APPEAL NO. 090167
FILED MAY 27, 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 14, 2009. The issues before the hearing officer were: "[d]id the [Texas Department of Insurance, Division of Workers' Compensation (Division)] abuse its discretion in appointing [(Dr. A)] as a second designated doctor and is [(Dr. R)] or [Dr. A] the correct designated doctor?" The hearing officer determined that the Division is without jurisdiction at this time to determine the appropriateness of an appointment of a second designated doctor or the identity of the correct designated doctor.

The appellant/cross-respondent (claimant) appealed, disputing the hearing officer's determination that the Division is without jurisdiction to decide the disputed issues and contending that the Division abused its discretion when it appointed Dr. A as a second designated doctor. The respondent/cross-appellant (carrier) responded, contending that appointing Dr. A as a second designated doctor was not an abuse of discretion. The carrier also requests that the hearing officer's decision regarding no jurisdiction be reversed and a new decision rendered that the Division did not abuse its discretion in appointing Dr. A as a second designated doctor and that Dr. A is the correct designated doctor. Insofar as the carrier's response is a cross-appeal, the carrier's cross-appeal was not timely filed and was not considered. The appeal file does not contain a response from the claimant to the carrier's cross-appeal.

DECISION

Reversed and rendered in part and reversed and remanded in part.

UNTIMELY CROSS-APPEAL

Although the carrier's response was timely as a response, it was untimely as a cross-appeal. The deemed date of receipt of the hearing officer's decision was January 20, 2009, and a timely appeal must have been filed by Tuesday, February 10, 2009. The carrier's response/cross-appeal was hand delivered to the Division on February 11, 2009, and was received by the Division on that date. Accordingly, insofar as the carrier's response is considered a cross-appeal, the cross-appeal, not having been filed or mailed by February 10, 2009, is untimely as a cross-appeal. *See* 28 TEX. ADMIN. CODE § 143.3(e), 102.5(d), 143.3(d)(2), 102.3(a)(3) and 102.3(b) (Rules 143.3(e), 102.5(d), 143.3(d)(2), 102.3(a)(3) and 102.3(b)). The carrier's response was timely and was considered.

FACTUAL SUMMARY

It is undisputed that the claimant sustained a compensable injury on _____. The evidence reflects that Dr. R was initially appointed by the Division as

a designated doctor to determine the extent of the claimant's compensable injury. Dr. R examined the claimant on August 21, 2007, and gave his opinion as to the extent of the claimant's compensable injury.

In evidence is a Request for Designated Doctor (DWC-32) which reflects that the carrier requested a designated doctor examination to determine maximum medical improvement (MMI) and assess an impairment rating (IR). There was a treatment matrix attached to the DWC-32 in evidence. Dr. R examined the claimant on November 27, 2007, and certified that the claimant was not at MMI, noting that the claimant was "36 days post op as of his examination."

In evidence is a second DWC-32 which shows that the carrier requested a designated doctor examination to determine MMI and IR and that if the claimant was found not to be at MMI supporting medical evidence would be presented to support that determination. There was a treatment matrix attached to the DWC-32 in evidence. Dr. R examined the claimant in his capacity as designated doctor on June 3, 2008, and certified that the claimant was not yet at MMI, noting that the claimant needed a trial on the spinal stimulator for pain management.

In evidence is a third DWC-32 which shows that the carrier requested a designated doctor examination to determine MMI, IR, the claimant's ability to return to work, and an opinion on whether the claimant's current complaints and/or symptoms are a continuation of the _____, compensable injury. There was a treatment matrix attached to the DWC-32 in evidence. In evidence was a Dispute Resolution Information System note dated August 15, 2008, which noted that Dr. R, the first designated doctor, no longer meets the matrix. Dr. A was appointed as a second designated doctor to determine MMI, IR, and the claimant's ability to return to work. Dr. A examined the claimant on September 3, 2008, and certified that the claimant reached clinical MMI on September 3, 2008, with a 10% IR, and opined that the claimant would never be able to return to his pre-injury job.

