

APPEAL NO. 161313
FILED AUGUST 29, 2016

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 May 18, 2016, in Houston, 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's (Division) appointment of (Dr. H) on March 23, 2016, on maximum medical improvement (MMI), impairment rating (IR) and return to work was not in accordance with Section 408.0041 and Division rules.

The appellant (claimant) appealed the hearing officer's determination. The claimant argued that the hearing officer did not have authority to hear the case under 28 TEX. ADMIN. CODE § 127.1(f) (Rule 127.1(f)) because the respondent (self-insured) failed to file a request for an expedited CCH within three days of receiving the set notice for the March 23, 2016, appointment with Dr. H. The claimant also argued that the self-insured failed to present any evidence that the Division did not act with reference to guiding rules and principles. The claimant also appealed the hearing officer's Finding of Fact No. 5 finding that Dr. H's March 29, 2016, MMI/IR certification was not valid. The claimant argued that the validity of Dr. H's March 29, 2016, MMI/IR certification was not an issue at the CCH. The self-insured responded, urging affirmance of the hearing officer's determination and Finding of Fact No. 5.

DECISION

Reversed and rendered.

The parties stipulated that the claimant sustained a compensable injury on (date of injury).

SELF-INSURED'S ENTITLEMENT TO EXPEDITED CCH

Dr. H initially examined the claimant on September 9, 2015, and certified on September 13, 2015, that the claimant had not yet reached MMI. Dr. H next examined the claimant on December 9, 2015, and certified on February 7, 2016, that the claimant reached MMI on May 7, 2015, with a three percent IR.

On February 25, 2016, the claimant submitted a Request for Designated Doctor Examination (DWC-32) for the issues of MMI, IR, disability from May 7, 2015, through February 25, 2016, and return to work from May 7, 2015, through February 25, 2016.

The Division approved the claimant's DWC-32 in a Commissioner Order and set an examination with Dr. H on March 23, 2016, for the issues of MMI, IR, disability, and RTW. Dr. H examined the claimant on March 23, 2016, and certified on March 29, 2016, that the claimant had not reached MMI.

On April 4, 2016, the self-insured requested an expedited CCH under Rule 140.3 to dispute Dr. H's selection as the designated doctor for the March 23, 2016, examination. The self-insured pointed out in its request that Dr. H had previously examined the claimant on December 9, 2015, and determined that the claimant had reached MMI on May 7, 2015, with a three percent IR. The Division granted the self-insured's request, and an expedited CCH was held on May 18, 2016.

The claimant argues on appeal that the self-insured was not entitled to an expedited CCH on this issue. The claimant points out that pursuant to Rule 127.1(f) a party must file a request for an expedited CCH within three days after receiving the designated doctor appointment notice, and because the self-insured failed to file its request within three days of receiving the March 3, 2016, notice of appointment with Dr. H it was not entitled to the May 18, 2016, expedited CCH.

Rule 127.1(f) provides, in part, that a party is entitled to seek an expedited CCH under Rule 140.3 to dispute an approved or denied request for a designated doctor examination. Rule 127.1(f) also provides that the Division, upon timely receipt and approval of the request for expedited proceedings, shall stay the disputed examination pending the decision and order of the expedited CCH, and that parties seeking expedited proceedings and the stay of an ordered examination must file their request for expedited proceedings with the Division within three working days of receiving the order of the designated doctor examination.

Rule 140.3 provides that in addition to expedited proceedings provided by any other Division rule (such as Rule 127.1(f)), the Division may provide expedited benefit review conferences and benefit CCHs 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.

As noted above, the Order and appointment notice for the designated doctor appointment with Dr. H on March 23, 2016, is dated March 3, 2016. The self-insured's request for an expedited CCH is dated April 4, 2016. The self-insured requested the expedited CCH under Rule 140.3, and stated that it objected to the selection of Dr. H to serve as designated doctor for the March 23, 2016, examination for the issues of MMI and IR because Dr. H had previously addressed those issues. The self-insured's

request was granted and an Order setting the expedited CCH was issued by the Division on April 12, 2016, pursuant to Rule 140.3.

