APPEAL NO. 040313-s
FILED APRIL 5, 2004

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 August 21, 2003, with the record closing on January 15, 2004. The hearing officer determined that the respondent (claimant) reached maximum medical improvement (MMI) "by operation of law on January 5, 2001," that the claimant has a 13% impairment rating (IR) as assessed by the designated doctor in an amended report, and that the amended report has presumptive weight which "has not been overcome by the great weight of contrary medical evidence." The hearing officer's determination of the MMI date has not been appealed and has become final pursuant to Section 410.169.

The appellant (carrier) appeals the IR on two grounds: (1) that Section 408.123 "clearly contemplates that the [IR] needs to reflect the Claimant's condition at the time of MMI," and (2) that the Fulton (Fulton v. Associated Indemnity Corporation, 46 S.W.3d 364 (Tex. App.-Austin 2001, pet. denied) decision "makes it clear that the [IR] should not be revisited after 104 weeks from the date disability accrued." The file does not contain a response from the claimant.

DECISION

Reversed and remanded.

It is undisputed that the claimant sustained a low back injury on _____. The claimant was seen by a number of doctors and arguably surgery was considered as early as January 1999. The carrier's required medical examination (RME) doctor assessed the claimant at MMI on July 12, 2000, with a 9% IR. Dr. N was appointed as the designated doctor and in a report dated September 22, 2000, accepted the RME doctor's date of MMI and assessed a 7% IR based on Table 49 (II)(C) of the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association (AMA Guides). The claimant testified, and the medical records support, that her condition continued to get worse, that surgery was recommended, and that delays in having surgery were not due to the claimant. The claimant eventually had a two level laminectomy (L4-5, L5-S1) on December 3, 2002. The claimant's treating doctor in a report dated April 28, 2003, is unclear about the IR, or which edition of the AMA Guides he thought should be used.

After the CCH on August 21, 2003, the hearing officer apparently contacted the designated doctor (that correspondence is not in evidence) and the designated doctor reexamined the claimant on October 3, 2003. In a report of that date the designated doctor certified the claimant with a "statutory [MMI] date of July 12, 2000" and assessed a 13% IR based on a 10% impairment from Table 49 (II)(E) plus 1% impairment for an additional level of surgery and 1% impairment each for right and left lateral flexion. The parties were sent this report and allowed to comment, which they did. The hearing

officer again wrote the designated doctor by letter dated December 10, 2003, inquiring about MMI being "on the statutory date of July 12, 2000," stating that July 12, 2000, might not be the correct statutory MMI date and asked the doctor's opinion as to the claimant's clinical MMI date. Dr. N responded, noting details of the claimant's spinal surgery, that the "usual post-operative recovery is 4 months" and stated that it was assumed that the claimant reached clinical MMI on May 1, 2003. The hearing officer then found, in an unappealed determination, that the claimant reached statutory MMI (*see* Section 401.011(30)(B)) on January 5, 2001, and adopted the 13% IR assessed by the designated doctor.

We do not consider the Fulton, *supra*, decision applicable to this case as it generally only prohibits the Texas Workers' Compensation Commission (Commission), by rule, from shortening the statutory MMI date.

Section 408.125(e) provides that the report of the designated doctor chosen by the Commission shall have presumptive weight, and the Commission shall base the IR on that report unless the great weight of the other medical evidence is to the contrary, and that if the great weight of the medical evidence contradicts the IR contained in the report of the designated doctor chosen by the Commission, the Commission shall adopt the IR of one of the other doctors. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.6(i) (Rule 130.6(i)) provides that designated doctor's response to a request for clarification is also considered to have presumptive weight, as it is part of the designated doctor's opinion. The carrier cites Section 408.123 as authority for adopting the designated doctor's 7% IR. Section 408.123 was amended in 2003. However, Section 408.123(a), which provides that after an employee has been certified by a doctor as having reached MMI, the certifying doctor shall evaluate the condition of the employee and assign an IR using the IR guidelines of Section 408.124, has remained unchanged. That provision, however, has been subject to different interpretations depending on the circumstances of a particular fact situation. The Commission has promulgated Rule 130.1(c)(3) effective March 14, 2004, to assist in the interpretation of Section 408.123(a).

Neither party, nor the hearing officer, reference Rule 130.1(c)(3) and we are cognizant that it was not in effect at the time of the CCH, however, it does give guidance on how Section 408.123(a) should be interpreted. Rule 130.1(c)(3) provides that the "[a]ssignment 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." That rule has been interpreted to mean that the IR shall be based on the condition as of the MMI date and is not to be based on subsequent changes, including surgery. The preamble of Rule 130.1(c)(3) clarifies that IR assessments "must be based on the injured employee's condition as of the date of MMI." 29 Tex Reg. 2337 (2004). In response to public comment, the Commission in the preamble responded that "[I]n the event the MMI date is changed due to a post-MMI change in the injured employee's conditions, there should be a re-evaluation of the IR as of the new MMI date." The preamble also notes that in the event that the MMI date is changed the IR would have to be based on the injured employee's condition as of the

changed MMI date. This interpretation is consistent with Section 408.123(a) and the Texas Supreme Court statement in Texas Workers' Compensation Commission, *et al*. v. Garcia, 893 S.W.2d 504 (Tex. 1995), which states that the IR is determined at MMI. Applying this interpretation to Section 408.123(a) the IR must be assessed as of the unappealed date of statutory MMI of January 5, 2001. We remand the case for the designated doctor to assess an IR for the compensable injury based on the injured employee's condition as of January 5, 2001.

We reverse the hearing officer's decision that the claimant has a 13% IR and remand the case for the designated doctor to assess an IR as of January 5, 2001, and after allowing comment by the parties, for the hearing officer to issue a new decision on the IR, not inconsistent with this opinion.

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 Workers' Compensation Commission's Division of Hearings, 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* Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

The true corporate name of the insurance carrier is **CONNECTICUT INDEMNITY COMPANY** and the name and address of its registered agent for service of process is

CORPORATION SERVICE COMPANY
800 BRAZOS, COMMODORE 1, SUITE 750
AUSTIN, TEXAS 78701.

_____
Thomas A. Knapp
Appeals Judge

CONCUR:

_____
Chris Cowan
Appeals Judge

_____
Margaret L. Turner
Appeals Judge