

APPEAL NO. 140790  
FILED JUNE 6, 2014

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). An expedited contested case hearing (CCH) was held on March 25, 2014, in [City], Texas, with [hearing officer] presiding as hearing officer. The hearing officer resolved the disputed issue by deciding that the Texas Department of Insurance, Division of Workers' Compensation (Division) is not required to contact the designated doctor, [Dr. P], to resolve the extent-of-injury issue regarding the designated doctor's report dated July 15, 2013, pursuant to 28 TEX. ADMIN. CODE § 127.5 (Rule 127.5).<sup>1</sup>

The appellant (claimant) appealed the hearing officer's determination that the Division is not required to contact the designated doctor, Dr. P, to resolve the extent-of-injury issue pursuant to Rule 127.5. The claimant argues that the Division is required to contact Dr. P to resolve the extent-of-injury issue pursuant to Rule 127.10(c). The claimant also argues that the language in Rule 127.10(c) is mandatory and that the designated doctor was required to request additional testing and make referrals to other doctors to opine on the disputed right shoulder conditions. The respondent (carrier) responded, urging affirmance. Further, the carrier contends that the language in Rule 127.10(c) is directory, and not mandatory.

DECISION

Reversed and rendered.

Section 410.024(b) provides that the commissioner by rule shall adopt guidelines relating to claims that do not require a benefit review conference (BRC) and may proceed directly to a CCH or arbitration. Rule 140.3 provides in part that the Division may provide an expedited BRC and CCH for resolution of disputes involving compensability, liability for essential medical treatment, or any type of issue as defined by Division policy for which the executive director or delegate determines an expedited proceeding will serve the best interests of the workers' compensation system or its participants.

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<sup>1</sup> We note that Dr. P is an out-of-state doctor serving as the designated doctor in this case. See Rule 127.120(a), Exception to Certification as a Designated Doctor for Out-of-State Doctors, which provides that when necessary because the injured employee is temporarily located or is residing out-of-state, the Division may waive any of the requirements as specified in this chapter for an out-of-state doctor to serve as a designated doctor to facilitate a timely resolution of the dispute or perform a particular examination.

As previously mentioned, an expedited CCH was held on March 25, 2014. At the CCH the claimant informed the hearing officer that he requested an expedited CCH on the issue in dispute. The claimant and the claimant's attorney appeared telephonically. The claimant did not offer any exhibits at the CCH. The hearing officer admitted Hearing Officer's Exhibit Nos. 1-2 and Carrier's Exhibit's A-G.<sup>2</sup> Although the parties agreed that the issue in dispute was whether the Division should contact the designated doctor, Dr. P, to resolve the extent-of-injury issue regarding the designated doctor's report dated July 15, 2013, pursuant to Rule 127.5,<sup>3</sup> the parties subsequently agreed that the actual issue in dispute was whether an LOC should be sent to the designated doctor, Dr. P. The parties actually litigated and limited their dispute to whether the designated doctor, Dr. P, was required to refer the claimant for testing pursuant to Rule 127.10(c) in order to opine on the disputed extent-of-injury conditions of the right shoulder based on his report dated July 15, 2013, and addendum dated August 21, 2013.

Rule 127.10(c) provides in part that the designated doctor shall perform additional testing when necessary to resolve the issue in question. The designated doctor shall also refer an injured employee to other health care providers when the referral is necessary to resolve the issue in question and the designated doctor is not qualified to fully resolve the issue in question. The preamble to Rule 127.10(c) discusses in part the Division's response to concerns regarding the necessity or reasonableness of designated doctor referrals for testing and notes that "referrals for additional testing are often absolutely necessary for and thus essentially part of the designated doctor's examination of an injured employee." See 35 Tex. Reg. 11325, December 17, 2010. Also, the preamble discusses that the amendments to Section 408.0041 demonstrate a "clear mandate for the Division to take a greater role in monitoring and evaluating requests for designated doctor examinations" and anticipates an "increase [to] the efficiency of the Division's dispute resolution process." See 35 Tex. Reg. 11325. In this case, both the carrier and the claimant requested LOCs in part for the reason that the designated doctor, Dr. P, had failed to refer the claimant for testing pursuant to Rule 127.10(c) to resolve the extent-of-injury at issue.

