APPEAL NO. 130061
FILED FEBRUARY 21, 2013

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 November 15, 2012, in [City], Texas, with [hearing officer] presiding as hearing officer. The following issues were before the hearing officer:

(1) Did the impairment rating (IR) assigned by [Dr. B] on September 21, 2009, become final under 28 TEX. ADMIN. CODE § 130.102(h) (Rule 130.102(h))?

(2) What is the appellant's (claimant) IR?

(3) Does the [date of injury], compensable injury include tendinosis of the left distal supraspinatus and infraspinatus tendons, left shoulder rotator cuff tear, SLAP tear left shoulder, aggravation of acromioclavicular arthritis, cervical radiculopathy, cervical protrusion at C5-6, aggravation of degenerative spondylolisthesis at L4-5, and depression?

(4) (As amended by the agreement of the parties) Is the claimant entitled to supplemental income benefits (SIBs) from the first quarter, August 15 through November 13, 2010; second quarter, November 14, 2010, through February 12, 2011; third quarter, February 13 through May 14, 2011; fourth quarter, May 15 through August 13, 2011; fifth quarter, August 14 through November 12, 2011; sixth quarter, November 13, 2011, through February 11, 2012; seventh quarter, February 12 through May 12, 2012; eighth quarter, May 13 through August 11, 2012; and ninth quarter, August 12 through November 10, 2012?

(5) Is the respondent (carrier) relieved of liability for SIBs because of the claimant's failure to timely file an Application for [SIBs] (DWC-52) for the second quarter, period November 14, 2010, through February 12, 2011; the third quarter, period February 13 through May 14, 2011; the fourth quarter, period May 15 through August 13, 2011; and the sixth quarter, period November 13, 2011, through February 11, 2012?

(6) Did the carrier waive its right to contest the claimant's entitlement to SIBs for the fifth quarter, period August 14 through November 12, 2011; the seventh quarter, period February 12 through May 12, 2012; and the eighth quarter, period May 13 through August 11, 2012, by failing to timely request a benefit review conference (BRC)?

And added upon the agreement of the parties:

(7) What is the date of maximum medical improvement (MMI)?

The hearing officer resolved the disputed issues by deciding: (1) the certification of MMI and IR assigned by Dr. B on September 21, 2009, did not become final under Rule 130.102(h); (2) the claimant's IR is 0%; (3) the compensable injury of [date of injury], does not include left shoulder rotator cuff tear, SLAP tear left shoulder, aggravation of acromioclavicular arthritis, cervical radiculopathy, cervical protrusion at C5-6, aggravation of degenerative spondylolisthesis at L4-5, and depression; (4) the compensable injury of [date of injury], does include tendinosis of the left distal supraspinatus and infraspinatus tendons; (5) quarters one through nine are not ripe for adjudication because the claimant's IR is 0%; and (6) the claimant reached statutory MMI on May 9, 2009.

The claimant appealed the hearing officer's finality under Rule 130.102(h), IR, extent-of-injury determinations adverse to him, and SIBs determinations. The claimant further contends that he timely filed a SIBs application for the first, second, third, fourth, and sixth quarters once he received the paperwork, and that the carrier waived the right to dispute the fifth, seventh, and eighth SIBs quarters by not timely filing a request for a BRC. We note that although the issue certified at the BRC and agreed to by the parties regarding the claimant's timely filing of a DWC-52 listed the second, third, fourth, and sixth quarters of SIBs, the parties also litigated the first quarter of SIBs. We further note that the claimant did not appeal Finding of Fact No. 13, which states "[the] [c]arrier received [the] [c]laimant's first, second, third, and fourth quarter applications on June 20, 2011." The claimant also points out in his appeal that the hearing officer failed to comment on the carrier waiver of fifth, seventh, and eighth quarter SIBs. The carrier responded, urging affirmance.

