Division shall adopt the IR of one of the other doctors. Rule 130.6(i) provides that the designated doctor's response to a Division request for clarification is considered to have presumptive weight as it is part of the doctor's opinion.

On June 28, 2006, Dr. M responded to a letter of clarification explaining that he assigned 20% IR based on the AMA Guides and not based on the Advisories. Dr. M explained that he assigned a 20% IR under DRE Category Lumbosacral IV based on "the fracture at L2 appears to be compressed approximately 60%." He also explained that "the fracture at L1 appears to be compressed approximately 40%." Page 3/99 of the AMA Guides provides the following:

> Structural Inclusions:
>
> Certain spine fracture patterns may lead to significant impairments and yet not demonstrate any of the findings involving the differentiators [one of which is loss of motion segment integrity evidenced by roentgenograms]. Therefore, with the Injury Model, "structural inclusions" are included in some of the DRE categories. If the patient has a condition that meets the definition of a category that includes a structural inclusion, the physician need not determine if the other criteria for that category are present.
>
> If the patient demonstrates the structural inclusions of two categories, the physician should place the patient in the category with the higher impairment percent.

Page 3/102 of the AMA Guides, under DRE Lumbosacral Category IV states:

> Structural Inclusions:
>
> (1) Greater than 50% compression of one vertebral body without residual neurologic compromise;
>
> (2) Multilevel spine segment structural compromise, as with fractures or dislocations, without residual neurologic motor compromise.

We note that the parties stipulated the claimant sustained a compensable injury to the L1 through S1 levels of his spine. The evidence reflects that Dr. M assigned a 20% IR based on DRE Category Lumbosacral IV under structural inclusions per the AMA Guides, irrespective of Advisories. We affirm the hearing officer's determination that the IR is 20% as being supported by the evidence.

SIBS

The carrier appeals the hearing officer's determination that the claimant is entitled to SIBs for the second quarter on the basis that the claimant does not have an IR equal to or greater than 15% and that some of the claimant's job search efforts could not be verified. We have affirmed that the claimant's IR is 20% and we affirm the hearing officer's determination that the claimant is entitled to SIBs for the second quarter as being sufficiently supported by the evidence.

SUMMARY

We reverse the hearing officer's determination that the IR by Dr. M on December 2, 2004, became final under Rule 130.102(g) and render a new decision that the IR assigned by Dr. M did not become final under Rule 130.102(g).

We affirm the hearing officer's determinations that the claimant's IR is 20% and that the claimant is entitled to SIBs for the second quarter.

The true corporate name of the insurance carrier is **BITUMINOUS CASUALTY CORPORATION** and the name and address of its registered agent for service of process is

GLENN CAMERON
222 WEST LAS COLINAS BOULEVARD, SUITE 1720
IRVING, TEXAS 75016-7968.

_____
Veronica L. Ruberto
Appeals Judge

CONCUR:

_____
Thomas A. Knapp
Appeals Judge

_____
Margaret L. Turner
Appeals Judge