APPEAL NO. 072003
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 October 9, 2007. The hearing officer resolved the sole disputed issue before her by determining that the appellant's (claimant) impairment rating (IR) is 10% as assigned by the designated doctor, Dr. G. The claimant appeals, contending that his IR should be 16% as assigned by his treating doctor. The respondent (carrier) responds, urging affirmance.

DECISION

Reversed and remanded.

The parties stipulated that: (1) the claimant sustained a compensable injury on _____; (2) Dr. G was appointed as the designated doctor; and (3) the claimant reached maximum medical improvement (MMI) on June 27, 2006, pursuant to Section 401.011(30)(B) (the expiration of 104 weeks from the date on which income benefits began to accrue).

Section 408.125(c) provides that the report of the designated doctor shall have presumptive weight, and the Texas Department of Insurance, Division of Workers' Compensation (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.

Dr. G examined the claimant on June 21, 2006. On his Report of Medical Evaluation (DWC-69) dated June 21, 2006, Dr. G originally certified that the claimant reached MMI on June 21, 2006, and checked the box indicating that was the statutory date of MMI, however, that date was crossed out and a date of July 8, 2006, was marked in its place, along with Dr. G's initials. Dr. G indicated 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) and assessed a 10% IR. Dr. G assessed a 5% impairment for the lumbar spine under Diagnosis-Related Estimate Lumbosacral Category II: Minor Impairment and 5% impairment under Class 1, for epididymitis (Section 11.5c page 11/258 of the AMA Guides).

The hearing officer adopted Dr. G's 10% IR, however, Dr. G's report cannot be adopted because he provided a prospective date of MMI of July 8, 2006, in his DWC-69 dated June 21, 2006. 28 TEX. ADMIN. CODE § 130.1(b)(4)(C)(i) (Rule 130.1(b)(4)(C)(i)) provides that the date of MMI may not be prospective.

In addition, Dr. G's IR of 10% cannot be adopted because the IR is not based on the claimant's condition as of the stipulated date of MMI of June 27, 2006. 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. *See* Appeals Panel Decision (APD) 040313-s, decided April 5, 2004, and APD 040514, decided April 28, 2004.

There is one other certification of MMI/IR in evidence. Dr. P, a doctor acting in place of the treating doctor, examined the claimant on November 9, 2006, and certified the claimant reached clinical MMI on that date with a 16% IR. Dr. P assessed a 12% impairment for the lumbar spine using the Range of Motion Model (Table 75 of the AMA Guides Sections II E and G) and 5% impairment for epididymitis. The claimant asserts that Dr. P's rating is the correct rating and that his report should be adopted. Dr. P's 16% IR is based on an MMI date of November 9, 2006. As previously stated, the parties stipulated that the date of MMI was June 27, 2006. Because Dr. P assigned an IR that was not based upon the claimant's condition on the stipulated date of MMI, June 27, 2006, his assigned 16% IR cannot be adopted. Rule 130.1(c)(3), APD 040313-s, *supra*.

As neither IR certification can be adopted for the reasons set forth above, we reverse the hearing officer's determination that the claimant's IR is 10%, and remand the case for the hearing officer to determine if Dr. G is still qualified and available to be the designated doctor in this case (*See* Rule 126.7(h)) and if so, for the hearing officer to advise the designated doctor that the MMI date cannot be prospective, and that the designated doctor is to assign an IR for the compensable injury based on the claimant's condition as of the stipulated June 27, 2006, date of MMI, in accordance with the AMA Guides considering the medical records and certifying examination. The parties are to be given an opportunity to present evidence and comment on the designated doctor's report. The hearing officer is then to determine the IR. If Dr. G is no longer qualified and available to serve as the designated doctor, then another designated doctor is to be appointed pursuant to Rule 126.7(h).

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 **LIBERTY MUTUAL FIRE INSURANCE COMPANY** and the name and address of its registered agent for service of process is

CORPORATION SERVICE COMPANY
701 BRAZOS STREET, SUITE 1050
AUSTIN, TEXAS 78701.

_____
Thomas A. Knapp
Appeals Judge

CONCUR:

_____
Veronica L. Ruberto
Appeals Judge

_____
Margaret L. Turner
Appeals Judge