APPEAL NO. 022176
FILED OCTOBER 7, 2002

This case returns following our remand decision in Texas Workers' Compensation Commission Appeal No. 021013, decided June 12, 2002. In that decision, we affirmed in part, reversed and rendered in part, and reversed and remanded in part. Our remand concerned the disputed issue, "[w]ho is the claimant's treating doctor?" We remanded for the hearing officer to further consider the evidence in light of the provisions of TEX. W.C. Comm'n, 28 TEX. ADMIN. CODE §126.9 (c)(3) (Rule 126.9(c)(3)) and to make further findings and a conclusion of law. Pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act), the hearing officer held a remand hearing on July 22, 2002, took official notice of the record of the prior hearing, and heard additional argument from the parties in support of their respective positions on the treating doctor issue. Relative to the remanded issue, the hearing officer repeated a portion of the only finding in his previous decision which addressed this issue, made two additional findings, and entered the following conclusion of law: "[Dr. F] was the first doctor to provide treatment to the Claimant for the August 16, 2001 injury, and was not an exception to the initial treating doctor under the definitions of Rule 126.9c3."

The appellant (claimant) has appealed this determination, contending that Dr. F's treatment of the claimant's injured finger on three occasions following the emergency room surgery was in the nature of follow-up care for the injured finger and was not treatment for something other than follow-up care; and, therefore, that Dr. F did not become his treating doctor. The respondent (carrier) contends, in its response to the appeal, that Dr. F did provide treatment for something other than follow-up care in that Dr. F's treatment during the three post-surgical visits progressed from merely "stabilizing" the injured finger to "rehabbing" the injured finger with physical therapy and drug therapy; and, therefore, that Dr. F did indeed become the treating doctor pursuant to the provisions of Rule 126.9(c)(3).

DECISION

Reversed and a new decision rendered.

During his argument at the remand hearing, the carrier's representative vigorously stated his disagreement with our decision to remand on the treating doctor issue, characterizing it as "a very poor decision" and asserting that the Appeals Panel "obviously . . . doesn't understand the significance of treating doctor as it applies to the day-to-day business that we do in this profession, . . ."; that the Appeals Panel apparently did not understand what the hearing officer wrote in his initial Decision and Order and that he would "explain it to them a little better since they will probably get it again"; that we took it upon ourselves "to write almost the entire [remand] decision" for the hearing officer; and implying that we were indulging in fact finding at the appellate level. Having nevertheless prevailed in the hearing officer's remand decision, the

carrier, in its response, argues that "[I]t is absolutely ridiculous" for the claimant to contend that Dr. F was only providing follow-up care related to the surgical treatment and that, had this same treatment been provided by Dr. R, the doctor the claimant wants as his treating doctor, it would not be characterized as mere follow-up care following the emergency treatment.

As we stated in our prior decision, Rule 126.9(c) provides that the first doctor who provides health care to an injured employee shall be known as the initial choice of treating doctor but that "[t]he following do not constitute an initial choice of treating doctor: (3) any doctor providing emergency care unless the injured employee receives treatment from the doctor for other than follow-up care related to the emergency treatment." The medical records reflect that on August 16, 2000, the claimant was taken to (Hospital) where he was diagnosed with amputation of the left long finger at Zone 2 middle phalanx; that on that date he underwent a replantation procedure of that finger under general anesthesia; and that he was discharged from the hospital by Dr. F on August 20, 2000, with instructions to "[f]ollow up with [Dr. F] as an outpatient." The evidence reflects that Dr. F practiced at the (Clinic) and was on call for the hospital on August 16, 2000. Dr. F's records reflect that he saw the claimant on August 28, 2001, "for F/U"; that on September 4, 2001, he saw the claimant "for routine F/U," removed the sutures, prescribed a TENS unit for pain control so that the claimant can continue occupational therapy, and stated that x-rays would be obtained on the next visit; that on September 17, 2001, he "spoke to" the claimant and advised him that he was going to have to return to work at light duty but that his employer would have to accommodate his restrictions and his therapy; and that on September 18, 2001, the claimant was "here for F/U," that his wounds were clean and he had improved function, that x-rays were taken, and that the claimant was to continue therapy three times per week and return for a follow up in two weeks. In evidence is the Texas Workers' Compensation Work Status Report (TWCC-73), signed by Dr. F on September 17, 2001, which returned the claimant to work as of September 22, 2001, with a number of restrictions on the use of his left hand and left middle finger. Also in evidence is a September 21, 2001, letter to the carrier from Ms. U at (Clinic) stating that the claimant had no problems with his care until he was told he had to return to work and was given the TWCC-73, apparently on September 20, 2001, and that he returned to (Clinic) on September 21, 2001, screaming at Ms. U, demanding his records, and stating that he was changing treating doctors and that Dr. R says he cannot work. Also in evidence is a September 19, 2001, letter from Dr. R stating that the claimant cannot work because he is awakened at night every two hours with pain and because he would risk infection in another environment.

Pertinent to the appealed issue, the hearing officer, in Finding of Fact No. 5, found that Dr. F was the first physician who treated the claimant, who provided emergency surgery, and who "provided immediate follow up for Claimant's emergency surgery," and that Dr. F "provided addition [sic] medical treatment in the form of physical therapy, and a course of pain medication that was beyond a mere continuation of following up on Claimant's emergency surgery." In so much of his discussion as is relevant to the remanded issue, the hearing officer, apparently accepting the carrier's

contentions, states that he construes Rule 126.9(c)(3) to limit "follow up care related to the emergency treatment" to medical activities "made immediately necessary by the emergency surgery, such as checking the wound for infection, and examining the stitches," and that Dr. F "provided a course of rehabilitation treatment, including physical therapy beyond what was immediately necessary medical care from the emergency surgery." We regard this construction of the rule provision as strained beyond reason and plain legal error. We perceive no sound basis for agreeing with the hearing officer that, in the circumstances of this case, the follow-up care of the plastic surgeon who reattached the claimant's amputated finger in emergency surgery should not provide for and include pain relief and recovery of the functioning of the injured finder including sensation, strength, and range of motion.

Accordingly, we reverse so much of Finding of Fact No. 5 as determines that Dr. F provided medical treatment which went beyond a continuation of follow-up care for the claimant's emergency surgery, and so much of Conclusion of Law No. 4 (and the "Decision") as states that Dr. F "was not an exception to the initial treating doctor under

the definition of Rule 126.9c3." To resolve the disputed issue, we render a new decision that Dr. F is not the treating doctor.

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

GARY SUDOL
9330 LBJ FREEWAY, SUITE 1200
DALLAS, TEXAS 75243.

_____
Philip F. O'Neill
Appeals Judge

CONCUR:

_____
Elaine M. Chaney
Appeals Judge

_____
Susan M. Kelley
Appeals Judge