

APPEAL NO. 100318
FILED MAY 21, 2010

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 February 19, 2010. The hearing officer resolved the disputed issue by deciding that the appellant's (claimant) compensable injury of _____, does not include the injuries diagnosed as disc herniations at C4-5, C5-6 with stenosis; cervical myelopathy; cervical radiculopathy; C3-4 disc protrusion with encroachment of the neural foramen and cord contact with protrusion into the subarachnoid space; C3-4 disc extrusion; C4-5 protrusion encroaching on the right neural foramen with effacement of the cord and central canal stenosis; C5-6 disc protrusion with bilateral encroachment of the neural foramen; and C6-7 disc protrusion with bilateral encroachment of the neural foramen. The claimant appealed the hearing officer's extent-of-injury determination. The respondent (carrier) responded, requesting that the decision of the hearing officer "be sustained in all respects." The carrier acknowledged in its response that the case should be remanded in order for the hearing officer "to correct his misstatement about the [designated doctor]."

DECISION

Reversed and remanded.

The parties stipulated that the claimant sustained a compensable injury on _____, and that the carrier accepted a compensable injury extending to a cervical sprain/strain and laceration of the head.¹ (Dr. M) was appointed by the Texas Department of Insurance, Division of Workers' Compensation (Division) as the designated doctor to determine the date of the claimant's maximum medical improvement (MMI) and the claimant's impairment rating (IR). In evidence is a letter (EES-14) dated August 4, 2009, appointing Dr. M as a designated doctor to determine MMI and IR. Dr. M examined the claimant on August 18, 2009, and certified the claimant reached MMI on May 15, 2007, with a 0% IR. A letter of clarification (LOC) was sent to Dr. M dated September 24, 2009, which advised Dr. M that there was a dispute regarding whether the compensable injury includes a neck sprain/strain, disc herniations at C4-5 and C5-6, with severe stenosis, cervical myelopathy, and cervical radiculopathy. The LOC requested that Dr. M give a second Report of Medical Evaluation (DWC-69) which includes an assessment of MMI and IR for the disputed diagnoses. In a response dated September 28, 2009, Dr. M noted that the claimant did not complain of a neck injury or neck problem until March 2008, almost one year after the injury. Dr. M maintained that the report he previously submitted was correct and that no changes were necessary. In response to additional LOCs, Dr. M did provide an alternative certification of MMI and IR which includes an assessment for the disputed

¹ A review of the record reflects that the parties stipulated that the carrier accepted a compensable injury extending to a cervical sprain/strain and laceration of the head although it was not specifically included in the written stipulations contained in the decision and order.

diagnoses. In the Background Information portion of his decision and order, the hearing officer incorrectly stated that Dr. M was asked to give his opinion on the relationship between the blow to the back of the head on _____, and the claimant's cervical problems. The hearing officer specifically found that the preponderance of the evidence is not contrary to the designated doctor's opinion regarding the causation of the claimant's disputed injuries.

The claimant argues on appeal that the hearing officer's decision is erroneous as a matter of law because he applied an improper proof standard to resolve the disputed issue. The claimant argues that the hearing officer incorrectly gave presumptive weight to the opinion of Dr. M regarding the extent of the claimant's injury although he was only appointed to determine the date of MMI and assess an IR. In its response, the carrier contends the hearing officer understood Dr. M was not appointed for purposes of determining the extent of injury and "likely just incorrectly wrote that in his opinion." The carrier contends the hearing officer "made the correct findings and conclusions" but acknowledges the case should be remanded to the hearing officer "to correct his inadvertent misstatement."

28 TEX. ADMIN. CODE § 126.7(c) (Rule 126.7(c)) provides that a designated doctor examination shall be used to resolve questions about the impairment caused by the employee's compensable injury; the attainment of MMI; the extent of the compensable injury; whether the employee's disability is a direct result of the work-related injury; the ability of the employee to return to work; or issues similar to those described above. Rule 126.7(d) provides that the report of the designated doctor is given presumptive weight regarding the issues in question and/or dispute, unless the preponderance of the evidence is to the contrary. Rule 126.7 became effective on January 1, 2007, and provides in subsection (w) that a request for a designated doctor under its provisions may be made on or after January 1, 2007.

We have held that when a designated doctor is appointed to determine IR only, his opinion as to IR is entitled to presumptive weight, but his opinion as to MMI is not entitled to presumptive weight. Appeals Panel Decision (APD) 93710, decided September 28, 1993. In such a case, the designated doctor's opinion on MMI may be weighed and considered along with the other medical evidence to determine when MMI was reached. APD 94480, decided June 3, 1994. We note that this line of cases was decided prior to the adoption of Rule 126.7 allowing the designated doctor to be used to resolve issues other than MMI and IR. However, as noted in the prior line of cases, a designated doctor's opinion is entitled to presumptive weight on the issues on which he is appointed to give an opinion. In the instant case, Dr. M was appointed only to give an opinion on MMI and IR but was not appointed to give an opinion on the extent of the claimant's injury. Under these circumstances it was error for the hearing officer to afford the opinion of the designated doctor presumptive weight regarding the extent-of-injury issue. Therefore, we reverse the hearing officer's determination that the compensable injury does not include disc herniations at C4-5, C5-6 with stenosis; cervical myelopathy; cervical radiculopathy; C3-4 disc protrusion with encroachment of the neural foramen and cord contact with protrusion into the subarachnoid space; C3-4 disc

extrusion; C4-5 protrusion encroaching on the right neural foramen with effacement of the cord and central canal stenosis; C5-6 disc protrusion with bilateral encroachment of the neural foramen; and C6-7 disc protrusion with bilateral encroachment of the neural foramen and we remand this case back to the hearing officer to make a determination regarding whether the claimant's _____, extends to the disputed conditions consistent with this decision. On remand, the opinion of the designated doctor may be weighed and considered along with the other medical evidence to determine the extent of the claimant's injury but it should not be given presumptive weight on the extent-of-injury issue.

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 **LIBERTY INSURANCE CORPORATION** 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.**

Margaret L. Turner
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Veronica L. Ruberto
Appeals Judge