APPEAL NO. 140722
FILED JUNE 5, 2014

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 October 21, 2013, with the record closing on March 11, 2014,[1] in [City], Texas, with [hearing officer] presiding as hearing officer. The hearing officer resolved the disputed issues by deciding that: (1) the first certification of maximum medical improvement (MMI) and assigned impairment (IR) from [Dr. G] on February 4, 2013, did not become final under Section 408.123 and 28 TEX. ADMIN. CODE § 130.12 (Rule 130.12); (2) the appellant/cross-respondent (self-insured) is entitled to reduce the respondent/cross-appellant's (claimant) income benefits that were and are due and payable beginning on June 14, 2013; and (3) the claimant's IR is 28%.

The self-insured appealed the hearing officer's 28% IR determination, alleging that the impairment includes a rating for a non-compensable injury and the measurements used by the certifying doctor were not as of the date of MMI. Furthermore, the self-insured alleges that it was denied the opportunity to obtain a post-designated doctor required medical examination (RME) doctor pursuant to a letter of clarification (LOC) by the hearing officer. The claimant responded, urging affirmance of the hearing officer's 28% IR.

The claimant cross-appealed the hearing officer's determination that the self-insured is entitled to reduce the claimant's income benefits that were and are due and payable beginning on June 14, 2013. Also, the claimant specifically appeals the hearing officer's Finding of Fact No. 13 which states that "10/28th (36%) of [the] [c]laimant's 28% [IR] for the compensable injury of [date of injury], is due to the compensable injury of [prior date of injury]," because the amount of contribution was not in dispute and was not actually litigated by the parties. The self-insured responded, urging affirmance of the hearing officer's finding on the amount of contribution.

The hearing officer's determination that the first certification of MMI and IR from Dr. G on February 4, 2013, did not become final under Section 408.123 and Rule 130.12 was not appealed and became final pursuant to Section 410.169.

DECISION

Affirmed as reformed.

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[1] We note that the hearing officer misidentified the date the record closed as March 11, 2013, rather than March 11, 2014.

Section 410.203(b) was amended effective September 1, 2011, to allow the Appeals Panel to affirm the decision of a hearing officer as prescribed in Section 410.204(a-1). Section 410.204(a) provides, in part, that the Appeals Panel may issue a written decision on an affirmed case as described in subsection (a-1). Subsection (a-1) provides that the Appeals Panel may only issue a written decision in a case in which the panel affirms the decision of a hearing officer if the case: (1) is a case of first impression; (2) involves a recent change in law; or (3) involves errors at the CCH that require correction but do not affect the outcome of the hearing. This case is a situation that requires correction but does not affect the outcome of the hearing.

The claimant testified that she was injured while trying to break up a fight between two students on [date of injury]. The parties stipulated that: (1) the claimant sustained a compensable injury on [date of injury]; (2) the compensable injury of [date of injury], extends to a lumbar sprain/strain, a cervical sprain/strain, a right shoulder sprain/strain, a right shoulder rotator cuff tear, a chest contusion, a left wrist contusion, an ankle contusion, a groin sprain/strain, and a left shoulder sprain/strain; (3) the date of statutory MMI is December 9, 2012;[2] and (4) as of June 12, 2012, Dr. C was the Texas Department of Insurance, Division of Workers' Compensation (Division)-appointed designated doctor on the issues of MMI and IR.

IR

Section 408.125(c) provides that the report of the designated doctor shall have presumptive weight, and the Division shall base the IR on that report unless the preponderance of the other medical evidence is to the contrary, and that, if the preponderance of the medical evidence contradicts the IR contained in the report of the designated doctor chosen by the Division, the Division shall adopt the IR of one of the other doctors. Rule 130.1(c)(3) provides that the assignment of an IR for the current compensable injury shall be based on the injured employee's condition as of the MMI date considering the medical record and the certifying examination.

In this case Dr. G, the referral doctor, examined the claimant on February 4, 2013, and certified that the claimant reached MMI on December 9, 2012, with a 23% IR. Dr. C, the designated doctor, examined the claimant on May 9, 2013, and certified that the claimant reached MMI on December 9, 2012, with a 13% IR. The hearing officer's

[2] We note that although the parties stipulated that the date of statutory MMI is December 9, 2012, the parties did not stipulate that the claimant reached statutory MMI on December 9, 2012. However, the benefit review conference report dated September 27, 2013, states that the parties agreed the date of MMI is December 9, 2012, as certified by Dr. G and [Dr. C]. Also, the hearing officer determined that the claimant reached MMI on December 9, 2012.