The hearing officer's determinations that the claimant reached statutory MMI on May 9, 2009, and that the compensable injury of [date of injury], does include tendinosis of the left distal supraspinatus and infraspinatus tendons were not appealed and have therefore become final pursuant to Section 410.169. We reform the hearing officer's determination to clarify that the claimant reached MMI on May 9, 2009, the statutory date of MMI.

DECISION

Affirmed in part and reversed and remanded in part.

The parties stipulated that on [date of injury], the claimant sustained a compensable injury at least in the form of a head contusion with laceration, post-

concussion syndrome, cervical sprain/strain, thoracic sprain/strain, lumbar sprain/strain, left shoulder strain, and left knee sprain.

We note that the decision and order also states that the parties stipulated to the following: "E. The [Texas Department of Insurance, Division of Workers' Compensation (Division)]-selected designated doctor [Dr. B], M.D., certified that [the] [c]laimant reached [MMI] on May 9, 2009, and assigned a 22% [IR];" "F. [The] [c]arrier's choice of doctor, [Dr. F], M.D., certified [the] [c]laimant reached [MMI] on May 9, 2009, and assigned a 0% [IR];" and "G. The compensable injury of [date of injury], extends to and includes tendinosis of the left distal supraspinatus and infraspinatus tendons." However, the record reflects that the parties did not enter into these three stipulations.

FINALITY UNDER RULE 130.102(h) AND EXTENT OF INJURY

The hearing officer's determinations that the certification of MMI and IR assigned by Dr. B on September 21, 2009, did not become final under Rule 130.102(h), and the compensable injury of [date of injury], does not include left shoulder rotator cuff tear, SLAP tear left shoulder, aggravation of acromioclavicular arthritis, cervical radiculopathy, cervical protrusion at C5-6, aggravation of degenerative spondylolisthesis at L4-5, and depression are supported by sufficient evidence and are therefore affirmed.

MMI AND IR

Section 401.011(30)(A) defines MMI as "the earliest date after which, based on reasonable medical probability, further material recovery from or lasting improvement to an injury can no longer reasonably be anticipated." Section 408.1225(c) provides that the report of the designated doctor has presumptive weight, and the Division shall base its determination of whether the employee has reached MMI on the report of the designated doctor unless the preponderance of the other medical evidence is to the contrary.

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 hearing officer determined that the claimant's IR is 0% per Dr. F's MMI/IR certification. Dr. F, the post-designated doctor required medical examination doctor,

examined the claimant on September 15, 2009, to determine the claimant's MMI and IR. Dr. F certified that the claimant reached clinical MMI on May 9, 2009, and in his narrative report dated September 15, 2009, assigned a 0% IR. We note that although Dr. F marked on the Report of Medical Evaluation (DWC-69) that he certified the claimant has permanent impairment as a result of the compensable injury, Dr. F neglected to either assign a 0% IR or state that the claimant has no impairment on the DWC-69. Dr. F's narrative lists the following diagnoses: degenerative spondylolisthesis; status post-cervical sprain; status post-lumbar sprain; and adhesive capsulitis.

As previously discussed, the parties stipulated that the claimant sustained a compensable injury at least in the form of a head contusion with laceration; post-concussion syndrome; cervical sprain/strain; thoracic sprain/strain; lumbar sprain/strain; left shoulder strain; and left knee sprain. Additionally, some of the hearing officer's extent-of-injury determinations have become final and the rest are supported by sufficient evidence and have been affirmed. Therefore, the conditions that have been agreed to or administratively determined to be part of the compensable injury are as follows: head contusion with laceration; post-concussion syndrome; cervical sprain/strain; thoracic sprain/strain; lumbar sprain/strain; left shoulder strain; left knee sprain; and tendinosis of the left distal supraspinatus and infraspinatus tendons.

