

APPEAL NO. 090166
FILED APRIL 13, 2009

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 January 22, 2009. With regard to the only issue before her, the hearing officer determined that the _____, compensable injury does not extend to a cervical herniated nucleus pulposus or radiculopathy.

The appellant (claimant) appealed, contending that the designated doctor's report that the hearing officer cited in reaching her conclusion, was not the designated doctor for the claimant's _____, compensable injury. The respondent (carrier) responded, urging affirmance.

DECISION

Reversed and remanded.

The parties stipulated that on _____, the claimant sustained a compensable injury. The claimant testified that on _____, as she was lifting a 25 pound bag of dog food at work she felt a "pinching" sensation in her mid and low back. The claimant initially received treatment for her mid and lower back. An MRI of the cervical spine, performed on December 5, 2001, noted 3 to 5 mm herniations at C4-5, C5-6 and C6-7. Dr. S was appointed as the designated doctor for the _____, compensable injury to give an opinion on the extent of the compensable injury. In a report dated September 13, 2007, Dr. S reviewed the various medical reports, procedures and diagnostic studies. In discussing the injury, Dr. S noted that surgery was never required for the injury and that the claimant "apparently resumed working until another injury was claimed on or about _____." Dr. S listed diagnoses of "1. [c]ervical strain" and "2. [l]umbar strain" for the _____, compensable injury.

The hearing officer, in her Background Information referenced Dr. M, a designated doctor appointed for the claimant's _____, injury, and commented:

The [Texas Department of Insurance, Division of Workers' Compensation (Division)] appointed [Dr. M], D.C., as the designated doctor to determine the extent of the compensable injury. [Dr. M] examined [c]laimant on August 23, 2007. He subsequently diagnosed [c]laimant as having lumbar disc degeneration, lumbar sprain/strain and an ankle sprain. [Dr. M] has opined that [c]laimant's diagnosed lumbar disc degeneration, lumbar sprain/strain and ankle sprain are a result of [c]laimant's work-related injury.

Section 408.0041(e) provides that the report of the designated doctor has presumptive weight unless the preponderance of the evidence is to the contrary. See

also 28 TEX. ADMIN. CODE § 126.7(d) (Rule 126.7(d)). The hearing officer made findings that Dr. M, the Division-selected designated doctor, has diagnosed the claimant as having lumbar disc degeneration, lumbar sprain/strain and an ankle sprain as a result of the _____, compensable injury; and that Dr. M's opinion regarding the extent of the claimant's _____, compensable injury is not contrary to the preponderance of the evidence and is, therefore, entitled to presumptive weight. The hearing officer presumably meant that Dr. M's report had presumptive weight and the preponderance of the evidence was not to the contrary.

In fact, Dr. M was the designated doctor appointed to determine the extent of injury and whether a lumbar disc was compensable for a _____, injury, not the _____, compensable injury at issue in this case. Dr. M clearly references the _____, date of injury and an entirely different mechanism of injury. Dr. M did not address the _____, compensable injury.

Dr. S was appointed to give an opinion regarding the extent of the claimant's _____, compensable injury. The hearing officer mistakenly gave presumptive weight to the report from Dr. M, who gave an opinion regarding the extent of the _____, alleged injury. In view of the fact that the hearing officer found that Dr. M's opinion regarding the extent of the claimant's _____, compensable injury had presumptive weight and the preponderance of the evidence was not to the contrary and based her decision on Dr. M's report, we reverse the hearing officer's decision as being legally and factually incorrect. We remand this case to the hearing officer to make a determination on the issue in dispute, considering all the evidence including the report of Dr. S, the designated doctor appointed to give an opinion on the extent of the claimant's _____, compensable injury whose report has presumptive weight unless the preponderance of the evidence is to the contrary. No evidentiary rehearing on remand or new evidence is necessary. The parties may be allowed to submit written comments.

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 Appeals Panel Decision 060721, decided June 12, 2006.

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

**CORPORATION SERVICE COMPANY
701 BRAZOS STREET, SUITE 1050
AUSTIN, TEXAS 78701.**

Thomas A. Knapp
Appeals Judge

CONCUR:

Veronica L. Ruberto
Appeals Judge

Margaret L. Turner
Appeals Judge