

APPEAL NO. 070930
FILED JULY 11, 2007

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 August 30, 2006, with the record closing on April 17, 2007. The hearing officer resolved the disputed issues by deciding that the respondent (claimant) reached maximum medical improvement (MMI) on June 11, 2002, with an impairment rating (IR) of 20% as certified by Dr. F, the Texas Department of Insurance, Division of Workers' Compensation (Division)-selected designated doctor.

The appellant (carrier) appealed, disputing the hearing officer's determinations of MMI and IR. The carrier contends that the designated doctor, Dr. F, improperly considered the claimant's post-MMI surgery and did not properly assign an IR based on the claimant's condition on the date of MMI. The carrier additionally argues that 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 4th edition) should have been used for the certification of MMI/IR rather than the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association (AMA Guides 3rd edition) and that Dr. F's revised certification of MMI/IR is contrary to the preponderance of the other medical evidence. The claimant responded, urging affirmance of the hearing officer's determinations.

DECISION

Affirmed in part and reversed and remanded in part.

FACTUAL SUMMARY

The parties stipulated that on _____, the claimant sustained a compensable injury. The claimant testified that he sustained injuries to his right shoulder, right wrist, and low back. The evidence reflects that the claimant underwent right shoulder and right wrist surgery on January 17, 2001. The claimant had a second surgery to his right shoulder on September 26, 2001, and a second surgery to his right wrist on March 26, 2002. The claimant underwent a two-level lumbar fusion on November 5, 2002, and had subsequent spinal surgeries on July 14, 2004, and July 21, 2004.

The first certification of MMI/IR of the claimant for the _____, compensable injury was provided on October 4, 2000, by Dr. S, who certified that the claimant reached clinical MMI on that date with a 12% IR, using the AMA Guides 3rd edition. That certification was disputed, and a designated doctor was appointed. The first designated doctor, Dr. D, examined the claimant on December 28, 2000, and certified that the claimant had not yet reached MMI. On February 11, 2002, Dr. F, the second appointed designated doctor, certified that the claimant was at MMI on that date with a

9% IR (assigning a 10% upper extremity (UE) impairment for the right shoulder, 6% UE impairment for the right wrist, and 0% impairment for lumbar spine) using the AMA Guides 3rd edition. On December 23, 2005, Dr. B, a doctor selected by the treating doctor to act in place of the treating doctor, certified that the claimant reached MMI statutorily on June 13, 2002, with a 15% IR, using the AMA Guides 4th edition. In response to a letter of clarification sent by the hearing officer after the CCH, Dr. F agreed to re-examine the claimant. After re-examining the claimant on February 26, 2007, Dr. F certified that the claimant reached MMI statutorily on June 11, 2002, with a 20% IR, using the AMA Guides 3rd edition. Dr. F assigned 2% UE impairment for loss of range of motion (ROM) of the right wrist, 8% UE impairment for loss of ROM for the right shoulder, and 11% impairment for the lumbar spine. Dr. F indicated in the attached worksheets to his report that the assigned 11% impairment for the lumbar spine was based on “[s]urgically treated disc lesion with or without residual signs or symptoms [,] L4-L5[,] L5-Sacrum[,] 2 operations,” referencing page 73, table 49.¹

APPROPRIATE EDITION OF THE AMA GUIDES

28 TEX. ADMIN. CODE § 130.1(c)(2)(B)(ii) (Rule 130.1(c)(2)(B)(ii)) provides in part that the appropriate edition of the AMA Guides to use for all certifying examinations conducted on or after October 15, 2001, is the AMA Guides 3rd edition, if, at the time of the certifying examination, there is a certification of MMI by a doctor pursuant to subsection (b) of Rule 130.1 made prior to October 15, 2001, which has not been previously withdrawn through agreement of the parties or previously overturned by a final decision. See Appeals Panel Decision (APD) 061227, decided August 3, 2006.

On October 4, 2000, Dr. S provided a certification of MMI and assignment of IR pursuant to Rule 130.1. Carrier argues that there is no evidence that the DWC-69 from Dr. S, is a “valid certification.” The DWC-69 certification of MMI/IR from Dr. S is signed and assigns a specific date at which MMI was reached (the date not being prospective or conditional) and an IR based on the certifying exam. To determine the appropriate edition of the AMA Guides to be used to assess impairment for any certifying examinations conducted on or after October 15, 2001, we must look to Rule 130.1(c)(2)(B)(ii). There is no evidence that Dr. S was not a doctor authorized to certify MMI and determine whether there is permanent impairment, and if so, assign permanent impairment.

