APPEAL NO. 071880
FILED DECEMBER 20, 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 September 17, 2007. The hearing officer decided that: (1) the respondent (claimant) is entitled to supplemental income benefits (SIBs) for the first and second quarters; (2) the claimant reached maximum medical improvement (MMI) on January 15, 2006, with a 20% impairment rating (IR); and (3) the MMI date of January 15, 2006, with a 20% IR, as certified by Dr. J became final pursuant to 28 TEX. ADMIN. CODE § 130.102(g) (Rule 130.102(g)) on June 10, 2007, the expiration of the first SIBs quarter.

The appellant (carrier) appealed the hearing officer's SIBs, MMI, IR, and finality determinations. The claimant responded, urging affirmance.

DECISION

Affirmed in part, reversed and rendered it part, and reversed and remanded in part.

The parties stipulated that: (1) the claimant sustained a compensable injury on _____; and (2) Dr. J was properly appointed as the Texas Department of Insurance, Division of Workers' Compensation (Division)-selected designated doctor. Additionally, the parties stipulated that "*if it is determined that the 20% [IR] by [Dr. J] is determined to be final*" that: (1) the qualifying period for the first quarter of SIBs began on November 28, 2006, and ended on February 26, 2007; (2) the first quarter of SIBs began on March 12, 2007, and ended on June 10, 2007; (3) the qualifying period for the second quarter of SIBs began on February 27, 2007, and ended on May 28, 2007; and (4) the second quarter of SIBs began on June 11, 2007, and ended on September 9, 2007. [Emphasis added]. It is undisputed that the claimant sustained a compensable low back injury and that she had a two-level lumbar fusion in October 2004.

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 of SIBs, the date of MMI and the IR shall be final and binding. The finality issue is phrased "[h]as the [IR] of 20% and MMI date of January 15, 2006, as certified by [Dr. J], become final pursuant to Rule 130.102(g), [on June 10, 2007] the expiration of the first SIBs quarter?"

The facts of this case are undisputed. The designated doctor, Dr. J examined the claimant on August 11, 2005, and certified that the claimant reached MMI on that date with a 10% IR. The hearing officer took official notice of the Dispute Resolution Information System (DRIS) notes for this case. The DRIS notes indicate that: (1) the claimant contacted the Division to dispute Dr. J's assessment of a 10% IR on

September 30, 2005 (sequence 12)[1]; (2) a Request for a Benefit Review Conference (BRC) form (DWC-45) was filed on October 6, 2005 (sequence 13); (3) a request for a letter of clarification or BRC was denied due to insufficient medical records on October 20, 2005 (sequence 16); (4) a DWC-45 was received on January 18, 2005 (sequence 22); and (5) a DWC-45 was deleted and a request for a letter of clarification was sent to the designated doctor on January 26, 2006. The designated doctor, Dr. J, reexamined the claimant on February 23, 2006, and he amended his certification and reported that the claimant reached MMI on January 15, 2006, with a 20% IR. Dr. J's reports reflect that he used 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), in assessing the IRs.

The hearing officer notes in his decision that the "[c]laimant's prior attempts at disputing the rating were denied or deleted" and that there "was no pending dispute." The hearing officer found that "[n]either party disputed the 20% rating with a MMI date of January 15, 2006, until August 15, 2007, when the Carrier disputed the rating" and that "[t]here was no pending dispute regarding the date of [MMI] or [IR] prior to the expiration of the first quarter."

In Appeals Panel Decision (APD) 041649, decided August 30, 2004, the claimant disputed the 6% IR assessed by the required medical examination (RME) doctor and thereafter a designated doctor was appointed by the Division. The designated doctor assessed a 20% IR and the carrier disputed this rating by filing a DWC-45 on August 9, 2001. The DWC-45 was "denied" on August 29, 2001, and a letter of clarification was sent to the designated doctor, however he did not respond. No further attempts were made to contact the designated doctor. The expiration of the first SIBs quarter was on December 1, 2002. The Appeals Panel cited the preamble to Rule 130.102(g), which states that "[t]his provision will not apply to any situation where a party has raised a dispute prior to the first quarter of [SIBs]." 24 Tex. Reg. 408 (January 22, 1999). The Appeals Panel affirmed the hearing officer's determination that the carrier had not waived the right to dispute the 20% IR assigned by the designated doctor, pursuant to Rule 130.102(g).[2] *See also* APD 061788, decided November 27, 2006, where the Appeals Panel held that the appointment of the designated doctor did not resolve the carrier's dispute of the IR assigned by the referral doctor and that the claimant's IR was in dispute prior to the expiration of the first quarter of SIBs.

