APPEAL NO. 121709
FILED OCTOBER 25, 2012

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 July 16, 2012, with the record closing on July 20, 2012, in [City], Texas, with [hearing officer] presiding as hearing officer. The hearing officer resolved the disputed issues by deciding that: (1) [Dr. W] was appointed as the designated doctor in accordance with Section 408.0041 and 28 TEX. ADMIN. CODE § 127.5 (Rule 127.5); (2) the appellant (claimant) reached maximum medical improvement (MMI) on September 28, 2009; and (3) the claimant's impairment rating (IR) is zero percent.

The claimant appealed, disputing the hearing officer's determinations that Dr. W was appointed as the designated doctor in accordance with Section 408.0041 and Rule 127.5 as well as the determinations of MMI and IR. The respondent (carrier) responded, urging affirmance.

DECISION

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

The parties stipulated that the claimant sustained a compensable injury on [date of injury]. The claimant testified that he worked for employer as a truck driver and was injured while trying to free some boxes from the back of a trailer he was unloading. In a prior decision and order dated August 6, 2010, it was determined that the compensable injury of [date of injury], extended to a left foot/ankle ganglion cyst but did not extend to a lumbar sprain/strain, aggravation of lumbar degenerative disc disease, or aggravation of lumbar degenerative joint disease. In evidence was correspondence from the Texas Department of Insurance, Division of Workers' Compensation (Division) dated November 12, 2010, which stated that the hearing officer's decision became final.

APPOINTMENT OF DR. W

At issue was whether Dr. W was appointed as the designated doctor in accordance with Section 408.0041 and Rule 127.5. We note that Dr. W was initially appointed as the designated doctor for extent of injury on September 8, 2009. Rule 127.5 was adopted to be effective February 1, 2011. At the time of the appointment of Dr. W as the designated doctor, Rule 126.7(e) set forth the provisions that applied to the selection and scheduling of an examination by a designated doctor. The applicable provisions are now found in Rule 127.5. Rule 126.7(e) provided in part that the Division shall notify the designated doctor, the employee, the employee's representative, if any, and the insurance carrier that the designated doctor will be directed to examine the

employee and that the written notice shall explain the purpose of the designated doctor examination.

In evidence is a Request for Designated Doctor (DWC-32), date stamped as received by the Division on August 31, 2009. The DWC-32 was requested by the claimant for a designated doctor examination to give an opinion on the extent of the compensable injury. The disputed injury listed on the DWC-32 was the lower back, and the left foot/ankle was listed as a compensable injury not in dispute. A second DWC-32 was in evidence, date stamped as received by the Division on September 10, 2009. The second DWC-32 was submitted by the carrier and requested that a designated doctor be appointed to give a certification of MMI and assign an IR.

Upon request by the carrier at the CCH, the hearing officer took official notice of the Dispute Resolution Information System (DRIS) notes dated August 31, 2009, to January 10, 2010. The DRIS notes state that that a letter notifying the parties of the appointment of Dr. W was mailed on September 9, 2009. In evidence is the letter dated September 9, 2009, which appointed Dr. W to examine the claimant on September 28, 2009. The listed purpose of the examination is to determine the extent of the employee's compensable injury. The DRIS notes list the purpose of the examination as being to determine extent of the claimant's compensable injury and additionally note that on September 15, 2009, the issues of MMI and IR were added, but there was no indication that a new letter was sent out to document the addition of the MMI/IR issues for consideration during the designated doctor's examination. The DRIS notes document that the issues of MMI/IR were added and the DWC-32 was faxed to the designated doctor's office. The DRIS notes further indicate that on September 17, 2009, the claimant called the Division and asked what was going on with his claim and was told that there is a designated doctor's appointment coming up for extent of injury.

The hearing officer admitted into evidence without objection an additional letter which notified the parties of an appointment with Dr. W scheduled for January 18, 2010, for the purpose of extent of injury. The evidence indicated that due to a scheduling problem a different designated doctor, [Dr. M], was appointed for this specific extent of injury question that listed a ganglion cyst as the disputed diagnosis. Dr. M examined the claimant on March 2, 2010, to opine on the extent of the compensable injury.

The claimant testified that he never got notice that a purpose of the examination by Dr. W on September 28, 2009, was to include MMI/IR. The claimant testified that the letter appointing Dr. W as the designated doctor did not indicate that she would examine him for the purposes of MMI/IR and that during the examination Dr. W never explained that she would be examining the claimant for the purposes of MMI/IR. The claimant

alleged that Dr. W was not properly appointed as the designated doctor because he did not receive notice that she was examining him for the purposes of MMI/IR.

The disputed issue was listed as follows: Was Dr. W appointed as the designated doctor in accordance with Section 408.0041 and Rule 127.5? The hearing officer in the Background Information portion of his decision stated "the evidence substantiates that [the] [c]laimant was not given written notice that Dr. [W] would address [MMI and IR] . . . ." However, the hearing officer determined that Dr. W was appointed as the designated doctor in accordance with Section 408.0041 and Rule 127.5. Although, the disputed issue did not distinguish the appointment of Dr. W as the designated doctor for the purposes of extent of injury or for the purpose of MMI/IR, the parties actually litigated whether or not Dr. W was appointed as the designated doctor for the purposes of MMI/IR in accordance with Section 408.0041 and Rule 127.5. The hearing officer was persuaded that the claimant was not given notice of Dr. W's appointment as the designated doctor for the purpose of MMI/IR.

