APPEAL NO. 151634
FILED OCTOBER 6, 2015

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 23, 2015, in Fort Worth, Texas, with (hearing officer) presiding as hearing officer. The hearing officer resolved the disputed issues by deciding that: (1) good cause exists to relieve the respondent (carrier) from the effects of the Benefit Dispute Agreement (DWC-24) signed on January 15, 2015; and (2) (Dr. R) was not properly appointed as a designated doctor in accordance with Section 408.0041 and 28 TEX. ADMIN. CODE § 127.5 (Rule 127.5).

The appellant (claimant) appealed the hearing officer's determination that the carrier is relieved from the effects of the DWC-24 signed on January 15, 2015. The claimant contends that the hearing officer erred in finding that the medical records constituted newly discovered evidence because the carrier knew of the existence of those medical records and failed to exercise due diligence in obtaining the medical records prior to signing the DWC-24 on January 15, 2015. Also, the claimant appeals the hearing officer's determination that Dr. R was not properly appointed as a designated doctor based on sufficiency of the evidence. The carrier responded, urging affirmance of the hearing officer's determinations.

DECISION

Reversed and rendered.

The claimant testified that on (date of injury), while climbing onto his delivery truck, he slipped and fell forward striking his right knee against a metal step of the truck. The parties stipulated that on (date of injury), the claimant sustained a compensable injury. In evidence is a Notice of Disputed Issues(s) and Refusal to Pay Benefits (PLN-11) which states that the carrier accepts that the compensable injury of (date of injury), extends to a right knee contusion and right knee strain.

On September 25, 2014, the Texas Department of Insurance, Division of Workers' Compensation (Division) appointed (Dr. E) as designated doctor for the purpose of determining the extent of the compensable injury. On October 10, 2014, the designated doctor, Dr. E, examined the claimant and opined that the compensable injury extends to a right knee contusion, right knee sprain, right medial meniscus tear, ACL acute sprain, and patellar and quadriceps tendinopathy.

On November 25, 2014, the carrier requested subpoenas duces tecum stating in that request that the carrier's investigation had revealed that the claimant received medical treatment prior to the claimed date of injury. Also, the carrier states that medical records requested from various healthcare providers would assist in determining whether these healthcare providers rendered pre-injury treatment to the claimant's right knee. On December 4, 2014, the Division granted the carrier's request and issued the subpoenas.

The claimant was scheduled to be examined by the post-designated doctor required medical examination (RME) doctor, (Dr. KR) on December 19, 2014. On that same date, December 19, 2014, the carrier filed a motion requesting continuance of a CCH set for December 29, 2014, "to allow time for the receipt of [Dr. KR's] extent of injury RME report as well as the subpoenaed records that are relevant to the issues of extent of injury and disability."

On December 19, 2014, Dr. KR examined the claimant and opined that the compensable injury included right knee contusion, right knee strain, right medial meniscus tear, signal inhomogeneity along the ACL, and distal patellar and quadriceps tendinopathy.

On January 15, 2015, a day prior to the scheduled CCH of January 16, 2015, the parties, both of which were represented by attorneys, signed a DWC-24 resolving the disputed issues of extent, bona fide offer of employment (BFOE), and disability. The DWC-24 states that the parties agreed that: (1) the (date of injury), compensable injury extends to and includes a right knee medial meniscus tear, right ACL sprain, and patellar tendinopathy; (2) the employer tendered a BFOE to the claimant; and (3) the claimant did not have disability for the period beginning August 8, 2014, and ending October 9, 2014, resulting from the compensable injury, but the claimant did have disability resulting from the compensable injury "beginning on October 10, 2014 and continuing."

On January 26, 2015, the claimant underwent an arthroscopy of the right knee joint.

On February 10, 2015, the carrier received some subpoenaed medical records, including progress notes and medication reports, which show that the claimant had a prior right knee injury in 2003, while in military service, and had complaints of right knee pain in 2011, 2012, 2013, and 2014. Also, the subpoenaed progress notes in evidence indicate that the claimant received prescriptions for pain medication from various healthcare providers.