JURISDICTION

The hearing officer found that the issue certified does not involve a determination by the Division of liability of an insurance carrier for compensation for an injury or death. However, pursuant to Section 402.001(b) the Division was established "to administer and operate the workers' compensation system of this state as provided by this title." Pursuant to Section 410.002 and Rule 140.1 the Hearings Division is given the authority to resolve benefit disputes, which are defined as a dispute regarding compensability or eligibility for, or the amount of, income or death benefits. Section 401.011(5) defines "[b]enefit" to mean a medical benefit, an income benefit, a death benefit, or a burial benefit based on a compensable injury.

If an employee has disability under Section 408.101, pursuant to Section 408.102(a), temporary income benefits (TIBs) continue until the employee reaches MMI. Section 408.121(a) provides, in part, that an employee's entitlement to impairment

income benefits (IIBs) begins on the day after the date the employee reaches MMI and ends on the earlier of: (1) the date of expiration of a period computed at the rate of three weeks for each percentage point of impairment; or (2) the date of the employee's death. Section 408.0041(a) provides, in part, that at the request of the insurance carrier or an employee, or on the commissioner's own order, the commissioner may order a medical examination to resolve questions about MMI, IR and other matters. Section 408.0041(f) provides, in part, that unless otherwise ordered by the commissioner, the insurance carrier shall pay benefits based on the opinion of the designated doctor during the pendency of any dispute. Section 408.0041(h)(1) provides that the insurance carrier shall pay for an examination required under Subsection (a) or (f).

Designated doctors selected to determine, or give an opinion on MMI and IR, directly impacts TIBs and possibly IIBs. *See also* Appeals Panel Decision (APD) 090135, decided April 6, 2009, and APD 090307, decided May 11, 2009.

We reverse the hearing officer's determination that the Division is without jurisdiction to determine the appropriateness of an appointment of a second designated doctor or the identity of the correct designated doctor, and render a new decision that the Division does have jurisdiction to determine whether the Division abused its discretion in appointing Dr. A as a second designated doctor and whether Dr. R or Dr. A is the correct designated doctor.

ABUSE OF DISCRETION AND CORRECT DESIGNATED DOCTOR

Because of the hearing officer's determination on the jurisdiction issue, the hearing officer did not make findings of fact, conclusions of law, or a decision on the merits of the disputed issue reported out of the benefit review conference. The issues of whether the Division abused its discretion in appointing Dr. A as a second designated doctor and whether Dr. R or Dr. A is the correct designated doctor remain to be resolved.

Because we have rendered a new decision that the Division does have jurisdiction to determine whether the Division abused its discretion in appointing Dr. A as a second designated doctor and whether Dr. R or Dr. A is the correct designated doctor, we remand this case to the hearing officer to make a determination on the disputed issues.

SUMMARY

We reverse the hearing officer's determination that the Division is without jurisdiction to determine the appropriateness of an appointment of a second designated doctor or the identity of the correct designated doctor and render a new decision that the Division does have jurisdiction to resolve these issues.

Because we have rendered a new decision that the Division does have jurisdiction to resolve the issues of whether the Division abused its discretion in

appointing Dr. A as a second designated doctor and whether Dr. R or Dr. A is the correct designated doctor, we remand this case to the hearing officer to make a determination on whether the Division abused its discretion in appointing Dr. A as a second designated doctor and whether Dr. R or Dr. A is the correct designated doctor.

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

For service in person the address is:

EXECUTIVE DIRECTOR
(ADDRESS)
(CITY), TEXAS (ZIP CODE).

For service by mail the address is:

EXECUTIVE DIRECTOR
(ADDRESS)
(CITY), TEXAS (ZIP CODE).

_____
Margaret L. Turner
Appeals Judge

CONCUR:

_____
Cynthia A. Brown
Appeals Judge

_____
Veronica L. Ruberto
Appeals Judge