Dr. F did not consider and rate all of the conditions that are part of the compensable injury. Specifically, Dr. F did not consider a head contusion with laceration; post-concussion syndrome; thoracic sprain/strain; left shoulder strain; left knee sprain; and tendinosis of the left distal supraspinatus and infraspinatus tendons. Additionally, Dr. F considered conditions not determined to be a part of the compensable injury, degenerative spondylolisthesis and adhesive capsulitis. We therefore reverse the hearing officer's determination that the claimant's IR is 0%. *See* Appeals Panel Decision (APD) 110463, decided June 13, 2011; and APD 101567, decided December 20, 2010.

There is only one other assignment of IR with a May 9, 2009, date of MMI, which is that of Dr. B, the designated doctor. Dr. B examined the claimant on September 21, 2009, to determine the claimant's MMI and IR. On that date Dr. B certified that the claimant reached MMI on the statutory MMI date of May 9, 2009, and assigned a 22% IR. In assessing his 22% IR, Dr. B combined a 6% whole person (WP) impairment for the claimant's left shoulder, with a 15% WP impairment under Diagnosis-Related Estimates Cervicothoracic Category III: Radiculopathy, which yielded a 20% WP impairment. Dr. B also assessed an additional 3% impairment for lack of treatment under page 2/9 of the Guides to the Evaluation of Permanent Impairment, fourth edition (first, second, third, or fourth printing, including corrections and changes as issued by

the American Medical Association prior to May 16, 2000) (AMA Guides). Dr. B combined the 20% with the 3% for 22% WP impairment.

In his narrative report dated September 21, 2009, Dr. B lists the following as compensable diagnoses: post-concussion syndrome; cervical protrusion and stenosis of C5-6; lumbar strain; left shoulder impingement; and scars, low back. Dr. B did not consider and rate all of the conditions that have been agreed to and administratively determined to be part of the compensable injury. Specifically, Dr. B did not consider head contusion with laceration; cervical sprain/strain; thoracic sprain/strain; left shoulder strain; left knee sprain; and tendinosis of the left distal supraspinatus and infraspinatus tendons. Additionally, Dr. B considered conditions not determined to be a part of the compensable injury: cervical protrusion and stenosis of C5-6; left shoulder impingement; and scars, low back. Accordingly, his 22% IR cannot be adopted. *See* APD 110267, decided April 19, 2011, and APD 043168, decided January 20, 2005.

We note that in a response to a letter of clarification dated January 15, 2010, Dr. B stated he received criticism for his use of the "effects of treatment" on page 2/9 of the AMA Guides. Dr. B further commented that:

. . . the 3% was assigned due to the fact that the [claimant] had an ongoing painful condition, for which he takes medications. Those medications have an effect on the [claimant's] body that is not adequately calculated in the range of motion assessment. The oral anti-inflammatories cause harm to the kidneys and the narcotics can cause sedation. The 3% impairment is appropriate to calculate that impairment and is provided for by the [AMA Guides] on page [2/9].

The portion of the AMA Guides relied upon by Dr. B to assess 3% impairment for "lack of treatment" is not applicable in the claimant's circumstances. There was no evidence that the claimant was taking medication which resulted in apparent total remission of his condition, nor any evidence establishing that the medications taken by the claimant have caused impairment. *See* APD 090692-s, decided July 14, 2009.

Since the hearing officer's determination that the claimant's IR is 0% has been reversed and there is no other IR in evidence that can be adopted, we remand the IR issue to the hearing officer for further action consistent with this decision.

SIBS

The hearing officer determined that SIBs for the first through ninth quarters are not ripe for adjudication because the claimant's IR is 0%. Given our reversal of the hearing officer's determination that the claimant's IR is 0%, we reverse the hearing officer's determination of SIBs for the first through ninth quarters are not ripe

for adjudication because the claimant's IR is 0%, and remand the issue of first through ninth quarter SIBs to the hearing officer to make a determination of SIBs entitlement upon a determination of the IR consistent with this decision.