The hearing officer found that the Division complied with recognized rules, principles, and procedures in appointing Dr. W as the designated doctor to address whether the claimant's low back injury was part of the compensable injury, the date of MMI and IR. However, the evidence establishes, as noted by the hearing officer in his Background Information, that the claimant was not given notice that Dr. W was appointed as the designated doctor for the purposes of MMI/IR. Therefore, the hearing officer's determination that Dr. W was appointed as the designated doctor in accordance with Section 408.0041 and Rule 127.5 is so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust. Accordingly, we reverse the hearing officer's determination that Dr. W was appointed as the designated doctor in accordance with Section 408.0041 and Rule 127.5 (the applicable provisions which are identical to those formerly found in Rule 126.7) and render a new decision that Dr. W was not appointed as the designated doctor for MMI/IR in accordance with Section 408.0041 and Rule 126.7(e), the rule which applies to the facts of this case.

MMI/IR

As previously noted, Dr. W was not appointed as the designated doctor for MMI/IR in accordance with Section 408.0041 and Rule 127.5. Dr. W examined the claimant on September 28, 2009, and certified that the claimant reached MMI on that date with a zero percent IR, using the Guides to the Evaluation of Permanent Impairment, fourth edition (1st, 2nd, 3rd, or 4th printing, including corrections and changes as issued by the American Medical Association prior to May 16, 2000) (AMA Guides). In her narrative report, Dr. W stated that the extent of the claimant's

compensable injury is a left ankle sprain. Dr. W measured range of motion (ROM) of the claimant's left ankle and noted that there is no diagnosis-related impairment for the left ankle that would be ratable. The ROM measurements resulted in zero percent impairment, applying the AMA Guides. As previously stated, it has been determined that the compensable injury of [date of injury], extends to a left foot/ankle ganglion cyst. The hearing officer noted in the Background Information portion of his decision that ". . . no medical evidence [was] offered that would tend to show that the ganglion cyst would be ratable under the AMA Guides except for the effect of that condition on the [ROM] of the ankle."

In evidence is a letter dated October 21, 2010, from [Dr. D], who opined that the claimant's ganglion cyst requires the expertise of a foot and ankle specialist and evaluation for excision of this lesion in order to allow his clinical course to progress. The designated doctor did not consider the claimant's entire compensable injury, specifically the left foot/ankle ganglion cyst, when determining whether the claimant reached MMI. Therefore, the hearing officer's finding that the "preponderance of the evidence is not contrary to Dr. [W's] determination that [the] [c]laimant reached [MMI] on September 28, 2009, with a [zero percent] [IR]" is so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust.

The only other certification of MMI/IR in evidence is from the claimant's treating doctor, [Dr. N]. Dr. N certified that the claimant reached MMI on July 12, 2011, with an eight percent IR, using the AMA Guides. Dr. N assessed five percent impairment for the claimant's lumbar spine, placing the claimant in Diagnosis-Related Estimate Category II: Minor Impairment and assessed three percent for loss of ROM of the claimant's left ankle. Dr. N listed a lumbar sprain/strain, left ankle sprain, and ganglion cyst on the left foot as the claimant's diagnoses. As previously stated, a prior decision and order determined that the compensable injury of [date of injury], extended to a left foot/ankle ganglion cyst but did not extend to a lumbar sprain/strain, aggravation of lumbar degenerative disc disease, or aggravation of lumbar degenerative joint disease. Dr. N considered conditions that are not part of the claimant's compensable injury and therefore, her certification cannot be adopted. There is no other certification in evidence. Accordingly, we reverse the hearing officer's determinations that the claimant reached MMI on September 28, 2009, and that the claimant's IR is zero percent as certified by Dr. W and remand the issues of MMI and IR to the hearing officer for further action consistent with this decision.

REMAND INSTRUCTIONS

A designated doctor should be appointed in accordance with Section 408.0041 and applicable Division rules to determine MMI/IR for the compensable injury of [date of

injury]. The hearing officer is to advise the designated doctor that the compensable injury, a left ankle/foot sprain/strain, extends to left foot/ankle ganglion cyst but does not extend to a lumbar sprain/strain, aggravation of lumbar degenerative disc disease, or aggravation of lumbar degenerative joint disease. The assignment of an IR is required to be based on the claimant's condition as of the MMI date considering the medical record and the certifying examination and according to the rating criteria of the AMA Guides and the provisions of Rule 130.1(c)(3). The parties are to be allowed an opportunity to respond. The hearing officer is to determine the issues of MMI and IR consistent with this decision.

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 **TEXAS MUTUAL INSURANCE COMPANY** and the name and address of its registered agent for service of process is

RON O. WRIGHT, PRESIDENT
6210 EAST HIGHWAY 290
AUSTIN, TEXAS 78723.

Margaret L. Turner
Appeals Judge

CONCUR:

Cynthia A. Brown
Appeals Judge

Thomas A. Knapp
Appeals Judge