The carrier argues that the certification by Dr. D, the first designated doctor, that the claimant was not at MMI on December 28, 2000, which the carrier alleges was never challenged, overturns the prior certification by Dr. S. We disagree. In APD 040583-s, decided May 3, 2004, the Appeals Panel held that the selection of the

¹ We note that although Dr. F in the attached worksheets correctly combines the UE impairments, using the Combined Values Chart and then converts the impairment assigned for the right UE to whole person impairment prior to combining with the impairment assigned for the lumbar spine (which results in a 16% IR), the 20% IR certified in the Report of Medical Evaluation (DWC-69) fails to take into account the conversion of the impairment assessed for the right UE to whole person. See AMA Guides 3rd edition, page 35.

designated doctor and subsequent certification that the claimant was not at MMI did not establish that the treating doctor's certification was "withdrawn" or set aside "by the conduct of the parties." Also, there is no evidence that the MMI certification by Dr. S was overturned by a final decision. In that case, as with the instant one, the hearing officer did not err in finding that the AMA Guides 3rd edition applies, because at the time the certifying examinations were conducted (after October 15, 2001) there was a certification of MMI by Dr. S pursuant to subsection (b) of Rule 130.1 made prior to October 15, 2001. The certification by Dr. S has not been previously withdrawn through agreement of the parties or previously overturned by a final decision. Accordingly, we affirm the hearing officer's determination that the AMA Guides 3rd edition is the appropriate edition because the first certification by Dr. S was made prior to October 15, 2001.

MMI/IR

The medical evidence in the record indicates that the claimant continually received treatment for the compensable injury after February 11, 2002, the date of MMI initially certified by Dr. F, the second designated doctor, and medical records indicate that the additional treatment received by the claimant, some of which was received after June 11, 2002, the date believed by Dr. F to be the statutory MMI date, did improve his condition. Although any surgeries which occurred after the MMI date cannot be specifically rated, the surgeries may be considered in certifying the date of MMI. See generally APD 040998-s, decided June 16, 2004. A medical note dated April 7, 2005, contemplates releasing the claimant to return to work in July 2005. Further, Dr. B agreed that the claimant's date of MMI should be the statutory date. There is sufficient evidence to establish that the claimant's date of MMI was after February 11, 2002.

The evidence reflects that the revised certification by Dr. F of a MMI date of June 11, 2002, with a 20% IR, which the hearing officer found was supported by a preponderance of the evidence, was based on what Dr. F believed was the statutory date of MMI. It is clear Dr. F intended for the MMI date he certified to be the date of statutory MMI because he noted in his narrative report that the claimant reached statutory MMI on June 11, 2002, and marked the MMI date as statutory on the DWC-69. The parties did not stipulate to the date of statutory MMI. Section 401.011(30) defines MMI 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 be anticipated; (B) the expiration of 104 weeks from the date on which income benefits begin to accrue (statutory); or (C) the date determined as provided by Section 408.104 (MMI after spinal surgery). Rule 124.7 pertaining to the initial payment of temporary income benefits provides in subsections (a) and (b) as follows:

- (a) As used in this section, the following terms have the following meanings, unless the context clearly indicates otherwise: "Accrual date" means the day an injured worker's income benefits begin to accrue. "Day of disability" means a day when the worker is unable

to obtain and retain employment at wages equivalent to the pre-injury wage because of a compensable injury. Intermittent days of disability shall be cumulated to calculate the accrual date.

- (b) An injured worker's accrual date is the worker's eighth day of disability.

It is not clear from the record exactly when the claimant's disability began. However, the compensable injury date is _____, and the claimant's accrual date for income benefits could not have been earlier than June 20, 2000. Given the earliest possible accrual date, the date of statutory MMI for the claimant could not be earlier than June 18, 2002, which is the expiration of 104 weeks from the earliest date on which income benefits could have begun to accrue. Because the designated doctor believed the claimant reached MMI statutorily rather than clinically and he incorrectly calculated (or was provided) what he believed to be the statutory MMI date, there is no evidence to support the June 11, 2002, date of MMI certified by Dr. F. Consequently, we reverse the hearing officer's determination that the claimant reached MMI on June 11, 2002, and remand back to the hearing officer. The hearing officer should see if the parties can stipulate to the date of statutory MMI applicable to this case, or if not, take evidence from the parties regarding the accrual date of disability so the hearing officer can determine the correct date of statutory MMI.

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, the Appeals Panel stated that Rule 130.1(c)(3):

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).

As previously mentioned, the claimant underwent spine surgeries on November 5, 2002, July 14, 2004, and July 21, 2004. The evidence indicates that Dr. F expressly included a rating for spinal surgery, which would be incorrect if the spinal surgeries occurred after the MMI date.

The December 23, 2005, certification from Dr. B cannot be adopted because she did not utilize the appropriate edition of the AMA Guides; Dr. B used the 4th edition rather than the 3rd edition.

Because the date of MMI has not yet been determined, we reverse the hearing officer's determination that the IR is 20% and remand the case back to the hearing officer. The hearing officer is to determine whether Dr. F is still qualified and available to be the designated doctor, and if so, to instruct Dr. F to certify the claimant's date of

MMI (informing Dr. F of the correct statutory date and that the MMI date can be no later than the statutory date) and assess an IR based on the claimant's condition as of the MMI date certified by Dr. F, considering the medical record and the certifying examination in accordance with the AMA Guides 3rd edition (without assessing impairment for post MMI surgeries). A copy of this certification is to be made available to the parties, and the parties are to be given an opportunity to respond. The hearing officer is then to make a determination on the issues of MMI and IR.

If Dr. F is no longer qualified or available to serve as the designated doctor then another designated doctor is to be appointed pursuant to Rule 126.7(h) to certify the claimant's MMI and assess an IR based on the certified date of MMI.

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

**CT CORPORATION
350 NORTH ST. PAUL STREET
DALLAS, TEXAS 75201.**

Margaret L. Turner
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Veronica L. Ruberto
Appeals Judge