APPEAL NO. 091210
FILED OCTOBER 16, 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 July 17, 2009. The disputed issues were:

1. If the respondent/cross-appellant (claimant) has reached maximum medical improvement (MMI), what is the impairment rating (IR)?

2. What is the date of [MMI]?

3. Does the compensable injury extend to include the herniated disc with nerve root impingement at level L5-S1?

4. Has the appellant/cross-respondent (carrier) waived the right to contest the compensability of the herniated disc with nerve root impingement at level L5-S1 by not timely contesting the injury in accordance with Section 409.021?

5. Should the designated doctor be disqualified under 28 TEX. ADMIN. CODE § 180.21 (Rule 180.21)?

The hearing officer determined that: the claimant has not reached MMI and because the claimant has not reached MMI, an IR cannot be determined; the compensable injury does extend to include the herniated disc with nerve root impingement at L5-S1; the carrier has also waived the right to contest compensability of the herniated disc with nerve root impingement at L5-S1 by not timely contesting the extent of the injury in accordance with Section 409.021; and the designated doctor should not be disqualified under Rule 180.21.

The carrier appealed the carrier waiver issue, contending that waiver does not apply to extent-of-injury disputes, and the MMI/IR issues, contending that the claimant was at MMI on December 10, 2008, with a zero percent IR pursuant to the designated doctor's report. The claimant cross-appealed, contending that the designated doctor, (Dr. P) is disqualified due to a disqualifying association pursuant to Rule 180.21. The carrier responded to the claimant's cross-appeal, urging affirmance of the hearing officer's determination on the Rule 180.21 issue. The appeal file does not contain a response from the claimant to the carrier's appeal.

DECISION

Affirmed in part and reversed and rendered in part.

The parties stipulated that the claimant sustained a compensable injury on _____. The claimant testified how on that date he was struck in the back of his head by a very heavy object. The evidence established that the claimant was taken to an emergency room and the following day was diagnosed with a concussion and cervical and lumbar sprains by the "company doctor." The carrier in a Notice of Disputed Issue(s) and Refusal to Pay Benefits (PLN-11) dated February 18, 2009, accepted a "soft tissue/sprain/strain only."

MMI/IR

The hearing officer's determination that the claimant has not reached MMI, and that because the claimant has not reached MMI, an IR cannot be determined at this time is supported by sufficient evidence and is affirmed.

EXTENT OF INJURY

The hearing officer found that the preponderance of the evidence establishes that the _____, compensable injury includes the herniated disc with nerve root impingement at L5-S1 and that finding is supported by the evidence. The hearing officer's determination that the compensable injury does extend to include the herniated disc with nerve root impingement at L5-S1 is supported by sufficient evidence and is affirmed.

CARRIER WAIVER

Section 409.021(a) provides that for claims based on a compensable injury that occurred on or after September 1, 2003, that not 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. In Appeals Panel Decision (APD) 041738-s, decided September 8, 2004, the Appeals Panel established that when a carrier does not timely dispute the compensability of an injury, the compensable injury is defined by the information that could have been reasonably discovered by the carrier's investigation prior to the expiration of the waiver period.

The hearing officer found that the carrier received first written notice of the claimant's injury on September 3, 2008, and filed its first dispute that the compensable injury was limited to cervical and lumbar sprains/strains on February 18, 2009, which was well after the expiration of the 60-day waiver period.

In State Office of Risk Mgmt. v. Lawton,[1] 2009 Tex. LEXIS 629 (Tex. August 28, 2009), the Texas Supreme Court held that the interpretation given in APD 041738-s, *supra*, would eliminate the distinction between compensability and extent of injury. In Lawton, the carrier agreed the claimant had a compensable injury. Similarly, in the instant case, the carrier agreed the claimant had a compensable injury and later disputed the extent of that injury. We find the reasoning set forth in the Lawton decision applicable to the facts in the case at issue. Accordingly, we reverse the hearing officer's decision that the carrier waived the right to contest compensability of the herniated disc with nerve root impingement at L5-S1 and render a new decision that the carrier did not waive its right to contest compensability of the herniated disc with nerve root impingement at L5-S1.

