APPEAL NO. 142232
FILED DECEMBER 16, 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 was held on July 1, 2013, and August 20, 2014, in Fort Worth, Texas, with [hearing officer] presiding as hearing officer. With regard to the issues before him, the hearing officer determined that: (1) the [Date of Injury], compensable injury extends to C4-5 disc bulge, C5-6 disc bulge with annular tear, C6-7 disc bulge, and a pain disorder associated with psychological factors and a general medical condition; (2) (Dr. S) was not disqualified to serve as designated doctor at the time the Texas Department of Insurance, Division of Workers' Compensation (Division)-selected (Dr. Se) as the successor designated doctor on the basis of the hearing officer's determination that Dr. S was non-cooperative in evaluating the impairment; (3) the Division properly selected Dr. Se as a successor designated doctor to Dr. S to address the issues of maximum medical improvement (MMI) and impairment rating (IR); (4) Injury 1 did have a disqualifying association under 28 TEX. ADMIN. CODE § 127.140 (Rule 127.140) when it was selected by Dr. Se to arrange to have a neuropsychological evaluation of the appellant/cross-respondent (claimant); however, (Dr. G), who performed that evaluation, did not have a disqualifying association; (5) the claimant reached MMI on June 12, 2007; and (6) the claimant's IR is 5%.

The claimant appealed the hearing officer's determinations that Dr. S was not disqualified, that Dr. Se was properly appointed, that Dr. G did not have a disqualifying association, and the hearing officer's determinations on MMI and IR based on a sufficiency of the evidence point of error. The respondent/cross-appellant (carrier) appealed the determination that the extent-of-injury conditions in dispute are compensable. The carrier responded to the claimant's appeal, urging affirmance of the disputed issues by the claimant. The claimant responded to the carrier's cross-appeal, urging affirmance of the disputed issue by the carrier.

DECISION

Affirmed in part, reversed and rendered in part, and reversed and remanded in part.

The claimant testified that he was injured when he fell from a tractor trailer while securing a load of hay. It was undisputed that the carrier accepted injuries in the form of a concussion, cervical sprain/strain, lumbar sprain/strain, left 2nd rib fracture,

traumatic brain injury with cognitive dysfunction, traumatic vestibular injury, anxiety, and mood disorder/depression. The parties stipulated that the date of statutory MMI in this case is December 8, 2008.

EXTENT OF INJURY, DISQUALIFICATION OF DR. S, AND PROPER APPOINTMENT OF DR. SE

The hearing officer's determinations that: (1) the [Date of Injury], compensable injury extends to C4-5 disc bulge, C5-6 disc bulge with annular tear, C6-7 disc bulge, and a pain disorder associated with psychological factors and a general medical condition; (2) Dr. S was not disqualified to serve as designated doctor at the time the Division selected Dr. Se as the successor designated doctor on the basis of the hearing officer's determination that Dr. S was non-cooperative in evaluating the impairment; and (3) the Division properly selected Dr. Se as a successor designated doctor to Dr. S to address the issues of MMI and IR are supported by sufficient evidence and are affirmed.

DISQUALIFYING ASSOCIATION

Rule 127.140(a) and (b) provide in part:

(a) A disqualifying association is any association that may reasonably be perceived as having potential to influence the conduct or decision of a designated doctor. Disqualifying associations may include:

(1) receipt of income, compensation, or payment of any kind not related to health care provided by the doctor;

(4) contracts or agreements for space or equipment rentals, personnel services, management contracts, referral services, billing services agents, documentation management or storage services or warranties, or any other services related to the management or operation of the doctor's practice;

(6) a contract with the same workers' compensation health care network certified under Chapter 1305, Insurance Code or a contract with the same political subdivision or political subdivision health plan under Labor Code §504.053(b)(2) that is responsible for the provision of medical benefits to the injured employee

(b) For examinations performed after January 1, 2013, a designated doctor shall also have a disqualifying association relevant to an examination or claim if an agent of the designated doctor has an association relevant to the claim that would constitute a disqualifying association under subsection (a) of this section.

It is undisputed that Injury 1 has a disqualifying association under Rule 127.140(a)(6) since it is part of the same healthcare network that provides medical benefits to the claimant. That portion of the hearing officer's determination that Injury 1 did have a disqualifying association under Rule 127.140 is supported by sufficient evidence and is affirmed.