Discussion states that "[b]ecause neither [Dr. G] nor [Dr. C] had rated the entire compensable injury, a [LOC] was sent to [Dr. C]. On October 28, 2013, [Dr. C] responded and requested a re-examination." Dr. C examined the claimant on January 21, 2014, and certified that the claimant reached MMI on December 9, 2012, with a 28% IR. The hearing officer's Finding of Fact No. 10 which states that Dr. C's January 21, 2014, IR is the only IR that considers the entire compensable injury is supported by sufficient evidence. The hearing officer's determinations that the claimant's IR is 28% is supported by sufficient evidence and is affirmed.

On appeal, the self-insured contends that it was denied procedural due process because it was not granted additional time to be allowed to obtain an RME doctor to opine on the designated doctor's amended report. The designated doctor, Dr. C, re-examined the claimant on January 21, 2014, and certified on that date that the claimant reached MMI on December 9, 2012, with a 28% IR. In a letter dated February 21, 2014, the hearing officer gave the parties the opportunity to respond to Dr. C's report by March 3, 2014. On March 3, 2014, the self-insured responded and requested additional time so that an RME doctor may be obtained. On March 11, 2014, the hearing officer issued an order denying the carrier's request to hold the record open for an RME report because the self-insured failed to exercise due diligence in seeking and obtaining an alternate IR although the self-insured was fully aware that the designated doctor had not rated the entire compensable injury prior to the CCH. An abuse of discretion occurs when a decision is made without reference to any guiding rules or principles. *See Morrow v. H.E.B., Inc., 714 S.W.2d 297 (Tex. 1986)*. In Appeals Panel Decision (APD) 091437, decided November 20, 2009, the carrier did not request an RME until August 27, 2009, the date the hearing officer set for submitting closing arguments from the parties. The hearing officer closed the record on August 27, 2009. The Appeals Panel found no abuse of discretion in the hearing officer denying the carrier's motion for continuance. In this case, we find no abuse of discretion by the hearing officer in denying the self-insured's request to leave the record open to obtain an RME doctor.

DATE CONTRIBUTION BEGINS

In evidence is a Carrier's Request for Reduction of Income Benefits Due to Contribution (DWC-33) dated and received by the Division on June 14, 2013. The self-insured requested a reduction of income benefits in the amount of 38% based on a 5% IR for a prior compensable injury and a 13% IR for the current compensable injury (5/13=38%). The Division approved a reduction of income benefits by 25% for the effects of contribution on June 18, 2013.

The disputed issue was "[o]n what date is [the self-insured] entitled to reduce the [c]laimant's impairment income benefits [IIBs] based on the Division Order for

Contribution dated June 18, 2013?" The hearing officer found that the self-insured filed a request to reduce the claimant's IIBs and supplemental income benefits (SIBs) due to the contribution to the claimant's impairment from the [prior date of injury], compensable injury on June 14, 2013. (*See* APD 002211-s, decided November 6, 2000, which held that the carrier may only recoup overpayments on IIBs and SIBs that accrue on or after the date the carrier files a request for contribution with the Division.) The hearing officer's determination that the self-insured is entitled to reduce the claimant's income benefits that were and are due and payable beginning on June 14, 2013, is supported by sufficient evidence and is affirmed.

However, as the claimant contends on appeal, the amount of contribution was not an issue before the hearing officer. A review of the record reflects that the parties did not agree to litigate the amount of contribution. The hearing officer assigned contribution in the amount of 10/28ths, or 36%, based on a 10% IR for a prior compensable injury, and the current 28% IR for the current compensable injury. Because the amount of contribution was not an issue before the hearing officer and it was not actually litigated by the parties, we reform the hearing officer's decision by striking Finding of Fact No. 13 that "10/28th (36%) of [the] [c]laimant's 28% IR for the compensable injury of [date of injury], is due to the compensable injury of [prior date of injury]."

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

SUPERINTENDENT
[ADDRESS]
[CITY], TEXAS [ZIP CODE].

Veronica L. Ruberto
Appeals Judge

CONCUR:

Carisa Space-Beam
Appeals Judge

Margaret L. Turner
Appeals Judge