DISQUALIFYING ASSOCIATION
PURSUANT TO RULE 180.21

The claimant, in his cross-appeal, alleges that Dr. P, the designated doctor, has a disqualifying association through (SWS). Dr. P, in a report dated December 10, 2008, certified that the claimant reached MMI on that date with a zero percent IR. Dr. P's letterhead has a street address, suite number, telephone number and fax number that is the same as the peer review doctor. On January 16, 2009, Dr. P responded to a letter of clarification (LOC) stating his original determination stands.

In evidence is a peer review report from (Dr. L) dated February 11, 2009. Dr. L states in his report that his opinion "mirrors that of the designated doctor." Dr. L's letterhead has the same street address, suite number, telephone number and fax number as Dr. P.

In response to a second LOC, dated March 27, 2009, and a third LOC, dated May 1, 2009, Dr. P declined to change his original opinion. The claimant's attorney called himself as a witness and under oath testified that he has personal knowledge of the services that SWS provides and that Dr. P's reports and Dr. L's report came from SWS. The claimant also alleges that the carrier also used SWS for its choice of a required medical examination (RME) physician. However, the [RME] Notice or Request for Order (DWC-22) naming the RME doctor has a different address and telephone number.

The hearing officer, in his Background Information stated:

> Although [c]laimant has presented evidence of the involvement of [SWS] with the pre [designated doctor (DD)] analysis letter (which is not in evidence), the appointment of the DD, the filing by [SWS] for the [c]arrier of a [Request for Designated Doctor (DWC 32)] and DWC 22, the DD's original MMI certification report of December 10, 2008 predated most of that involvement and it does not,

[1] We note that the decision in Lawton, *supra*, is not yet final until opportunities for rehearing have been exhausted.

in this case, rise to the level necessary to disqualify the DD under [Division] Rule 180.21.

Rule 126.7(h)(2) references Rule 180.21 with regard to disqualifying associations. Rule 180.21(a)(2) pertaining to the designated doctor list defines a disqualifying association:

> (2) Disqualifying association—Any association that may reasonably be perceived as having potential to influence the conduct or decision of a doctor, which may include:
>
> * * * *
>
> (D) contracts or agreements for space or equipment rentals, personnel services, management contracts, referral services, or warranties, or any other services related to the management of the doctor's practice.

In APD 960569, decided April 22, 1996, applying a different rule but with a similar definition as Rule 180.21, the Appeals Panel affirmed a hearing officer's determination that where two doctors "shared office space and a telephone number" there was a disqualifying association. APD 060834, decided June 14, 2006, cited APD 022577, decided December 2, 2002, in which a hearing officer's determination of a disqualifying association was upheld where the RME doctor and the designated doctor shared the same office space and telephone line. In that case, there was some additional evidence regarding the RME doctor's conduct and comments.

Based on the precedent of APD 960569, *supra*, and APD 060834, *supra*, applying Rule 180.21, we hold that the sharing of office space, and telephone/fax numbers constitutes a disqualifying association in this case. We reverse the hearing officer's determination that the designated doctor should not be disqualified under Rule 180.21 and render a new decision that sharing the same address, the same suite number and same telephone number and fax number by the designated doctor and the peer review doctor may reasonably be perceived as having potential to influence the conduct or decision of the designated doctor.

SUMMARY

We affirm the hearing officer's determination that the claimant has not reached MMI, and since the claimant has not reached MMI, an IR cannot be determined. We also affirm the hearing officer's determination that the compensable injury includes the herniated disc with nerve root impingement at L5-S1.

We reverse the hearing officer's determination that the carrier has waived the right to contest compensability of the herniated disc with nerve root impingement at L5-S1 and render a new decision that the carrier has not waived the right to contest compensability of the herniated disc with nerve root impingement at L5-S1.

We also reverse the hearing officer's determination that the designated doctor should not be disqualified under Rule 180.21 and render a new decision that the designated doctor is disqualified as having a disqualifying association under Rule 180.21.

The true corporate name of the insurance carrier is **GRANITE STATE INSURANCE 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