

APPEAL NO. 090307
FILED MAY 11, 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 (CCH) was held on January 30, 2009. The disputed issue reported out of the benefit review conference (BRC) was:

1. Was (Dr. R) or (Dr. B) properly appointed as the designated doctor in accordance with Section 408.0041 and 28 TEX. ADMIN. CODE § 126.7 (Rule 126.7)?

After the CCH, and without consulting the parties, the hearing officer added an issue "upon a finding of good cause" as follows:

2. Does the Texas Department of Insurance, Division of Workers' Compensation (Division) have jurisdiction to decide, "[w]as [Dr. R] or [Dr. B] properly appointed as the designated doctor in accordance with [Section] 408.0041 and Rule 126.7?"

The hearing officer found that no income or medical benefits are in dispute and determined that the Division does not have jurisdiction to hear the case and therefore made no further findings or determinations regarding whether Dr. R or Dr. B was the properly appointed designated doctor.

The appellant (claimant) appealed, objecting to the hearing officer "*sua sponte*" adding the jurisdiction issue, contending that physicians appointed as designated doctors pursuant to Rule 126.7 directly impact the claimant's benefits. The claimant argues that the designated doctor's opinion will impact the termination, continuation, or initiation of temporary income benefits (TIBs) or assess an impairment rating (IR) which translates to impairment income benefits (IIBs). The appeal file does not contain a response from the respondent (carrier).

DECISION

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

BACKGROUND INFORMATION

It is undisputed that the claimant sustained a compensable abdominal hernia injury on _____, picking up heavy totes. An operative report dated August 22, 2007, reflects a laparoscopy was performed to repair an incisional hernia on that date.

In evidence is a Request for Designated Doctor (DWC-32) which reflects that the claimant requested a designated doctor examination to determine maximum medical

improvement (MMI) and IR. The treatment matrix attached to the DWC-32 listed the digestive system as the injured area and notes that surgery and prescriptive medication had been provided.¹ In evidence is a Dispute Resolution Information System (DRIS) note dated December 13, 2007, which reflects that Dr. R was appointed as the designated doctor.² Dr. R examined the claimant on January 8, 2008, certified the claimant was not at MMI and recommended that the claimant see a pain management doctor. Dr. R re-examined the claimant on April 29, 2008, and again certified that the claimant was not at MMI, stating that nothing had been done since he saw her last and the claimant's complaints were exactly the same. Dr. R again noted that the claimant needs to see a pain management doctor or another surgeon to get help with her ongoing pain. Dr. R commented that the claimant "may have nerve entrapment or some other problem with the incision."

In evidence is a second DWC-32 which shows that the carrier requested a designated doctor examination to determine MMI and IR. The treatment matrix attached to the DWC-32 listed lower extremities and feet as the injured area, and noted that surgery, prescription medication and physical medicine had been provided. A DRIS note dated September 19, 2008, states "Previous [designated doctor] [Dr. R] no longer meets [treatment] requirements. Assign new [designated doctor]." A DRIS note dated September 26, 2008, states Dr. B was appointed. The "Health Care Provider Detail" indicates that Dr. B is a certified general surgeon. Dr. B, in a report dated October 14, 2008, certified that the claimant reached clinical MMI on that date with a zero percent IR.

JURISDICTION

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 benefits 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 benefit to mean a medical benefit, an income benefit, a death benefit, or a burial benefit on a compensable injury.

In the Background Information the hearing officer commented:

The jurisdiction of a [CCH] Officer extends to making findings of fact and conclusions of law and awarding benefits due. Resolution of the issue in this case will not involve a determination of whether any benefits are due. Thus, the Division lacks jurisdiction to decide the issue.

The hearing officer found "[n]o income or medical benefits are in dispute," and determined that the Division does not have jurisdiction to hear this case. We disagree.

¹ The treatment matrix form does not have a category for hernias.

² Neither Dr. R's report nor the "Health Care Provider Detail" shows Dr. R was certified in any specialty.

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

In this case, whether the claimant is not at MMI as certified by Dr. R, or whether the claimant reached MMI on October 14, 2008, as certified by Dr. B, impacts the claimant's entitlement to TIBs. Further, Dr. R leaves open the matter of an IR, while Dr. B found a zero percent IR, which impacts whether or not the claimant might receive IIBs. 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.

We reverse the hearing officer's determination that the Division does not have jurisdiction to hear this case, and we render a new decision that the Division does have jurisdiction to determine who the properly appointed designated doctor is.

PROPERLY APPOINTED 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 BRC. The issue of whether Dr. R or Dr. B was properly appointed as the designated doctor in accordance with Section 408.0041 and Rule 126.7 remains to be resolved.

Because we have rendered a new decision that the Division does have jurisdiction to resolve the issue of whether Dr. R or Dr. B was properly appointed as the designated doctor to determine MMI and IR, we remand this case to the hearing officer to make a determination of who the properly appointed designated doctor is.

SUMMARY

We reverse the hearing officer's determination that the Division does not have jurisdiction in this case because no income or medical benefits are in dispute and we render a new decision that the Division does have jurisdiction in this case.

Because we have rendered a new decision that the Division does have jurisdiction to resolve the issue of whether Dr. R or Dr. B is the properly appointed designated doctor to determine MMI and IR, we remand the case to the hearing officer to make a determination on the issue of whether Dr. R or Dr. B is the properly appointed designated doctor to determine MMI and IR.

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 **MITSUI SUMITOMO INSURANCE USA** and the name and address of its registered agent for service of process is

**PRENTICE-HALL CORPORATION SYSTEM, INC.
800 BRAZOS
AUSTIN, TEXAS 78701.**

Thomas A. Knapp
Appeals Judge

CONCUR:

Veronica L. Ruberto
Appeals Judge

Margaret L. Turner
Appeals Judge