

APPEAL NO. 121194
FILED SEPTEMBER 6, 2012

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 17, 2012, with the record closing on May 31, 2012, in [City], Texas, with [hearing officer] presiding as hearing officer. The hearing officer resolved the disputed issues by deciding that: (1) the appellant/cross-respondent's (claimant) impairment rating (IR) is 19%; (2) the IR assigned by [Dr. D] on May 2, 2011, did not become final under 28 TEX. ADMIN. CODE § 130.102(h) (Rule 130.102(h)); (3) the claimant is not entitled to supplemental income benefits (SIBs) for the first quarter, August 3 through November 1, 2011; (4) the claimant is not entitled to SIBs for the second quarter, November 2, 2011, through January 31, 2012; (5) the respondent/cross-appellant (carrier) is not relieved of liability for SIBs because of the claimant's alleged failure to timely file an Application for SIBs (DWC-52) for the second quarter; (6) the claimant is not entitled to [SIBs] for the third quarter, February 1 through May 1, 2012; and (7) the carrier is not relieved of liability for SIBs because of the claimant's alleged failure to timely file a DWC-52 for the third quarter.

The claimant appealed, disputing the hearing officer's determinations of the IR and non-entitlement of SIBs for the first, second, and third quarters. The carrier responded, urging affirmance of those disputed determinations. The carrier cross-appealed, disputing the hearing officer's determinations that the carrier is not relieved of liability for SIBs because of the claimant's failure to timely file a DWC-52 for the second and third quarters. The appeal file does not contain a response from the claimant to the carrier's cross-appeal.

The hearing officer's determination that the IR assigned by Dr. D on May 2, 2011, did not become final under Rule 130.102(h) was not appealed and has become final pursuant to Section 410.169.

DECISION

Reversed and rendered in part and reversed and remanded in part.

The parties stipulated that: (1) the claimant sustained a compensable injury on [date of injury]; (2) the compensable injury of [date of injury], includes a left hand laceration, an abrasion of the ring and middle fingers of the left hand, a bilateral shoulder strain, a lumbar strain, a herniated disc at L3-4, coccydynia, a right sacroiliac joint injury, and a right knee strain; and (3) the claimant reached maximum medical improvement (MMI) on the date of statutory MMI on June 29, 2010. The claimant

testified she was injured when a load lock she was installing came undone and hit her, throwing her off balance and causing her to fall.

IR

The claimant contends that her IR should be 30% as certified by [Dr. W], who was initially appointed by the Texas Department of Insurance, Division of Workers' Compensation (Division) as designated doctor for MMI and IR. Dr. W certified in a Report of Medical Evaluation (DWC-69) that the claimant reached MMI on June 17, 2010, with a 30% IR. Dr. W examined the claimant on March 9, 2010. A letter of clarification (LOC) was sent to Dr. W which stated that prospective MMI dates are invalid. Dr. W responded, stating as of March 9, 2010, the claimant was not at MMI. Further as previously noted, the parties stipulated that the claimant reached MMI on the date of statutory MMI, June 29, 2010.

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.

Dr. D was subsequently appointed by the Division as the designated doctor for MMI and IR. Dr. D examined the claimant and certified in a DWC-69 that the claimant reached MMI on January 24, 2011, with a 28% IR, using 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).

Dr. D assessed 5% impairment for the lumbar spine, placing the claimant in Diagnosis-Related Estimate Lumbosacral Category II: Minor Impairment. Based on range of motion (ROM) measurements, Dr. D then assessed 24% upper extremity (UE) impairment for loss of ROM of the left shoulder and 20% UE impairment for the right shoulder. Dr. D then converted the UE impairment to whole person (WP) (14% for the left UE and 12% for the right UE) and combined the impairment assessed for the lumbar spine to arrive at the 28% IR assessed in the DWC-69. In response to an LOC, Dr. D subsequently sent a revised DWC-69 which certified that the claimant reached MMI on June 29, 2010 (the stipulated statutory date) with a 28% IR. A subsequent LOC was sent to Dr. D on April 28, 2011, which noted some errors made by Dr. D in applying Figure 44, page 3/45 of the AMA Guides to the ROM figures noted in his examination. In his response to the LOC, Dr. D acknowledged he made errors and amended his certification of IR to 19%. The hearing officer found that the preponderance of the

evidence is not contrary to Dr. D's certification of MMI and determination of the claimant's IR.

