APPEAL NO. 070669
FILED JUNE 29, 2007

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 begun on January 8, 2007, and concluded on March 5, 2007. The hearing officer determined that: (1) the compensable injury of _____, extends to include cervical herniated nucleus pulposus (HNP), degenerative spondylosis, and disc pathology, but does not extend to include radiculopathy; (2) the respondent/cross-appellant (self-insured) waived its right to contest compensability of cervical HNP, degenerative spondylosis, and disc pathology by not timely contesting those diagnoses in accordance with Section 409.021; (3) the self-insured has not waived its right to contest compensability of radiculopathy; (4) the appellant/cross-respondent (claimant) was at maximum medical improvement (MMI) on January 6, 2006; and (5) the claimant's impairment rating (IR) is 5%.

The claimant appeals the determinations that the compensable injury does not extend to include radiculopathy; that the self-insured has not waived the right to contest compensability of the radiculopathy; and that she was at MMI on January 6, 2006, with a 5% IR, asserting her MMI date should be August 3, 2006, with a 19% IR as assessed by Dr. G. The self-insured appeals the determinations on the extent of injury and on waiver (except the determinations regarding radiculopathy); the findings that the self-insured had written notice of the injury on October 9, 2004; and that the claimed cervical disc pathology "would have been apparent to [self-insured] prior to December 8, 2004, through a reasonable investigation of the claim." The self-insured filed a response to the claimant's appeal. The file does not have a response to the self-insured's appeal.

DECISION

Affirmed in part; reversed and rendered in part; and reversed and remanded in part.

It is undisputed that the claimant sustained a compensable injury in a slip and fall incident on _____. The parties stipulated that the self-insured accepted, as compensable, a cervical sprain and a right shoulder injury.

EXTENT OF INJURY

We affirm the hearing officer's decision that the compensable injury extends to include a cervical HNP, degenerative spondylosis, and disc pathology, but it does not extend to include radiculopathy, as being supported by the evidence.

WAIVER

Section 409.021 provides that for claims based on a compensable injury that occurred on or after September 1, 2003, that no later than the 15th day after the date on which an insurance carrier receives written notice of an injury, the insurance carrier shall: (1) begin the payment of benefits as required by the 1989 Act; or (2) notify the Texas Department of Insurance, Division of Workers' Compensation (Division) and the employee in writing of its refusal to pay. Section 409.021(c) provides that if an insurance carrier does not contest the compensability of an injury on or before the 60th day after the date on which the insurance carrier is notified of the injury, the insurance carrier waives its right to contest compensability. For a claim for workers' compensation benefits based on a compensable injury that occurs on or after September 1, 2003, Section 409.021(f)(2) provides that a political subdivision that self-insures under Section 504.011, either individually or through an interlocal agreement with other political subdivisions, receives notice on the date the intergovernmental risk pool or other entity responsible for administering the claim for the political subdivision receives notice. Section 504.001(3) defines a "political subdivision" as including a school district. The self-insured is a school district. Section 504.011 provides that a political subdivision shall extend workers' compensation benefits to its employees by: (1) becoming a self-insurer; (2) providing insurance under a workers' compensation insurance policy; or (3) entering into an interlocal agreement with other political subdivisions providing for self-insurance. In the file, and in some of the self-insured's pleadings, the self-insured is sometimes referred to as "TASB" (the Texas Association of School Boards) Risk Management Fund by itself and sometimes next to the self-insured's school district's name.

When a claimant asserts that the carrier has waived the right to contest compensability, the claimant has the burden to prove when the carrier received the first written notice of injury and, once that is done, the burden shifts to the carrier to prove that it timely filed a dispute. Appeals Panel Decision 051656, decided September 14, 2005.

At the CCH, the hearing officer asked when the self-insured received written notice of the injury and emphasized that when waiver is an issue, the hearing officer must make a finding when the carrier received the first written notice. However, no evidence was presented as to the date that the self-insured received written notice of an injury. The hearing officer acknowledges as much by commenting in the Background Information:

> Although no evidence of the date of first written notice to the [self-insured] was offered, it certainly would have received such notice by October 9, 2004, the date it began payment of temporary income benefits. A sixty day window for filing a dispute of any injury discoverable during that period would end on December 8, 2004.

There was conflicting evidence in the claimant's testimony that she may have worked one or two weeks after the date of injury. The claimant also testified that she began missing work on October 18, 2004, and that she was not sure when she began missing work. The claimant testified that she does not recall when she got her first temporary income benefits check from the self-insured. There is no evidence when temporary income benefits began and there is no evidence to support an October 9, 2004, date of first written notice to the self-insured. The hearing officer made the appealed Finding of Fact that "[t]he [self-insured] had written notice of the injury on October 9, 2004; sixty days following that date is December 8, 2004."

