APPEAL NO. 101948
FILED FEBRUARY 22, 2011

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 December 8, 2010. The hearing officer determined that: (1) the respondent's (claimant) impairment rating (IR) is 36%; and (2) that the required medical examination (RME) report of (Dr. G) dated June 15, 2010, is not a valid report pursuant to 28 TEX. ADMIN. CODE § 126.6(b) (Rule 126.6(b)). The appellant (carrier) appeals the hearing officer's determination that the claimant's IR is 36%. The claimant responds, urging affirmance. The hearing officer's determination that the RME report of Dr. G dated June 15, 2010, is not a valid report pursuant to Rule 126.6(b) has not been appealed and has become final pursuant to Section 410.169.

DECISION

Reversed and remanded.

It was undisputed that the claimant sustained a compensable injury on _____, in a grain elevator explosion. The claimant sustained second and third degree burns to approximately 28% of his body, including his face, head, and upper and lower extremities. The claimant also sustained multiple facial fractures, and vision and hearing loss. He has undergone approximately eight surgeries since the date of injury.

The Texas Department of Insurance, Division of Workers' Compensation (Division) appointed (Dr. W) as the designated doctor to determine the claimant's maximum medical improvement (MMI) and IR, among other issues. Dr. W initially examined the claimant on September 26, 2008, and determined the claimant had not reached MMI as of that date.

In January 2009, the claimant underwent surgery for a ventral wall hernia, performed by (Dr. Gw). However, the claimant continued to have problems with his abdomen.

Dr. W next examined the claimant on April 3, 2009. The parties stipulated that statutory MMI is March 26, 2009. 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. W assigned a 36% IR. Dr. W's IR included a 9% whole person impairment (WPI) for burns under Chapter 13, Table 2 Class I, page 13/280 of the AMA Guides; a 5% WPI for facial fractures under Section 13.4: Disfigurement, page 13/279 of the AMA Guides; a 13% WPI for an ocular injury under Chapter 8 of the AMA Guides; a 0% WPI for an auditory injury under Chapter 9 of the AMA Guides; and a 15% WPI under Chapter 10.9: Hernias of the Abdominal Wall, Table 7 Class II, page 10/247 of the AMA Guides resulting in a combined IR of 36%.

In a progress note dated April 27, 2009, Dr. Gw noted the claimant had a possible ventral hernia, and recommended a CT scan of the abdomen to evaluate whether the claimant had an abdominal wall hernia. An x-ray was taken on April 30, 2009, to assess the claimant's abdomen. The x-ray indicated a possible hernia.

A peer review of the IR was performed by (Dr. B). In his peer review dated May 18, 2009, Dr. B noted, among other things, that the ventral wall hernia was healed and that there was no palpable defect in the supporting structures of the abdominal wall.

On July 27, 2009, a letter of clarification (LOC) was sent to Dr. W questioning, among other things, why he had assigned a Class II hernia impairment when Dr. W had stated in his narrative report dated April 30, 2009, that the claimant's physical examination "notes no palpable defect in the supporting structure of the abdominal wall and no notification of a frequent or persistent protrusion." Dr. W responded to the LOC on July 30, 2009, stating:

> In looking at my report I note, "[h]e has a lot of weakness in the anterior abdominal wall." I note that he made significant improvement since the surgery but it certainly is not as good as it was. That is an understatement. He has a very abnormal abdominal wall due to having a very large ventral hernia repair utilizing Alloderm. It is definitely an abnormal anterior wall. The whole abdominal wall is stretched out and it is weak and it is not anywhere near what it should be. I felt it very appropriate to rate this problem for the patient since he did not have this problem before he was burned and developed the need for laparotomy and hematoma and that left him with that huge ventral hernia that had to be fixed with an $11,000 piece of Alloderm. That anterior abdominal wall, as I have already said, is not what it used to be and it is appropriate to rate it. There is just no table available to rate it so I elected to utilize Hernia Related Impairment, Table 7. This is one of those cases that there is not an exact method available to rate a problem. I utilized what I felt to be the best approach to rating his problem.

On September 9, 2009, the claimant underwent an exploratory laparotomy with lysis of adhesions, component separation, and abdominal wall reconstruction with mesh placement by Dr. Gw. In a progress note dated June 30, 2010, Dr. Gw noted no hernia defects. The claimant testified at the CCH that the September 9, 2009, surgery was successful.

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. 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.

The Appeals Panel has held that the AMA Guides require a palpable defect for an impairment to be awarded for a hernia under Table 7. Appeals Panel Decision (APD) 072253-s, decided March 3, 2008. Although there was evidence that the claimant sustained complications after the initial January 2009 hernia repair, there was no evidence of a documented palpable defect in Dr. W's examination to determine MMI and IR. As such, Dr. W's IR assigning a 15% WPI for a hernia under Table 7 is not in accordance with the AMA Guides and therefore contrary to the preponderance of the other medical evidence. Accordingly, we reverse the hearing officer's determination that the claimant's IR is 36%.

As previously noted, the hearing officer's determination that Dr. G's report is not a valid report has not been appealed, and has become final and cannot be adopted. Since the hearing officer's determination that the claimant's IR is 36% has been reversed and there is no other assignment of an IR in evidence which we can adopt, 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). Accordingly, we remand the IR issue to the hearing officer.

On remand the hearing officer is to send a LOC to Dr. W, if he is still qualified and available to serve as the designated doctor, 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 is to inform Dr. W that he is not limited to consideration of Table 7 in assessing the claimant's impairment for an abdominal wall injury, and that he may choose to re-examine the claimant to assess the claimant's IR. Dr. W 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, March 26, 2009, considering the medical records and the certifying examination. A copy of this IR is to be made available to the parties and the parties are to be given an opportunity to respond. The hearing officer is then to make a determination on the IR issue. If Dr. W 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).[1]

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

[1] We note that the Division has adopted new rules concerning designated doctor scheduling and examinations effective February 1, 2011. The pertinent part of Rule 126.7(h) cited above is provided in the new Rule 127.5(d).

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

MR. RON O. WRIGHT, PRESIDENT
6210 EAST HIGHWAY 290
AUSTIN, TX 78723.

_____
Carisa Space-Beam
Appeals Judge

CONCUR:

_____
Cynthia A. Brown
Appeals Judge

_____
Thomas A. Knapp
Appeals Judge