In evidence is an email dated February 12, 2015, from the carrier to the claimant's attorney requesting that the claimant agree to rescind the DWC-24 based on the medical records showing the claimant had a prior right knee injury. In evidence is an email dated March 9, 2015, from the carrier to the claimant's attorney stating that it intends to file a Request to Schedule, Reschedule, or Cancel a Benefit Review Conference (BRC) (DWC-45) if the claimant is unwilling to rescind the DWC-24.

On March 16, 2015, the carrier filed a DWC-45 stating the disputed issue as "[r]elief from DWC-24 [a]greement based on fraud." The carrier attached a chronological summary of the date the agreement was signed and the date subpoenaed medical records were received, and states that the DWC-24 was based on the claimant's "fraudulent answers to vital prior history questions from both the designated doctor and [RME]." The carrier states that the claimant did not respond to its request to rescind the agreement.

On April 7, 2015, the claimant filed a Request for Designated Doctor Examination (DWC-32) for purposes of determining the claimant's maximum medical improvement (MMI) and impairment rating (IR). On April 14, 2015, the Division appointed Dr. R as designated doctor for the purposes of determining MMI and IR.

On April 16, 2015, the carrier filed its objection to the appointment of a designated doctor for MMI and IR and motion to stay the designated doctor's examination stating that the DWC-24 was signed as a result of the claimant's fraud and there is pending litigation on the compensable injuries listed on the DWC-32.

DWC-24

Section 410.030 provides that a written agreement is binding on the insurance carrier absent a finding of fraud, newly discovered evidence or other good and sufficient cause to relieve the insurance carrier of the effect of the agreement. Rule 147.4(d) provides, in part, that a signed written agreement is binding on: (1) a carrier and a claimant represented by an attorney through the final conclusion of all matters relating to the claim, whether before the Division or in court, unless set aside by the Division or court on a finding of fraud, newly discovered evidence, or other good and sufficient cause.

The hearing officer determined good cause exists to relieve the carrier from the effects of the DWC-24 signed on January 15, 2015. The hearing officer's Finding of Fact No. 3 states: "[n]ewly discovered evidence from the [c]laimant's previous healthcare providers he saw before this date of injury [(date of injury)] and other good and sufficient cause exist for relieving the parties of the effects of the agreement."

The hearing officer states in the Discussion portion of the decision that the RME doctor, Dr. KR, testified that she had reviewed the medical records generated prior to the date of injury and "if she had known about [the] [c]laimant's knee history she would have rendered a completely different opinion that the disputed conditions were not part of the compensable injury." Further, the hearing officer states that "[t]he medical records clearly show these conditions are not new and [t]he [c]laimant had been treating for them within weeks [prior to] the date of injury. Newly discovered evidence and other good and sufficient cause exist for relieving the parties of the effects of the agreement."

Based on the hearing officer's discussion and Finding of Fact No. 3, the hearing officer relied upon newly discovered evidence as a basis for setting aside the DWC-24. We note that the phrase "newly discovered evidence" is not defined under the 1989 Act. In Appeals Panel Decision (APD) 941109, decided September 28, 1994, the Appeals Panel cited case law in determining what constitutes newly discovered evidence. In *Merrifield v. Seyferth*, 408 S.W.2d 558 (Tex. Civ. App.-Dallas 1966, no writ), the court looked at "newly discovered evidence" as a basis for a new trial and stated that the appellant needed to show that the evidence was unknown prior to trial, that the failure to discover it was not due to lack of diligence, that the evidence was so material it would probably change the outcome, and that it was not cumulative, corroborative, collateral, or impeaching.

As previously mentioned the DWC-24 was signed on January 15, 2015, and the carrier received a portion of subpoenaed medical records on February 10, 2015. The request for the subpoena of medical records was made on November 25, 2014, a date prior to the date the DWC-24 was signed by the parties. In this case the carrier argued at the CCH that it should be relieved from the effects of the DWC-24 because it subsequently received medical records to show that the claimant had a prior right knee injury. The carrier states that it seeks relief from the effects of the DWC-24 because the receipt of the subpoenaed medical records is newly discovered evidence of the claimant's fraud.