Dr. D's certifying examination noted the following ROM figures for the loss of ROM of the claimant's left shoulder: flexion 85°, extension 20°, abduction 70°, adduction 45°, external rotation 60°, and internal rotation 80°. Dr. D applying Figure 38, page 3/43 of the AMA Guides, correctly notes that impairment for flexion and extension would be 9%. We note that the AMA Guides require that the figures be rounded to the nearest 10° and that he rounded the 85° measurement for flexion to 80° for 7% UE impairment and that the 20° measurement for extension results in 2% UE impairment.¹

Dr. D, applying Figure 41, page 3/44 of the AMA Guides, correctly notes that impairment for abduction and adduction is 5% UE impairment. Impairment for abduction of 70° results in 5% UE impairment and there is no impairment for 45° of adduction.

In his initial report, Dr. D assessed UE impairment of 10% for external and internal rotation, using Figure 44, page 3/45 of the AMA Guides. In his response to the LOC of April 28, 2011, Dr. D acknowledges that he made an error in calculating the impairment for external and internal rotation and stated that the ROM loss for external and internal rotation of the left shoulder totals 2% UE impairment. However, we note that Dr. D in his certifying examination noted the claimant's ROM for external rotation was 60° which results in 0% impairment and the claimant's ROM for internal rotation of 80° which also results in 0% impairment.

Dr. D initially assessed 24% UE impairment for the left shoulder and in his response to the LOC assessed 16% UE impairment for the left shoulder. We note that using the ROM measurements from Dr. D's certifying examination the UE impairment for the left shoulder is 14%.

Dr. D's certifying examination noted the following ROM figures for the loss of ROM of the claimant's right shoulder: flexion 100°, extension 60°, abduction 80°, adduction 45°, external rotation 90°, and internal rotation 60°. Dr. D, applying Figure 38, page 3/43 of the AMA Guides, correctly notes that UE impairment for flexion and extension would be 5%. Impairment for 100° of flexion results in 5% UE impairment and there is no impairment for 60° of extension.

Dr. D, applying Figure 41, page 3/44 of the AMA Guides, correctly notes that impairment for abduction and adduction is 5% UE impairment. Impairment for

¹ In this case, the WP IR of the claimant using the ROM measurements of Dr. D for both the right and left shoulder would result in 18% whether Dr. D rounded the 85° to 80° or 90°.

abduction of 8° results in 5% UE impairment and there is no impairment for 45° of adduction.

In his initial report, Dr. D assessed UE impairment of 10% for external and internal rotation, using Figure 44, page 3/45 of the AMA Guides. In his response to the LOC of April 28, 2011, Dr. D acknowledges that he made an error in calculating the impairment for external and internal rotation and stated that the ROM loss for external and internal rotation of the right shoulder totals 0% UE impairment. However, we note that Dr. D in his certifying examination noted the claimant's ROM for external rotation was 90° which results in 0% impairment but the claimant's ROM for internal rotation of 60° results in 2% UE impairment.

Dr. D initially assessed 20% UE impairment for the left shoulder and in his response to the LOC assessed 10% UE impairment for the left shoulder. We note that using the ROM measurements from Dr. D's certifying examination the UE impairment for the left shoulder is 12% UE.

The AMA Guides provide that the impairment values for loss of each shoulder motion are added to determine the impairment of the UE and then Table 3, page 3/20 is used to convert the impairment of the UE to impairment of the WP. The AMA Guides further provide that if both limbs are involved, the WP impairment should be calculated on a separate chart and then combined to arrive at the WP impairment assessed.

In his LOC response, Dr. D determined that after converting the UE impairments for the left and right shoulder to WP (10% and 6% respectively) the claimant would have 15% impairment for both the left and right shoulder, which he then combined with the 5% assessed for the lumbar spine and coccydynia injuries resulting in 19%. Dr. D noted that the right knee strain and left hand injuries had resolved for 0% impairment.

However, as previously discussed, Dr. D erred in applying Figure 44, page 3/45, of the AMA Guides for both the left and right shoulders. Using the ROM measurements obtained in the certifying examination of Dr. D, the UE impairment for the left and right shoulder would be 14% and 12% respectively which would convert to WP impairments of 8% and 7% respectively. The 8% for the left shoulder would then be combined with 7% of the right shoulder which would result in 14% WP impairment rather than the 15% WP impairment stated by Dr. D. Combining 14% WP impairment with the 5% WP impairment for the lumbar spine would result in 18% WP impairment for the claimant not 19% as stated by Dr. D. We note that in evidence is correspondence dated February 21, 2011, in which a peer review doctor sets forth the errors made by Dr. D in his initial narrative report.