In this case, it is undisputed that the claimant sustained a compensable cervical spine injury on [date of injury], and that the claimant had cervical spine surgery on August 23, 2012. Division records show that on June 11, 2013, Dr. P was appointed as the designated doctor for the purpose of addressing the issues of maximum medical

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<sup>2</sup> We note that Carrier's Exhibit G, described as "Commission Order, Denial of [Letter of Clarification (LOC)]" is dated August 14, 2012, which is a date prior to the designated doctor's, Dr. P, initial examination date of July 15, 2013. Also, Carrier's Exhibit G contains two date stamps from the carrier: August 16, 2012, and August 20, 2012.

<sup>3</sup> We note that Rule 127.5 relates to scheduling designated doctor appointments.

improvement, impairment rating, extent of injury and return to work. In evidence is Dr. P's narrative report dated July 15, 2013,<sup>4</sup> which states he examined the claimant on July 15, 2013. With regard to the disputed extent-of-injury conditions of the right shoulder, Dr. P specifically notes that he is to opine on whether the accident or incident giving rise to the compensable injury was a substantial factor in bringing about the disputed extent-of-injury conditions of right shoulder pain, right shoulder strain/sprain and right shoulder impingement. In his report Dr. P examined the claimant's right shoulder and noted neurological and range of motion (ROM) measurements of the right shoulder. Throughout his report Dr. P states that the claimant has significant pain and limitation in ROM to his right shoulder. Dr. P recommends that the claimant undergo an orthopedic evaluation, MRI and EMG/NCS to his right shoulder. Furthermore, Dr. P states that "[i]t is impossible at this time to determine if the right shoulder strain and impingement was a result of the accident on [date of injury], or a complication of the surgery on [August 23, 2012]. My reasoning behind this statement is that we do not have a firm diagnosis on the cause of the right shoulder pain. . . ."

Subsequently, on August 8, 2013, the carrier requested an LOC stating in part that the designated doctor failed to: answer the extent-of-injury issue; answer whether the claimant's right shoulder was injured as result of the medical treatment received for the cervical injury; and refer the claimant for testing which he believes would answer the questions posed to him. On August 14, 2013, the Division sent Dr. P an LOC based on the carrier's request. On August 21, 2013, Dr. P responded with an addendum to his prior narrative report stating in part that the "extent of his injury right now stands with a working diagnosis of right shoulder strain/sprain and right shoulder impingement. As far as referring for testing, I did not know that I was the one responsible to refer him for the testing as opposed to referring to an orthopedist to work up the etiology of his right shoulder pain." Further, Dr. P stated that that the claimant is unable to use his right arm and that he is unclear if the shoulder pain was due to a complication of surgery. Dr. P opined that he would have "expected a shoulder strain to have resolved by now and not produce this amount of weakness, limitation in [ROM] [and] weak grip strength."

On January 9, 2014, the claimant requested an LOC stating in part that Dr. P had failed a second time to answer the question regarding extent of injury to the right shoulder. The claimant's request specifically states that Dr. P failed to order a referral and diagnostic testing necessary pursuant to Rule 127.10(c). The appeal file contains a Commissioner Order dated January 17, 2014, denying the claimant's request for an LOC stating the reason as: "[t]he designated doctor examined the [claimant] and has provided an opinion."

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<sup>4</sup> We note that Dr. P's narrative report is dated July 16, 2013, rather than July 15, 2013.

The hearing officer in her Discussion states that “a letter requesting further clarification had been undertaken on August 14, 2013. [Dr. P] provided a response on August 21, 2013, and opted not to refer [the] [c]laimant out to an orthopedic doctor even though he noted that he was aware that he could do so. [Dr. P] is afforded discretion on whether or not to refer [the] [c]laimant to an orthopedic doctor and his decision to not do so does not require a request for further clarification.” We disagree. Dr. P clearly states he did not know that he was the one responsible to refer the claimant for the testing as opposed to referring to an orthopedic doctor to test the claimant’s right shoulder. Dr. P does not state that he chose or that he opted not to refer the claimant for additional testing but rather was not aware it was his responsibility to do so. In his report dated July 15, 2013, and addendum report dated August 21, 2013, Dr. P states that he does not have a firm diagnosis on the cause of the right shoulder pain, notes that the claimant has significant symptoms to his right shoulder, and specifically states that he cannot address the issue of whether the right shoulder conditions are due to the compensable injury or complications of surgery.