In the instant case, the claimant disputed the designated doctor's 10% IR when she contacted the Division on September 30, 2005. Subsequently, the designated doctor reexamined the claimant on February 23, 2006, and he amended his certification of MMI and IR. In his narrative report dated February 23, 2006, Dr. J opined that the claimant reached MMI "upon completion of the pain management program" in the "early part of January" 2006. Dr. J states in his report that he is "not sure why [he] previously

[1] The claimant was unrepresented at the time she contacted the Division. *See* Rule 141.1(c). The claimant was represented by an attorney beginning on October 7, 2005 (sequence 14).

[2] In APD 041649, *supra*, the issue was whether the carrier waived the right to dispute the IR assigned by the designated doctor. The Appeals Panel stated that "the waiver issue is predicated, at least in part, upon [Rule 130.102(g)]."

assigned her an [IR] of 10%, but in [his] opinion, upon reviewing all available information at this time, the appropriate impairment should be 20%."

The claimant contends that the finality issue is specific to the 20% IR assigned by the designated doctor and that the carrier did not dispute the 20% IR, thus the designated doctor's certification of MMI/IR became final pursuant to Rule 130.102(g). Additionally, the claimant contends that Rule 130.102(g) is only applicable to an IR in a SIBs case that is 15% or greater, thus Rule 130.102(g) is not applicable to the 10% IR that was assessed by the designated doctor prior to his amended certification of MMI/IR. Although neither party disputed the 20% IR assigned by Dr. J prior to the end of the first quarter of SIBs (ending date as stipulated to by the parties), the claimant did dispute the 10% IR assigned by Dr. J when she contacted the Division on September 30, 2005. Subsequently, a letter of clarification was sent to the designated doctor, and upon reexamination he amended his certification of MMI/IR. The designated doctor's amended certification of MMI and IR did not resolve the dispute that was initiated by the claimant on September 30, 2005. *See* APD 061788, *supra*. The hearing officer comments that the DRIS notes indicated that the "DWC-45" form was denied and deleted, however, this does not indicate that the dispute regarding the IR was resolved. Under the facts of this case, the evidence indicates that there was a pending dispute of the IR assigned by the designated doctor, which was initiated on September 30, 2005. Accordingly, we reverse the hearing officer's determination that the MMI date of January 15, 2006, with a 20% IR, as certified by Dr. J became final pursuant Rule 130.102(g) and we render a new decision that the MMI date of January 15, 2006, with a 20% IR, as certified by Dr. J did not become final pursuant to Rule 130.102(g).

MMI

The hearing officer's decision that the claimant reached MMI on January 15, 2006, 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.

As previously mentioned, Dr. J reexamined the claimant on February 23, 2006, and certified that the claimant reached MMI on January 15, 2006, with a 20% IR, and the MMI determination has been affirmed. Dr. J's narrative report dated February 23, 2006, indicates that he used the Range of Motion (ROM) Model to determine the claimant's IR. Dr. J's narrative report lists the calculations for lumbar ROM and he states that "[a]fter considering the above differentiators, the [claimant's] subjective symptoms and the medical records, it is determined the [claimant's] injury is best rated

under [Diagnosis-Related Estimate (DRE) Category IV: Loss of Motion Segment Integrity], for 20% whole person impairment of the lumbar spine." Additionally, Dr. J states that the claimant "had a two level fusion, and that typically qualifies for an impairment under" DRE Category IV, 20% IR. Although Dr. J does not reference Division Advisory 2003-10, signed July 22, 2003, and Advisory 2003-10B, signed February 24, 2004 (Advisories), it was under those Advisories that a multi-level fusion was said to have met the criteria for DRE Category IV. However, those Advisories were declared invalid in Texas Dep't. of Ins. v. Lumbermens Mutual Cas. Co., 212 S.W.3d 870 (Tex. App.-Austin, 2006, pet. denied), and, therefore, the Appeals Panel has held that an IR based on those Advisories is legal error and must be reversed. APD 071023-s, decided July 23, 2007.[3]