We have previously stated that, where the certifying doctor's report provides the component parts of the rating that are to be combined and the act of combining those numbers is a mathematical correction which does not involve medical judgment or discretion, the Appeals Panel can recalculate the correct IR from the figures provided in the certifying doctor's report and render a new decision as to the correct IR. See Appeals Panel Decision (APD) 041413, decided July 30, 2004; APD 100111, decided March 22, 2010; and APD 101949, decided February 22, 2011.

Under the guidance of those cases and according to the provisions of the AMA Guides, we note that Dr. D must combine 8% impairment of the WP for the left shoulder with the 7% impairment of the WP for the right shoulder, and 5% WP impairment for the lumbar spine, using the combined values chart which results in 18% impairment of the WP rather than the 19% WP IR assigned by Dr. D. The hearing officer was persuaded that Dr. D's certification of MMI and IR was not contrary to the preponderance of the evidence and after mathematical correction, that finding is supported by the evidence. Accordingly, we reverse the hearing officer's decision that the claimant has a 19% IR and we render a new decision that the claimant's IR is 18%.

ENTITLEMENT TO SIBS FOR THE FIRST, SECOND, AND THIRD QUARTERS

It is necessary to have a determination of the date of MMI and the IR to calculate the dates of the quarters and qualifying periods. Section 408.142 and Rule 130.101. See APD 052516, decided January 11, 2006. Because a new IR has been rendered, the dates of the qualifying periods and SIBs quarters will change. Given the differences in the dates of the applicable SIBs quarters and qualifying periods, we reverse the hearing officer's determinations that the claimant is not entitled to SIBs for the first, second, and third quarters and remand the SIBs issues in dispute to the hearing officer to examine the evidence and make a determination regarding entitlement to SIBs based on the correct dates. The hearing officer, at his discretion, may receive additional evidence from the parties on the issues of entitlement to SIBs for the first, second, and third quarters.

CLAIMANT'S TIMELY FILING OF THE SIBS APPLICATIONS FOR SECOND AND THIRD QUARTERS

The carrier correctly notes in its appeal that the hearing officer failed to make any findings of fact with regard to the dates the DWC-52s were filed for the second and third quarters.

We note that under Rule 130.104(b), the carrier is required to send a DWC-52 for a subsequent quarter with either the first payment for a quarter of SIBs to which the claimant is determined to be entitled or with the carrier's determination of non-

entitlement for that quarter. See APD 021776, decided August 28, 2002. The duty of a carrier to send the application arises only with either the first payment of SIBs or a determination of non-entitlement for any quarter. See APD 020047, decided February 21, 2002. As previously noted, the dates of the applicable SIBs quarters and qualifying periods will change based on the change in the IR. See Rules 130.104 and 130.105.

We reverse the hearing officer's determinations that the carrier is not relieved of liability for SIBs because of the claimant's alleged failure to timely file a DWC-52 for the second and third quarters and remand the issues of whether the carrier is relieved of liability because of the claimant's failure to timely file a DWC-52 for the second and third quarters to the hearing officer to examine the evidence and make a determination regarding these issues based on the correct dates. The hearing officer, at his discretion, may receive additional evidence from the parties on the issues of whether the carrier is relieved of liability for SIBs because of the claimant's failure to timely file DWC-52s for the second and third quarters.

SUMMARY

We reverse the hearing officer's decision that the claimant has a 19% IR and we render a new decision that the claimant's IR is 18%.

We reverse the hearing officer's determinations that the claimant is not entitled to SIBs for the first, second, and third quarters and remand the issues of SIBs entitlement for the first, second, and third quarters to the hearing officer for further action consistent with this decision.

We reverse the hearing officer's determinations that the carrier is not relieved of liability for SIBs because of the claimant's alleged failure to timely file DWC-52s for the second and third quarters and remand the issues of whether the carrier is relieved of liability for the claimant's failure to timely file a DWC-52 for the second and third quarters to the hearing officer for further action 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, as amended effective June 17, 2001, to exclude Saturdays and Sundays and holidays listed in Section 662.003 of the Texas Government Code in the computation of time in which a request for appeal or a response must be filed. See APD 060721, decided June 12, 2006.

The true corporate name of the insurance carrier is **TEXAS MUTUAL INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**RON O. WRIGHT
6210 EAST HIGHWAY 290
AUSTIN, TEXAS 78723.**

Margaret L. Turner
Appeals Judge

CONCUR:

Cynthia A. Brown
Appeals Judge

Thomas A. Knapp
Appeals Judge