The claimant argues that Dr. G is part of Injury 1 or was referred by Injury 1 to evaluate the claimant, and therefore, Dr. G also has a disqualifying association under Rule 127.140. Dr. Se examined the claimant on January 29, 2014. In a letter of clarification (LOC) dated April 9, 2014, the hearing officer informed Dr. Se that she failed to provide separate ratings for each compensable condition, and that she could refer the claimant for a neuropsychological evaluation to assist in her rating. In a response dated April 14, 2014, Dr. Se stated that she had referred the claimant to Injury 1 for a neuropsychological evaluation in order to determine the impairment for the traumatic brain injury. The claimant testified that he received a phone call from Injury 1 notifying him of the appointment for an evaluation with Dr. G, and was also transported to the appointment by Injury 1 employees in a van with Injury 1 lettering. Furthermore, the claimant submitted as evidence a document dated February 11, 2013, that identifies Dr. G as a team member for Injury 1. In an LOC response dated September 12, 2014, Dr. Se writes to the hearing officer that she, "referred [the claimant] to CI Med Group who then sent [the claimant] to Injury 1 of Dallas/Fort Worth without a request for a certain evaluator (i.e. [Dr. G]). CI Med Group-Injury 1 contacted [the claimant] to schedule this evaluation. . . . I received the report from CI Med Group, not [Dr. G's] office, on May 26, 2014."

Rule 127.140(a) defines a disqualifying association as any association that may reasonably be perceived as having potential to influence the conduct or decision of a designated doctor. In this case, it is undisputed that Injury 1 has a disqualifying association. The evidence, including Dr. Se's LOC responses that she referred the claimant to Injury 1, the document identifying Dr. G as a team member of Injury 1, and the claimant's testimony that Injury 1 scheduled and transported him to the appointment with Dr. G, was sufficient to establish a reasonable perception of a disqualifying association on the part of Dr. G through his association with Injury 1. Accordingly, we hold that the portion of the hearing officer's determination that Dr. G did not have a disqualifying association is so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust. We reverse that portion of the hearing officer's determination that Dr. G did not have a disqualifying association, and we render a new decision that Dr. G did have a disqualifying association under Rule 127.140.

MMI/IR

Section 401.011(30)(A) defines MMI as "the earliest date after which, based on reasonable medical probability, further material recovery from or lasting improvement to an injury can no longer reasonably be anticipated." Section 408.1225(c) provides that the report of the designated doctor has presumptive weight, and the Division shall base its determination of whether the employee has reached MMI on the report of the designated doctor unless the preponderance of the other medical evidence is to the contrary.

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.

The hearing officer determined that the claimant reached MMI on June 12, 2007, with a 5% IR in accordance with Dr. Se's amended certification. Dr. Se explained in her attached LOC response dated May 28, 2014, that her certification was based on Dr. G's May 26, 2014, evaluation which found that there is no permanent impairment for traumatic brain injury. As discussed above, we have reversed the hearing officer's determination that Dr. G did not have a disqualifying association and rendered a new decision that Dr. G had a disqualifying association under Rule 127.140. As Dr. Se's amended certification was based in part on Dr. G's evaluation report, we reverse the hearing officer's determination that the claimant reached MMI on June 12, 2007, with a 5% IR.

There is another certification by Dr. Se in evidence in which she certified that the claimant reached MMI on June 12, 2007, with a 10% IR. Dr. Se examined the claimant on January 29, 2014, and placed the claimant in Diagnosis-Related Estimate (DRE) Cervicothoracic Category II for a 5% impairment, DRE Lumbosacral Category I for a 0% impairment, and assigned an additional 5% impairment for a traumatic brain injury with disequilibrium based on Table 2, page 142, of 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). She further noted that the claimant showed no diagnosis related impairment for the rib fractures, concussion, pain disorder, anxiety, or mood disorder/depression. As discussed above, it was undisputed that the carrier accepted traumatic vestibular injury. Since Dr. Se failed to provide a separate rating for the traumatic vestibular injury, this certification cannot be adopted.

There are six other certifications in evidence. (Dr. L), the first designated doctor, examined the claimant on January 5, 2009, and certified that the claimant reached MMI on December 6, 2008, with a 10% IR. In a narrative report dated January 5, 2009, Dr. L listed diagnoses of traumatic brain injury with cognitive dysfunction, traumatic vestibular dysfunction, cervical syndrome, and lumbar syndrome. As Dr. L failed to rate or consider the entire compensable injury, including concussion, left 2nd rib fracture, anxiety, and mood disorder/depression, C4-5 disc bulge, C5-6 disc bulge with annular tear, C6-7 disc bulge, and a pain disorder associated with psychological factors and a general medical condition, this certification cannot be adopted.

In response to an August 9, 2013, LOC from the hearing officer, Dr. L issued an addendum dated August 12, 2013, in which he considered and provided ratings for the left 2nd rib fracture, traumatic brain injury, vestibular dysfunction, lumbar syndrome, cervical syndrome including C5-6 disc bulge with annular tear, C6-7 disc bulge, anxiety, and mood disorder/depression. Dr. L certified that the claimant reached MMI on December 8, 2008, with a 19% IR. As Dr. L failed to consider the compensable condition of pain disorder associated with psychological factors and a general medical condition, this certification cannot be adopted.

