

APPEAL NO. 071344  
FILED SEPTEMBER 26, 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 March 20, 2007. In Appeals Panel Decision (APD) 070806, decided May 29, 2007, the Appeals Panel remanded the case to the hearing officer to reconstruct the record because the compact disc recording was unintelligible. A CCH on remand was held on July 3, 2007.<sup>1</sup> The disputed issues were: (1) Does the compensable injury extend to the lumbar spine at L3-4 and L4-5 with degenerative changes?; (2) Has the appellant (carrier) waived the right to contest compensability of the lumbar spine at L3-4, L4-5 with degenerative changes, by not timely contesting the impairment rating (IR) prior to the expiration of the first quarter of supplemental income benefits (SIBs) in accordance with 28 TEX. ADMIN. CODE § 130.102(g) (Rule 130.102(g))?; (3) Is the respondent (claimant) entitled to SIBs for the seventh quarter, July 21, 2006, through October 19, 2006?; and (4) Is the claimant entitled to SIBs for the eighth quarter, October 20, 2006, through January 18, 2007? The hearing officer resolved the disputed issues on remand by determining that: (1) the compensable injury extends to include degenerative changes at L4-5 but does not extend to include degenerative changes at L3-4; (2) the carrier waived the right to contest compensability of the degenerative changes at L4-5 (pursuant to Rule 130.102(g)) but did not waive the right to contest degenerative changes at L3-4; (3) the claimant is entitled to SIBs for the seventh and eighth quarters.

The carrier appealed, contending that the compensable injury does not extend to include degenerative changes at L4-5; that there is no evidence that the L4-5 degenerative changes were included in the designated doctor's IR; and that the claimant was not entitled to SIBs for the seventh and eighth quarters. The appeal file does not contain a response from the claimant. There is no appeal of the hearing officer's determinations that the compensable injury does not extend to include degenerative changes at L3-4 and that the carrier did not waive the right to contest degenerative changes at L3-4.

DECISION

Affirmed in part and reversed and rendered in part.

The parties stipulated that the claimant sustained a compensable injury on \_\_\_\_\_. The documentary evidence indicates that the claimant suffered a low back injury in a fall from a truck. The parties stipulated that the claimant reached maximum medical improvement (MMI) with an IR of 15% or greater.

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<sup>1</sup> The recording of the hearing on remand is also largely unintelligible. Since the Appeals Panel may not remand a case more than once (Section 410.203(c)) we have reviewed the record largely based on the documentary evidence.

## SIBS

The hearing officer's determinations that the claimant is entitled to SIBs for the seventh and eighth quarters are supported by sufficient evidence and are affirmed.

### **CARRIER WAIVER (FINALITY) PURSUANT TO 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 of SIBs, the date of MMI and the IR shall be final and binding. A July 18, 2001, MRI report of the claimant's lumbar spine reported "T12-L1 thru L3-4" as unremarkable and L4-5 and L5-S1 as showing degenerative changes. In evidence is a Report of Medical Evaluation (DWC-69) and narrative dated June 28, 2003, from Dr. J, the designated doctor, which certified statutory MMI with a 29% IR utilizing 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). Dr. J assessed a 22% impairment for lumbar loss of range of motion (ROM), 7% impairment from Table 49, Section (II)(C), Impairments Due to Specific Disorders of the Spine,<sup>2</sup> and 3% impairment for neurological decreased sensation, which were combined to arrive at the 29% IR for the lumbar spine. The hearing officer determined that the first quarter of SIBs began on January 20, 2005, and ended April 20, 2005. There is no evidence that the MMI date or the IR were ever disputed. After the first quarter of SIBs ended, the carrier filed a Notice of Disputed Issue(s) and Refusal to Pay Benefits (PLN-11) disputing the L3-4 and L4-5 degenerative changes as not being part of the compensable injury and accepting L5-S1 as "the only body part that is part of this incident."