In APD 071818, decided December 6, 2007, the treating doctor's certification of MMI/IR could not be adopted because the treating doctor did not use the ROM Model as a differentiator as provided by the AMA Guides, but rather placed the claimant in a DRE category that was in proximity to the IR using the ROM Model. In that case, the treating doctor did not indicate in his narrative report that he could not decide into which DRE category to place the claimant. The AMA Guides on page 3/112 states that "[t]he [ROM Model] should be used only if the Injury Model [also known as the DRE Model] is not applicable, or if more clinical data on the spine are needed to categorize the individual's spine impairment." The AMA Guides on page 3/99 states that:

> If the physician cannot decide into which DRE category the patient belongs, the physician may refer to and use the [ROM] Model, which is described in Section 3.3j (p.113). Using the procedures of that model, the physician combines an impairment percent based on the patient's diagnosis with a percent based on the patient's spine motion impairment and a percent based on neurologic impairment, if it is present. The physician uses the estimate determined with the [ROM] Model to decide placement within one of the DRE categories. The proper DRE category is the one having the impairment percent that is closest to the impairment percent determined with the [ROM] Model.

In the instant case, it is clear from Dr. J's narrative report dated February 23, 2006, that he did not use the ROM Model as a differentiator as provided by the AMA Guides, but rather he placed the claimant in Lumbosacral DRE Category IV because the claimant had a two-level spinal fusion, which contradicts the AMA Guides. Lumbermens, *supra*. Dr. J does not indicate that he could not decide into which DRE category to place the claimant, and then used the ROM Model as a differentiator to decide placement within one of the DRE categories. Accordingly, Dr. J's assessment of a 20% IR cannot be adopted. Additionally, there are no other certifications of MMI and IR in evidence with a date of MMI of January 15, 2006. We reverse the hearing officer's 20% IR determination and we remand for the hearing officer to determine the claimant's IR in accordance with this decision.

[3] Commissioner's Bulletin #B-0033-07 issued July 18, 2007, withdrew the Advisories based on the decision in the Lumbermens case, *supra*.

SIBS

Since a requirement for SIBs eligibility in Section 408.142(a) is an IR of 15% or greater and we have reversed the 20% IR determination and remanded the IR issue to the hearing officer, we likewise reverse the hearing officer's SIBs determination and we remand for the hearing officer to determine SIBs entitlement for the first and second quarters.

SUMMARY

We affirm the hearing officer's determination that the claimant reached MMI on January 15, 2006. We reverse the hearing officer's determination that the MMI date of January 15, 2006, with a 20% IR, as certified by Dr. J became final pursuant Rule 130.102(g) and we render a new decision that the MMI date of January 15, 2006, with a 20% IR, as certified by Dr. J, did not become final pursuant to Rule 130.102(g). We reverse the hearing officer's 20% IR determination and we remand for the hearing officer to determine the claimant's IR. We reverse the hearing officer's SIBs determination and we remand for the hearing officer to determine SIBs entitlement for the first and second quarters.

On remand, the hearing officer is to determine whether Dr. J is still qualified and available to be the designated doctor, and if so, Dr. J is to determine the claimant's IR as of the January 15, 2006, MMI date. In the event, the designated doctor is no longer qualified to act in that capacity, the record would need to be held open for the appointment of another designated doctor and for a determination on the claimant's IR. The designated doctor should assign an IR for the claimant based on the claimant's condition as of the January 15, 2006, MMI date considering the medical records and certifying examination and in accordance with the AMA Guides. The hearing officer is to provide the designated doctor's assessment of the claimant's IR to the parties and allow the parties an opportunity to respond. Thereafter, the hearing officer should make a determination regarding the IR and SIBs issues.

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

LEO MALO
12222 MERIT DRIVE, SUITE 700
DALLAS, TEXAS 75251.

_____
Veronica L. Ruberto
Appeals Judge

CONCUR:

_____
Thomas A. Knapp
Appeals Judge

_____
Margaret L. Turner
Appeals Judge