Based on her determination that the disputed quarters of SIBs are not ripe for adjudication because the claimant's IR is 0%, the hearing officer made no determination regarding whether the carrier is relieved from liability for the first, second, third, fourth, and sixth quarters of SIBs because of the claimant's failure to timely file a DWC-52 for those quarters, and whether the carrier waived its right to contest the claimant's entitlement to the fifth, seventh, and eighth quarters of SIBs by failing to timely request a BRC. We therefore reverse the hearing officer's decision as being incomplete and remand the issues of whether the carrier is relieved from liability for the first, second, third, fourth, and sixth quarters of SIBs because of the claimant's failure to timely file a DWC-52 for those quarters, and whether the carrier waived its right to contest the claimant's entitlement to the fifth, seventh, and eighth quarters of SIBs by failing to timely request a BRC to the hearing officer to make a determination on these issues.

SUMMARY

We affirm the hearing officer's determinations that the certification of MMI and IR assigned by Dr. B on September 21, 2009, did not become final under Rule 130.102(h); and that the compensable injury of [date of injury], does not include left shoulder rotator cuff tear, SLAP tear left shoulder, aggravation of acromioclavicular arthritis, cervical radiculopathy, cervical protrusion at C5-6, aggravation of degenerative spondylolisthesis at L4-5, and depression.

We reverse the hearing officer's determination that the claimant's IR is 0%, and we remand the issue of IR to the hearing officer to make a determination of IR consistent with this decision.

We reverse the hearing officer's determination that SIBs quarters one through nine are not ripe for adjudication because the claimant's IR is 0%, and we remand the issue of first through ninth quarter SIBs to the hearing officer to make a determination of SIBs entitlement consistent with this decision.

We reverse the hearing officer's decision as being incomplete and remand the issues of whether the carrier is relieved from liability for the first, second, third, fourth, and sixth quarters of SIBs because of the claimant's failure to timely file a DWC-52 for those quarters, and whether the carrier waived its right to contest the claimant's entitlement to the fifth, seventh, and eighth quarters of SIBs by failing to timely request a BRC to the hearing officer to make a determination on these issues.

REMAND INSTRUCTIONS

Dr. B is the designated doctor in this case. On remand, the hearing officer is to determine whether Dr. B is still qualified and available to be the designated doctor. If Dr. B is no longer qualified or available to serve as the designated doctor, then another designated doctor is to be appointed to determine the claimant's IR for the [date of injury], compensable injury.

The hearing officer is to advise the designated doctor that the compensable injury of [date of injury], includes head contusion with laceration; post-concussion syndrome; cervical sprain/strain; thoracic sprain/strain; lumbar sprain/strain; left shoulder strain; and left knee sprain as agreed to by the parties, as well as tendinosis of the left distal supraspinatus and infraspinatus tendons as administratively determined. Further, the hearing officer is to advise the designated doctor that the [date of injury], compensable injury does not include left shoulder rotator cuff tear; SLAP tear left shoulder; aggravation of acromioclavicular arthritis; cervical radiculopathy; cervical protrusion at C5-6; aggravation of degenerative spondylolisthesis at L4-5; and depression.

We note that, for the reasons discussed above, the portion of the AMA Guides relied upon by Dr. B to assess 3% impairment for "lack of treatment" is not applicable in the claimant's circumstances.

The hearing officer is to request the designated doctor to assign an IR for the claimant's [date of injury], compensable injury based on the claimant's condition as of the May 9, 2009, date of MMI, considering the claimant's medical record and the certifying examination.

The parties are to be provided with the designated doctor's new assignment of IR, and are to be allowed an opportunity to respond. The hearing officer is then to make a determination on IR consistent with this decision. The hearing officer is then to make a determination on SIBs for the first through ninth quarters consistent with this decision. The hearing officer is then to make a determination on whether the carrier is relieved from liability for the first, second, third, fourth, and sixth quarters of SIBs because of the claimant's failure to timely file a DWC-52 for those quarters, and whether the carrier waived its right to contest the claimant's entitlement to the fifth, seventh, and eighth quarters of SIBs by failing to timely request a BRC.

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 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, TEXAS 78723.

Carisa Space-Beam
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Margaret L. Turner
Appeals Judge