In this case, the carrier may not have been aware of the contents of records documenting the claimant's previous healthcare treatment, but it certainly was aware that the claimant had previously received treatment from a number of healthcare providers and was further aware, as reflected in the carrier's request for subpoenas, that it needed to determine whether these healthcare providers had provided pre-injury treatment to the claimant's right knee. The fact that the carrier had not received records of the claimant's prior healthcare treatment at the time it signed the DWC-24 is not, by itself, enough to constitute newly discovered evidence or other good and sufficient cause to relieve the carrier from the effects of the agreement.

We note that fraud is a third criteria to determine whether the carrier is relieved from the effects of an agreement pursuant to Section 410.030. Although the hearing officer did not make a finding of fact on fraud, the carrier's allegation on fraud is based on the medical records the carrier received after the DWC-24 was signed. We have determined based on the evidence that the medical records are not newly discovered evidence because the carrier did not exercise due diligence in obtaining the records.

The hearing officer's determination that good cause exists to relieve the carrier from the effects of the DWC-24 signed on January 15, 2015, is against the great weight and preponderance of the evidence. Accordingly, we reverse the hearing officer's determination that good cause exists to relieve the carrier from the effects of the DWC-24 signed on January 15, 2015, and we render a new decision that there is no good cause for relieving the carrier of the effects of such agreement, and the DWC-24 signed on January 15, 2015, is final and binding pursuant to Section 410.030.

APPOINTMENT OF DR. R AS DESIGNATED DOCTOR

The hearing officer found that Dr. R was not properly appointed as designated doctor in accordance with Section 408.0041 and Rule 127.5. The hearing officer's Finding of Fact No. 6 states: "[t]he [d]esignated [d]octor appointment for the [d]esignated [d]octor to address MMI and [IR] would not be appropriate at this time because the issue of extent of injury has not been properly addressed and because the information on the DWC-32 is incorrect and misleading."

The hearing officer states in the Discussion portion of the decision that "[s]ince the agreement is rescinded and the compensable injury, at this time, does not include the disputed conditions, the [d]esignated [d]octor would be appointed under a false pretense that the compensable injury included these conditions. Those conditions need to be properly adjudicated by the parties. The appointment at this time is invalid because the information on the DWC-32 is incorrect and misleading."

We note that the DWC-24 signed on January 15, 2015, states that the parties agreed that the (date of injury), compensable injury extends to and includes a right knee medial meniscus tear, right ACL sprain, and patellar tendinopathy. The Appeals Panel has stated that "[u]nder the provisions of Section 408.125, no determination can be made regarding the claimant's IR because there is no report from a designated doctor." See APD 020385, decided March 18, 2002. *See also* APD 142008, decided November 5, 2014, and APD 132423, decided December 19, 2013, in which the issues of MMI and IR were in dispute, and a designated doctor had not been appointed to opine on the issues of MMI and IR. In both APD 142008 and APD 132423, the Appeals Panel reversed the hearing officer's decision and remanded for a designated doctor to be appointed on the issues of MMI and IR.

Given that we have reversed the hearing officer's determination that good cause exists to relieve the carrier from the effects of the DWC-24 signed on January 15, 2015, and we rendered a new decision that there is no good cause for relieving the carrier of the effects of such agreement, and the DWC-24 signed on January 15, 2015, is final and binding pursuant to Section 410.030, we reverse the hearing officer's determination that Dr. R was not properly appointed as a designated doctor in accordance with Section 408.0041 and Rule 127.5, and we render a new decision that Dr. R was properly appointed as a designated doctor in accordance with Section 408.0041 and Rule 127.5.

SUMMARY

We reverse the hearing officer's determination that good cause exists to relieve the carrier from the effects of the DWC-24 signed on January 15, 2015, and we render a new decision that there is no good cause for relieving the carrier of the effects of such agreement, and the DWC-24 signed on January 15, 2015, is final and binding pursuant to Section 410.030.

We reverse the hearing officer's determination that Dr. R was not properly appointed as a designated doctor in accordance with Section 408.0041 and Rule 127.5, and we render a new decision that Dr. R was properly appointed as a designated doctor in accordance with Section 408.0041 and Rule 127.5.

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

CT CORPORTION SYSTEM
1999 BRYANT STREET, SUITE 900
DALLAS, TEXAS 75201-3136.

Veronica L. Ruberto
Appeals Judge

CONCUR:

Carisa Space-Beam
Appeals Judge

Margaret L. Turner
Appeals Judge