(Dr. D), a doctor selected by the treating doctor to act in his place, examined the claimant on October 17, 2011, and certified that the claimant reached MMI on December 8, 2008, with a 15% IR. Dr. D considered and rated the cervical spine, including an annular tear and C6-7 disc bulge, left rib fractures, lumbar syndrome, anxiety, depression, traumatic brain injury, and traumatic vestibular injury. As Dr. D failed to consider and rate the compensable condition of pain disorder associated with psychological factors and a general medical condition, this certification cannot be adopted.

(Dr. B), a doctor selected by the treating doctor to act in his place, examined the claimant on January 17, 2013, and issued two alternate certifications. The first certification places the claimant at MMI on December 8, 2008, with a 10% IR. Dr. B considered and rated the cervical spine, including the disc bulges and annular tear, the lumbar spine, and traumatic vestibular injury. However, Dr. B's certification does not rate left 2nd rib fracture, traumatic brain injury, anxiety, mood disorder/depression, and pain disorder associated with psychological factors and a general medical condition; therefore, this certification cannot be adopted. He alternatively certifies that the claimant reached MMI on December 8, 2008, with a 37% IR. This certification considered and rated cognitive disorder, brain injury, anxiety, mood disorder/depression, and pain disorder associated with psychological factors and a general medical condition, in addition to the cervical spine, including the disc bulges and annular tear, the lumbar spine, and traumatic vestibular injury. However, Dr. B's

alternative certification does not rate traumatic brain injury or a left 2nd rib fracture; therefore, it cannot be adopted. On June 18, 2013, Dr. B amended his certifications to include the diagnosis code for the rib, but failed to provide a rating for it.

Dr. S examined the claimant on October 21, 2013, and certified that the claimant reached MMI on June 12, 2007, with a 10% IR. Dr. S considered and rated a brain injury, the lumbar spine, a traumatic vestibular injury, the cervical spine, including the disc bulges and annular tear, and pain disorder associated with psychological factors and a general medical condition. However, Dr S failed to rate anxiety and depression because he did not believe that those conditions are compensable. As Dr. S failed to rate the entire compensable injury, his certification cannot be adopted.

Since there are no other MMI/IR certifications in evidence that can be adopted, we remand the issues of MMI and IR to the hearing officer for further action consistent with this decision.

SUMMARY

We affirm the hearing officer's determinations that: (1) the [Date of Injury], compensable injury extends to C4-5 disc bulge, C5-6 disc bulge with annular tear, C6-7 disc bulge, and a pain disorder associated with psychological factors and a general medical condition; (2) Dr. S was not disqualified to serve as designated doctor at the time the Division selected Dr. Se as the successor designated doctor on the basis of the hearing officer's determination that Dr. S was non-cooperative in evaluating the impairment; and (3) the Division properly selected Dr. Se as a successor designated doctor to Dr. S to address the issues of MMI and IR.

We affirm that portion of the hearing officer's determination that Injury 1 did have a disqualifying association under Rule 127.140.

We reverse that portion of the hearing officer's determination that Dr. G did not have a disqualifying association, and we render a new decision that Dr. G did have a disqualifying association under Rule 127.140.

We reverse the hearing officer's determination that the claimant reached MMI on June 12, 2007, with a 5% IR and remand the issues of MMI and IR to the hearing officer for further action consistent with this decision.

REMAND INSTRUCTIONS

Dr. Se is the designated doctor in this case. On remand, the hearing officer is to determine whether Dr. Se is still qualified and available to be the designated doctor. If Dr. Se is no longer qualified or available to serve as the designated doctor, then another

designated doctor is to be appointed to determine the claimant's MMI and IR for the [Date of Injury], compensable injury.

The hearing officer is to advise the designated doctor that the compensable injury of [Date of Injury], includes a concussion, cervical sprain/strain, lumbar sprain/strain, left 2nd rib fracture, traumatic brain injury with cognitive dysfunction, traumatic vestibular injury, anxiety, and mood disorder/depression, as accepted by the carrier. The hearing officer is also to advise the designated doctor that the [Date of Injury], compensable injury extends to C4-5 disc bulge, C5-6 disc bulge with annular tear, C6-7 disc bulge, and a pain disorder associated with psychological factors and a general medical condition, as administratively determined. The hearing officer is to inform the designated doctor that Injury 1 and Dr. G have disqualifying associations and cannot be used to provide a neuropsychological evaluation to assist in determining MMI and IR. The hearing officer is to request the designated doctor to give an opinion on the claimant's date of MMI, which cannot be after the December 8, 2008, date of statutory MMI, and rate the entire compensable injury in accordance with the AMA Guides considering the medical record and the certifying examination.

The parties are to be provided with the designated doctor's new MMI/IR certification and are to be allowed an opportunity to respond. The hearing officer is then to make a determination on 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

RICHARD GERGASKO, PRESIDENT
6210 EAST HIGHWAY 290
AUSTIN, TEXAS 78723.

Cristina Beceiro
Appeals Judge

CONCUR:

Carisa Space-Beam
Appeals Judge

Margaret L. Turner
Appeals Judge