We hold that the hearing officer's determination that the self-insured had first written notice of the injury on October 9, 2004, is not supported by the evidence. We further hold that the claimant has failed to meet her burden of proof to establish the date that the self-insured received the first written notice of an injury. Accordingly, we reverse the hearing officer's determination that the self-insured waived its right to contest compensability of cervical HNP, degenerative spondylosis, and disc pathology by not timely contesting those diagnoses in accordance with Section 409.021. We render a new decision that the self-insured has not waived its right to contest compensability of the cervical HNP, degenerative spondylosis, and disc pathology. We affirm the hearing officer's decision that the self-insured did not waive the right to contest compensability of radiculopathy.

MMI AND IR

Dr. O was the designated doctor selected by the Division to evaluate the claimant for MMI and IR. Dr. O examined the claimant and signed the Report of Medical Evaluation (DWC-69) on January 4, 2006. Dr. O certified the claimant reached clinical MMI on a date in the future, January 6, 2006, with a 5% IR based on Diagnosis-Related Estimate (DRE) Lumbosacral Category II: Minor Impairment, applying 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. O explained that he found no clinical evidence of radiculopathy and explained his selection of the MMI date in a June 2, 2006, letter of clarification.

The hearing officer adopted Dr. O's MMI date of January 6, 2006, with a 5% IR. However, the Division cannot adopt Dr. O's certification of MMI because the MMI date was prospective. 28 TEX. ADMIN. CODE § 130.1(b)(4)(C)(i) (Rule 130.1(b)(4)(C)(i)) provides that the date of MMI may not be prospective. The DWC-69 also states that the MMI "(may not be a prospective date)." Also, the 5% IR assigned by Dr. O cannot be adopted because it is based on a prospective date of MMI. Rule 130.1(b)(2) provides that MMI must be certified before an IR is assigned.

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 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.

There are two other certifications of MMI/IR in evidence. Dr. F, a doctor acting in place of the treating doctor, examined the claimant on July 20, 2006, certifying MMI on that date with a 22% IR. Dr. G, another doctor acting in place of the treating doctor, examined the claimant on August 3, 2006, certifying clinical MMI on that date with a 19% IR. The claimant asserts that Dr. G's rating is the correct rating and that her report should be adopted.

Neither Dr. F nor Dr. G's reports can be adopted because both reports assess a rating for DRE Lumbosacral Category III: Radiculopathy. The hearing officer determined, and as discussed above, we are affirming, that the claimant's compensable injury does not extend to include radiculopathy.

Because Dr. O's certification has a prospective date of MMI and there is no other certification of MMI/IR that can be adopted, we reverse the hearing officer's determination that the claimant reached MMI on January 6, 2006, and that the claimant's IR is 5%, for the reasons set forth above. We remand the case for the hearing officer to determine if the designated doctor is still qualified and available to be the designated doctor (*See* Rule 126.7(h)) and if so, for the hearing officer to advise the designated doctor that the MMI date cannot be prospective. The designated doctor is to certify an MMI date that is not prospective and to assign an IR for the compensable injury based on the claimant's condition as of the date of MMI, in accordance with the AMA Guides considering the medical record and certifying examination. The designated doctor is to be advised that the claimant's compensable injury does not include cervical radiculopathy but does include the cervical HNP, degenerative spondylosis, and disc pathology. The parties are to be given an opportunity to present evidence and comment on the designated doctor's report. The hearing officer is then to determine the date of MMI and the IR. If Dr. O 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).

SUMMARY

We affirm the hearing officer's determinations that the compensable injury extends to include a cervical HNP, degenerative spondylosis, and disc pathology, but does not extend to radiculopathy, and that the self-insured did not waive the right to contest compensability of the radiculopathy. We reverse the hearing officer's finding that the self-insured had written notice of the injury on October 9, 2004, and the determination that the self-insured waived the right to contest compensability of cervical HNP, degenerative spondylosis, and disc pathology by not timely contesting those

diagnoses in accordance with Section 409.021. We render a new decision that the self-insured did not waive the right to contest compensability of cervical HNP, degenerative spondylosis, and disc pathology. We reverse the hearing officer's determinations that the claimant attained MMI on January 6, 2006, and has a 5% IR and remand the case for the hearing officer to advise the designated doctor that the MMI date cannot be prospective, for the designated doctor to certify a date of MMI that is not prospective and to assign an IR as of the date of MMI, and for the hearing officer's determination of MMI/IR.

The true corporate name of the insurance carrier is **(a self-insured governmental entity)** and the name and address of its registered agent for service of process is

SUPERINTENDENT
(ADDRESS)
(CITY), TEXAS (ZIP CODE).

_____
Thomas A. Knapp
Appeals Judge

CONCUR:

_____
Veronica L. Ruberto
Appeals Judge

_____
Margaret L. Turner
Appeals Judge