APPEAL NO. 071109
FILED SEPTEMBER 5, 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 was held on May 14, 2007, with the record closing on May 30, 2007. The hearing officer resolved the disputed issues by deciding that: (1) the appellant/cross-respondent's (claimant) impairment rating (IR) is 20%; (2) the compensable injury extends to include spondylolisthesis because the respondent/cross-appellant (carrier) waived the right to contest compensability of spondylolisthesis; (3) the claimant is not entitled to supplemental income benefits (SIBs) for the sixth or seventh quarters; and (4) the carrier is relieved of liability for SIBs for the seventh quarter because of the claimant's failure to timely file an application for SIBs for the seventh quarter.

The claimant appealed the hearing officer's determination that he was not entitled to SIBs for the sixth and seventh quarters and the determination that he failed to timely file an application for SIBs for the seventh quarter. The carrier appealed the hearing officer's IR determination, arguing that it is legally wrong because it was based on Advisory 2003-10, signed July 22, 2003, and Advisory 2003-10B, signed February 24, 2004 (Advisories), citing Texas Dep't. of Ins. v. Lumbermens Mutual Cas. Co., 212 S.W.3d 870 (Tex. App.-Austin, 2006, pet. denied). Additionally, the carrier appealed the hearing officer's determinations with regard to extent of injury and carrier waiver. The carrier filed a response to the claimant's appeal. The appeal file does not contain a response from the claimant to the carrier's appeal.

DECISION

Reversed and remanded in part, affirmed in part.

FACTUAL SUMMARY

The parties stipulated that the claimant sustained a compensable injury on _____, and that the claimant reached maximum medical improvement (MMI) on May 5, 2004. The evidence reflects that the claimant was examined by the Texas Department of Insurance, Division of Workers' Compensation (Division)-selected designated doctor, Dr. F, on May 5, 2004, and he certified that the claimant reached MMI on that same date, with a 20% IR based on the Advisories for a multilevel fusion. In a letter of clarification dated January 22, 2007, Dr. F states that without applying the Advisories he would assign a 0% IR, "because of the absence of injury in concert with the analysis recommended on page 100" of 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).[1] The hearing officer concluded that the claimant's IR is 20% as assigned by Dr. F.

EXTENT OF INJURY AND CARRIER WAIVER

The hearing officer's decision that the compensable injury extends to include spondylolisthesis because the carrier waived the right to contest compensability of spondylolisthesis is supported by sufficient evidence and is affirmed.

SIBS

The hearing officer's decision that the claimant is not entitled to SIBs for the sixth and seventh quarters, and that the carrier is relieved of liability for SIBs for the seventh quarter because of the claimant's failure to timely file an application for SIBS for the seventh quarter is supported by sufficient evidence and is affirmed.

IR

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. 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. 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* Appeals Panel Decision (APD) 040313-s, decided April 5, 2004.

The 20% IR determined by the hearing officer in this case as certified by Dr. F was based on the application of the Advisories. The Advisories have been declared invalid and their application an *ultra vires* act. Lumbermens, *supra*. The Texas Supreme Court denied the petition for review of this case on June 15, 2007. Therefore, the adoption of an IR that is based on the Advisories is legal error and must be reversed. *See* APD 071023-s, decided July 23, 2007. We reverse the hearing officer's determination that the claimant's IR is 20%.

Review of the record indicates that the only other certification of MMI/IR is from the designated doctor, Dr. F, in which he assigned a 0% IR. However, this IR cannot be adopted because he did not rate the entire compensable injury. Dr. F did not provide a rating for spondylolisthesis which has been determined to be compensable by virtue of carrier waiver. Dr. F states in his narrative report that "[i]n my opinion, the pre-existing

[1] Dr. F references page 100 of the AMA Guides which states that "[t]he Injury Model attempts to document physiologic and structural impairments relating to insults other than common developmental findings such as . . . (2) spondylolisthesis, found in 3%" of adults.

spondylolisthesis was neither caused nor aggravated by the [motor vehicle accident] event at issue. . . With regard to the injury event, I assess 0% impairment in accordance with the concepts set forth on Page 100" of the AMA Guides. Additionally, Dr. F stated in his narrative report that the operative report of March 7, 2003, identifies "spondylolysis at L5, spondylolisthesis at L5-S1, spinal stenosis and [hypomobility of L5-S1], but absolutely no indication of any injury produced pathology."

An MRI of the lumbar spine dated January 13, 2003, reflects that at L5-S1 "[t]here is a 1 [centimeter (cm)] anterior slipping of L5 on S1, associated with spondylolysis. There is a 7 [millimeters (mm)] prolapse and herniation of the disc at this level"[2] and that "[t]here is a bony defect in the pars interarticularis bilaterally indicating Grade 1 spondylolisthesis." The hearing officer determined that the claimant's compensable injury extends to include spondylolisthesis by virtue of carrier waiver. Although Dr. F references the AMA Guides on page 100, which states that "[t]he Injury Model attempts to document physiologic and structural impairments relating to insults other than common developmental findings such as . . . spondylolisthesis, found in 3%" of adults, Dr. F failed to consider the claimant's compensable spondylolisthesis injury in accordance with the AMA Guides in assessing an IR. We note that page 94 of the AMA Guides, states that the "evaluator assessing the spine should use the Injury Model, if the patient's condition is one of those listed in Table 70 (p. 108)". Table 70 lists spondylolisthesis as a condition in three different ways: (1) Spondylolisthesis *without* loss of motion segment integrity or radiculopathy; (2) Spondylolisthesis *with* loss of motion segment integrity or radiculopathy; and (3) Spondylolisthesis *with* cauda equina syndrome.

The doctor evaluating permanent impairment must consider the entire compensable injury. APD 043168, decided January 20, 2005. Dr. F's report reflects that he did not consider the claimant's spondylolisthesis to be part of the claimant's compensable injury in determining the IR. The claimant's spondylolisthesis has now been determined to be part of the compensable injury. Therefore, Dr. F's certification of MMI on May 5, 2004, with a 0% IR cannot be adopted because he did not rate the entire compensable injury. The doctor assigning the IR shall provide a description and explanation of specific clinical findings related to each impairment, including 0% IRs. Rule 130.1(c)(3)(D)(i). Since the hearing officer's IR determination has been reversed and there is no other certification of MMI/IR in evidence, we remand the IR issue 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, request that Dr. F rate the compensable injury, which includes spondylolisthesis, based on the stipulated date of MMI, May 5, 2004, in accordance with the AMA Guides. In determining the IR, Dr. F should consider the medical records and the certifying examination of the claimant. The hearing officer is to provide the designated doctor's response to the parties and allow the parties an opportunity to respond and then make a determination regarding the IR. If Dr. F is no longer qualified and available to serve as the designated doctor then another

[2] Conversion: 1 cm is equal to 10 mm.

designated doctor is to be appointed pursuant to Rule 126.7(h) to determine the claimant's IR, which includes spondylolisthesis based on the claimant's condition on the stipulated date of MMI, May 5, 2004.

SUMMARY

We affirm the hearing officer's extent of injury, carrier waiver, and SIBs determinations. We reverse the hearing officer's determination that the claimant's IR is 20%, and remand the IR issue to the hearing officer for a determination 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 **CONTINENTAL CASUALTY COMPANY** and the name and address of its registered agent for service of process is

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

_____
Veronica L. Ruberto
Appeals Judge

CONCUR:

_____
Thomas A. Knapp
Appeals Judge

_____
Margaret L. Turner
Appeals Judge