In APD 040150-s, decided March 8, 2004, the Appeals Panel applied Rule 130.102(g) stating:

Rule 130.1(c)(1) states that an IR is the percentage of permanent impairment of the whole body resulting from the current compensable injury. Section 401.011(24) defines IR as the percentage of permanent impairment of the whole body resulting from a compensable injury. Therefore, considering the definition of IR, we conclude that the IR was for the compensable injury and, thus, any injured body part or condition rated is included in the compensable injury under the facts of this case. Once the IR then became final pursuant to Rule 130.102(g), what was included in the underlying compensable injury was established.

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<sup>2</sup> Table 49, Section (II)(C) is for intervertebral disc or other soft tissue lesions, unoperated, with medically documented injury and a minimum of six months of medically documented pain, recurrent muscle spasm, or rigidity associated with moderate to severe degenerative changes on structural tests, including unoperated herniated nucleus pulposus, with or without radiculopathy. This provision does not specify specific levels of the lumbar spine.

As noted in APD 051082, decided June 28, 2005, the question is not so much waiver as it is finality of the IR and the underlying conditions which were rated in that IR. APD 051028-s, decided June 9, 2005, further explained:

The fact that the date of MMI and IR become final under these circumstances applies equally to the claimant and the carrier. A determination that the compensable injury extends to various other conditions not included in the IR will not allow the claimant to then challenge the date of MMI and/or the IR if there was no pending dispute regarding MMI and/or IR prior to the expiration of the first quarter of SIBs. However, once the first quarter of SIBs has expired and there has been no challenge of the MMI date and/or the IR, the claimant is not precluded from alleging that the compensable injury extends to include other conditions not included in the IR.

In applying these decisions the question becomes whether the L4-5 degenerative changes were included in Dr. J's 29% IR.

Dr. J in the June 28, 2003, report discusses the claimant's back pain, sensory alteration and left lower extremity weakness, but does not reference specific levels of the lumbar spine. Dr. J also references some "prior reports" by date but those reports are not in evidence. Dr. J gives ROM measurements but again does not reference specific levels of the lumbar spine. The hearing officer in the Background Information concedes that Dr. J did not specify the levels of the lumbar spine with degenerative changes in the 7% impairment for specific disorders of the spine, but comments "since there was medical evidence of degenerative changes at L4-5 and L5-S1 before that certification, it is reasonable to conclude that the diagnosed degenerative changes were included in the certification." While it is correct that Dr. J rated degenerative changes in the lumbar spine in his rating under Table 49, Section (II)(C), it is not possible to determine from his rating whether he was rating the L4-5 level, or the L5-S1 level, or both because he does not mention either level in his report. Dr. J's report does not specify what level or levels of the spine he is rating and the 7% impairment could have been justified on the degenerative changes at the L5-S1 level alone. The hearing officer's determination that the carrier has waived the right to contest compensability of the degenerative changes at L4-5 (pursuant to Rule 130.102(g)) is without support in the evidence and is reversed. We render a new decision that the carrier has not waived the right to contest compensability of the degenerative changes at L4-5.

### **EXTENT OF INJURY**

There is no appeal of the hearing officer's finding that as a result of the compensable injury, the claimant did not suffer damage or harm to the L4-5 level with degenerative changes. The hearing officer's determination that the compensable injury extends to include degenerative changes at L4-5 is based on her determination that the carrier waived the right to contest compensability of the degenerative changes at L4-5 under Rule 130.102(g). Because we have reversed the hearing officer's determination that the carrier waived the right to contest compensability of the L4-5 degenerative

changes, we also reverse the hearing officer's decision that the compensable injury extends to include degenerative changes at L4-5.

### SUMMARY

We affirm the hearing officer's determinations that the claimant is entitled to SIBs for the seventh and eighth quarters. We reverse the hearing officer's determination that the carrier waived the right to contest compensability of the degenerative changes at L4-5 pursuant to Rule 130.102(g) and render a new decision that the carrier did not waive the right to contest compensability of the degenerative changes at L4-5. We also reverse the hearing officer's determination that the compensable injury extends to degenerative changes at L4-5 and render a decision that the compensable injury does not extend to degenerative changes at L4-5.

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

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

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Thomas A. Knapp  
Appeals Judge

CONCUR:

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Veronica L. Ruberto  
Appeals Judge

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Margaret L. Turner  
Appeals Judge