In this case, Dr. P clearly states that he has concerns regarding the disputed right shoulder conditions and recommended further diagnostic testing of the claimant’s right shoulder. Dr. P’s specific concerns regarding the claimant’s right shoulder conditions, as stated in his report and addendum, establish a necessity to refer the claimant for additional testing pursuant to Rule 127.10(c) in order to address the issue before him of whether the compensable injury extends to the right shoulder conditions. We note that the claimant and the carrier agree that Dr. P states that additional testing of the right shoulder is needed to determine the extent-of-injury issue in dispute; however no additional testing for the right shoulder was ordered. As previously mentioned, the preamble to Rule 127.10(c) notes that “referrals for additional testing are often absolutely necessary for and thus essentially part of the designated doctor’s examination of an injured employee.”

In this case, the parties at the CCH and on appeal disagree on whether the language to Rule 127.10(c) is mandatory or directory. The Appeals Panel has discussed in prior decisions whether a rule is to be construed to be mandatory or directory by considering the statutory provisions that implemented the rule in question. In Appeals Panel Decision (APD) 93099, decided March 25, 1993, the Appeals Panel noted that there is no absolute test by which it may be determined whether an administrative rule or regulation is mandatory or directory. The prime object is to ascertain and give effect to the intent of the rule or regulation. In determining whether the administrative agency intended the provision to be mandatory or directory, consideration should be given to the entire rule, its nature, objects, and the consequences that would result from construing it each way.

In discussing designated doctor examination rules, APD 132258, decided November 20, 2013, cites to Rule 127.10(b).<sup>5</sup> In that case, the designated doctor did not have any of the claimant's medical records before making a determination on extent of injury, the issue the designated doctor was appointed to determine. The Appeals Panel reversed the hearing officer's extent-of-injury determination because the designated doctor did not have all the medical records as required by Rule 127.10(b) to make a determination on extent of injury. Likewise, in this case, the issue in question for the designated doctor to determine was extent of injury and based on his examination, review of the medical records, and report and addendum, he stated that it was necessary to obtain a firm diagnosis to adequately determine the extent of the claimant's compensable injury. The plain language of Rule 127.10(c) provides that when additional testing is necessary to resolve the issue in question, the designated doctor shall perform additional testing or if he is not qualified to do so, refer the injured employee to other health care providers to conduct such testing. Dr. P has clearly stated that the claimant needs an orthopedic evaluation and diagnostic studies because he is not able to determine based on his examination alone whether the disputed extent-of-injury conditions of the right shoulder are due to the compensable injury or complications of surgery.

In this case, the hearing officer misread Dr. P's report dated July 15, 2013, and addendum dated August 21, 2013. The hearing officer's finding that Dr. P is not required or compelled to request additional testing and make referrals to other doctors against his decision not to do so is against the great weight and preponderance of the evidence. Furthermore, the hearing officer's determination that the Division is not required to contact the designated doctor, Dr. P, to resolve the extent-of-injury issue regarding the designated doctor's report dated July 15, 2013, pursuant to Rule 127.5 is legally incorrect because Rule 127.5 was not actually litigated at the CCH, Rule 127.10(c) was actually litigated. Accordingly, we reverse the hearing officer's determination that the Division is not required to contact the designated doctor, Dr. P, to resolve the extent-of-injury issue regarding the designated doctor's report dated July 15, 2013, pursuant to Rule 127.5, and we render a new decision that the Division should send an LOC to the designated doctor, Dr. P, because he was required to refer the claimant for testing pursuant to Rule 127.10(c) in order to opine on the disputed extent-

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<sup>5</sup> Rule 127.10(b) provides that before examining an injured employee, the designated doctor shall review the injured employee's medical records, including any analysis of the injured employee's medical condition, functional abilities and return to work opportunities provided by the insurance carrier and treating doctor in accordance with subsection (a) of this section, and any materials submitted to the doctor by the Division. Rule 127.10(b) further provides that the designated doctor shall also review the injured employee's medical condition and history as provided by the injured employee, any medical records provided by the injured employee, and shall perform a complete physical examination of the injured employee. The designated doctor shall give the medical records reviewed the weight the designated doctor determines to be appropriate.

of-injury conditions of the right shoulder based on his report dated July 15, 2013, and addendum dated August 21, 2013.

The true corporate name of the insurance carrier is **ZURICH AMERICAN INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**CORPORATION SERVICE COMPANY  
211 EAST 7TH STREET, SUITE 620  
AUSTIN, TEXAS 78701-3232.**

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Veronica L. Ruberto  
Appeals Judge

CONCUR:

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Carisa Space-Beam  
Appeals Judge

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Margaret L. Turner  
Appeals Judge