

APPEAL NO. 072253-s
FILED MARCH 3, 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 (CCH) was held on November 8, 2007. The hearing officer resolved the disputed issues by deciding that there is not a valid impairment rating (IR) from the designated doctor and there is no other IR in the administrative record that can be adopted and that the appellant (claimant) is not entitled to supplemental income benefits (SIBs) for the period from January 26, 2007, through October 25, 2007. The claimant appealed, disputing both the determination on the issue of SIBs entitlement and the failure to determine an IR. The respondent (carrier) responded, urging affirmance.

DECISION

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

IR

The parties stipulated that the claimant sustained a compensable injury on _____; that Dr. M was the designated doctor; and that the claimant reached maximum medical improvement (MMI) on December 22, 2005, in accordance with the report of Dr. M. At issue was the claimant's IR and entitlement to the first three quarters of SIBs. The evidence reflected that the claimant sustained a double hernia while in the course and scope of his employment and underwent two surgical procedures. Dr. M examined the claimant on January 6, 2006, and certified that the claimant reached MMI on December 22, 2005, with a 19% 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. M assessed a 19% IR, placing the claimant in Class 2 of Table 7: Classes of Hernia-related Impairment, page 10/247 of the AMA Guides. According to the AMA Guides, to be placed in Class 2, Table 7 there must be a palpable defect in supporting structures of abdominal wall and:

frequent or persistent protrusion at the site of the defect with increased abdominal pressure; manually reducible; or
frequent discomfort, precluding heavy lifting, but not hampering normal activity.

Each class listed in Table 7 for rating a hernia-related impairment requires a palpable defect in the supporting structures of the abdominal wall in conjunction with other criteria. Dr. M stated in his report that on physical examination of the claimant on January 6, 2006, that "[t]here is pain on palpation but no persistent, irreducible or irreparable protrusion at the site of the one defect." Dr. M does not state that on physical examination there was a palpable defect in the supporting structures of the

abdominal wall. See 28 TEX. ADMIN. CODE § 130.1(c)(3) (Rule 130.1(c)(3)) regarding the requirement to identify and document laboratory or clinical findings of an impairment.

A peer review of the IR was performed by a doctor, who in written correspondence, stated that as a prerequisite to assessing impairment in Table 7 there must be an actual palpable defect in the supporting structures of the abdominal wall. The peer reviewer suggested that Dr. M should be asked whether he could palpate an actual defect in the supporting structures of the abdominal wall and whether the claimant had a residual hernia. A letter of clarification was sent to Dr. M. In a response dated February 10, 2006, Dr. M stated he disagreed with the peer review and had no changes to make in his assessment. Dr. M stated the hernias were repaired, but the problems were not solved, and listed some of the claimant's physical limitations. Dr. M then referenced the criteria listed in Table 7 of the AMA Guides, for Class 2 "frequent discomfort, precluding heaving lifting but not hampering normal activity." Dr. M did not state in his response that the claimant had a palpable defect in the supporting structures of the abdominal wall on physical examination. The hearing officer noted in his discussion that Dr. M apparently did not read the AMA Guides to require a palpable defect. The hearing officer further noted the AMA Guides did require a palpable defect for an impairment to be awarded for a hernia under Table 7. We agree. The hearing officer's finding that the IR assigned by Dr. M is not in accordance with the AMA Guides and is contrary to the preponderance of the other medical evidence is supported by the evidence. A carrier-selected required medical examination (RME) doctor examined the claimant in March 2007 and opined that the claimant's impairment is 0%, but no Report of Medical Evaluation (DWC-69) was submitted and the RME did not certify a date of MMI. The RME doctor stated in his narrative report that on physical examination he could not palpate a hernia defect. No other IR was in evidence, therefore, the hearing officer did not make a determination of IR. There was no final resolution of the claimant's IR, although it was an issue to be resolved at the CCH.

Further consideration and development of the evidence is necessary to resolve the issue of the claimant's IR. See Albertson's, Inc. v. Ellis, 131 S.W.3d 245 (Tex. App.-Fort Worth 2004, pet. denied). The hearing officer should send a letter of clarification to Dr. M, if he is still qualified and available, informing him that to assess impairment for a hernia-related injury under Table 7 of the AMA Guides, there must be a palpable defect in the supporting structures of the abdominal wall. Further, the hearing officer should inform Dr. M that he is not limited to consideration of Table 7 in assessing the claimant's impairment. We note that the medical records reflect the claimant has been diagnosed with ilioinguinal neuropathy. Dr. M should also be informed that the assignment of the IR for the compensable injury must be based on the claimant's condition as of the stipulated date of MMI, December 22, 2005, considering the medical records and the certifying examination. Dr. M's response to the letter of clarification should be distributed to the parties and they should have an opportunity to respond. Further, the parties should be allowed to provide additional evidence on remand to help resolve the issue of the claimant's IR. If Dr. M 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).

SIBS

The hearing officer determined that the claimant is not entitled to SIBs for the period from January 26, 2007, through October 25, 2007 (the periods calculated based on the stipulated MMI date and an IR of 19%). However, as previously stated the IR issue was not resolved at the CCH, and therefore a determination of SIBs entitlement cannot be made. One of the requirements for SIBs entitlement is that the employee has an IR of 15% or more, and in order to determine whether the claimant met the good faith and direct result criteria for SIBs entitlement during the qualifying periods, 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. See Appeals Panel Decision (APD) 052516, decided January 11, 2006.

SUMMARY

We remand the IR issue back to the hearing officer for further consideration and development of the evidence consistent with this decision. We reverse the hearing officer's determination that the claimant is not entitled to SIBs for the period from January 26, 2007, through October 25, 2007, and render a new decision that entitlement to SIBs cannot be determined until the IR issue has been resolved.

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 Texas Department of Insurance, Division of Workers' Compensation, 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 060721, decided June 12, 2006.

The true corporate name of the insurance carrier is **ST. PAUL FIRE AND MARINE INSURANCE** and the name and address of its registered agent for service of process is

**CORPORATION SERVICE COMPANY
D/B/A CSC-LAWYERS INCORPORATING SERVICE COMPANY
701 BRAZOS STREET #1050
AUSTIN, TEXAS 78701.**

Margaret L. Turner
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Veronica L. Ruberto
Appeals Judge