

APPEAL NO. 072277
FILED MARCH 12, 2008

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 December 3, 2007. The hearing officer resolved the disputed issues by deciding that: (1) the respondent/cross-appellant's (claimant) correct impairment rating (IR) is 10%; and (2) the 40% IR assigned by Dr. E, the designated doctor, on December 28, 2004, became final under 28 TEX. ADMIN. CODE § 130.102(g) (Rule 130.102(g)).

The appellant/cross-respondent (carrier) appealed the hearing officer's determination regarding the finality of the 40% IR based on Rule 130.102(g). The claimant responded, urging affirmance of the finality determination. However, the claimant also appealed, disputing the hearing officer's determination that the correct IR is 10%. The carrier responded to the claimant's appeal, urging affirmance of the determination that the correct IR is 10%.

DECISION

Affirmed in part and reversed and rendered in part.

BACKGROUND INFORMATION

It is undisputed that the claimant sustained a compensable injury on _____. The parties stipulated that the carrier accepted an injury to the neck from C4 to C7 and low back from L4 to S1 and that the claimant had undergone both cervical and lumbar multilevel spinal fusion surgeries. The parties also stipulated that the claimant reached maximum medical improvement (MMI) on November 26, 2004.

Dr. W, acting in place of the treating doctor, examined the claimant on November 26, 2004, and certified that the claimant reached MMI on that same date with a 40% IR under 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). Dr. W assessed a 40% IR based on a 20% impairment for the lumbar spine, placing the claimant in Diagnosis-Related Estimate (DRE) Lumbosacral Category IV: Loss of Motion Segment Integrity, and 25% impairment for the cervical spine, placing the claimant in DRE Cervicothoracic Category IV: Loss of Motion Segment Integrity or Multilevel Neurologic Compromise. Dr. W indicated that the 20% impairment assessed for the lumbar spine was due to the multilevel fusion in accordance with Advisory 2003-10B, signed February 24, 2004,¹ and the 25% impairment assessed for the cervical spine was "due to the multilevel

¹ Advisories 2003-10 and 2003-10B (the 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. Appeals Panel Decision (APD) 071023-s, decided July 23, 2007.

neurologic and motion segment structural compromise.” The parties stipulated that the carrier disputed Dr. W’s assigned IR of 40% on December 1, 2004.

The evidence reflects that Dr. E was appointed as the designated doctor by the Texas Department of Insurance, Division of Workers’ Compensation (Division). Dr. E examined the claimant on December 28, 2004, and certified that the claimant reached MMI on November 26, 2004, with a 40% IR. Dr. E assigned the claimant a 20% impairment for the lumbar spine, placing the claimant in DRE Lumbosacral Category IV: Loss of Motion Segment Integrity and a 25% impairment for the cervical spine, placing the claimant in DRE Cervicothoracic Category IV: Loss of Motion Segment Integrity or Multilevel Neurologic Compromise. Dr. E placed the claimant in the DRE IV categories for the lumbosacral spine impairment and the cervicothoracic spine impairment based on Advisory 2003-10, signed July 22, 2003, due to multilevel fusions of the lumbar and cervical spine.

In evidence is a required medical examination (RME) report from a carrier-selected doctor, Dr. F, who examined the claimant on August 20, 2007. Dr. F disagreed with the 40% IR assessed by Dr. W and Dr. E based on the Advisories. Dr. F certified a MMI date of November 26, 2004, and assigned the claimant an IR of 10%. Dr. F combined 5% impairment assessed for the lumbar spine under DRE Lumbosacral Category II: Minor Impairment with 5% impairment assessed for the cervical spine under DRE Cervicothoracic Category II: Minor Impairment.

The Division sent a letter of clarification to the designated doctor, Dr. E, on July 13, 2007, requesting that he provide an alternative IR without using the Advisories. Dr. E responded on July 23, 2007, stating that without using the Advisories, he would assess a 15% IR. Dr. E assessed a 10% impairment for the claimant’s lumbar spine injury, placing the claimant in DRE Lumbosacral Category III: Radiculopathy. He noted at the time of his examination the claimant had loss of ankle reflex but no objective documented motor or sensory deficits. Dr. E assessed 5% impairment for the claimant’s cervical spine injury, placing the claimant in DRE Cervicothoracic Category II: Minor Impairment. He noted that on examination for the cervical spine, the claimant had no atrophy, no documented “prior distal radiculopathy,” no paresthesias in the upper extremity, and no other deficits. In evidence is an amended certification from Dr. E based on an examination dated December 28, 2004, in which Dr. E certified the claimant at MMI on November 26, 2004, with a 15% IR.

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, the date of MMI and the IR shall be final and binding. The parties stipulated that the first quarter of supplemental income benefits (SIBs) began March 17, 2007, and ended June 15, 2007; and that the carrier disputed Dr. W’s assigned IR of 40% on December 1, 2004.

Dr. W's 40% IR was disputed, the designated doctor was appointed, and assigned an IR. The appointment of a designated doctor does not resolve a carrier's dispute of a claimant's IR by a referral doctor. APD 061788, decided November 27, 2006. The appointment of Dr. E as the designated doctor did not resolve the carrier's dispute of the claimant's IR assigned by Dr. W. In APD 041597, decided August 23, 2004, the claimant's IR had not become final and binding under Rule 130.102(g) because the Division records indicated that the self-insured disputed the IR assigned by the RME doctor by filing a Request for a Designated Doctor one day prior to the end of the first quarter of SIBs. In the instant case, the parties stipulated that the carrier disputed the IR of Dr. W on December 1, 2004.

The preamble to Rule 130.102(g) makes clear 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 (1999). See *also* APD 031470, decided July 22, 2003 (affirming that the carrier did not waive its right to dispute the IR, where the carrier filed a dispute of the IR prior to the expiration of the first quarter of SIBs but later paid first and second quarter SIBs). In the instant case, the claimant's IR was in dispute prior to the expiration of the first quarter of SIBs. Therefore, the 40% IR assigned by Dr. E, the designated doctor, did not become final and binding under Rule 130.102(g).

We reverse the hearing officer's determination that the 40% IR assigned by Dr. E on December 28, 2004, became final under Rule 130.102(g) and render a new decision that the 40% IR assigned by Dr. E did not become final under Rule 130.102(g).

IR

The hearing officer made a finding of fact that "the amended report of the designated doctor is not supported by a preponderance of the medical evidence" and another finding of fact that "the claimant does not have radiculopathy in his lower extremities as a result of the compensable injury and the surgery necessitated by that injury." These findings were not appealed.

The only certification of IR in evidence that is not based at least partially on the use of the Advisories and that does not rate lumbosacral radiculopathy is the IR certified by the carrier RME doctor, Dr. F, who certified an IR of 10%. The hearing officer determined that the correct IR was 10%. The hearing officer's decision that the correct IR is 10% is supported by sufficient evidence and is affirmed.

SUMMARY

We reverse the hearing officer's determination that the 40% IR assigned by Dr. E on December 28, 2004, became final under Rule 130.102(g) and render a new decision that the 40% IR assigned by Dr. E did not become final under Rule 130.102(g). We affirm the hearing officer's determination that the claimant's correct IR is 10%.

The true corporate name of the insurance carrier is **AMERICAN HOME ASSURANCE 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 78701-3232.**

Margaret L. Turner
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Veronica L. Ruberto
Appeals Judge