It is undisputed that the March 23, 2016, examination with Dr. H had already occurred by the time the self-insured filed its request for an expedited CCH. The self-insured requested the expedited CCH pursuant to Rule 140.3, not Rule 127.1(f). The issue in this case is whether Dr. H was appointed to serve as the designated doctor for the March 23, 2016, examination in accordance with Section 408.0041 and Division rules; the self-insured was not attempting to stay the March 23, 2016, examination because it had already taken place.

Rule 127.1(f) states that parties seeking expedited proceedings and the stay of an ordered examination must file their request for expedited proceedings with the Division within three working days of receiving the order of the designated doctor examination. The preamble to Rule 127.1 in pertinent part provides that the Division will only automatically stay a designated doctor examination if a request for the stay and expedited proceedings is timely received and approved. Nothing in Rule 127.1 implies that a party waives their right to contest the appointment of a designated doctor or approval of an examination if the party fails to file their request within the three-day timeframe provided in Rule 127.1(f). Although a party that fails to request expedited proceedings within the three-day period provided in Rule 127.1(f) has not met the requirement to stay the designated doctor examination, that party may still dispute the approval of the designated doctor through the general expedited CCH procedures contained in Rule 140.3. Accordingly, the self-insured is entitled to the expedited CCH held on May 18, 2016, to determine whether Dr. H was appointed to serve as the designated doctor for the March 23, 2016, examination in accordance with Section 408.0041 and Division rules.

DR. H'S DESIGNATED DOCTOR EXAMINATION ON MARCH 23, 2016

The hearing officer determined that the Division's appointment of Dr. H on March 23, 2016, on MMI, IR, and RTW was not in accordance with Section 408.0041 and Division rules.

An order of an administrative body is presumed to be valid and the burden of producing evidence establishing the invalidity of the administrative action is clearly on the party challenging the action. *Herron v. City of Abilene*, 528 S.W.2d 349 (Tex. Civ. App.-Eastland 1975, writ ref'd). The Division's appointment of Dr. H for the March 23, 2016, examination is presumed to be valid, and the self-insured had the burden of proof to establish that the Division's appointment of Dr. H was invalid.

The self-insured contended that the claimant's DWC-32 requesting the March 23, 2016, designated doctor examination was frivolous because Dr. H had previously examined the claimant for MMI and IR on December 9, 2015, and issued a certification on February 7, 2016, that certified the claimant reached MMI on May 7, 2015, with a three percent IR. The self-insured further contended that Section 408.0041(l) provides that a frivolous request for a designated doctor examination commits an administrative violation, and the Division's appointment of Dr. H for the March 23, 2016, examination was in error.

The hearing officer in her Discussion noted the self-insured's argument that the claimant's DWC-32 was erroneous and frivolous because Dr. H as the designated doctor had already examined the claimant and determined her MMI and IR. The hearing officer also noted that the claimant's DWC-32 acknowledged there was a designated doctor examination previously performed by Dr. H. However, the hearing officer also stated that due to Dr. H's delay in certifying MMI and IR following the December 9, 2015, examination, the claimant could reasonably believe, under the circumstances, that another designated doctor examination was necessary and therefore the claimant's DWC-32 was not frivolous. The hearing officer was clearly persuaded by the evidence that the claimant's DWC-32 was not frivolous, and as the fact-finder in this case it was within her prerogative to do so.

The self-insured did not meet its burden of proof to establish that the Division's appointment of Dr. H for the March 23, 2016, examination on MMI, IR, and RTW was not in accordance with Section 408.0041 and Division rules. Therefore, the hearing officer's determination that the Division's appointment of Dr. H for the March 23, 2016, examination on MMI, IR, and RTW was not in accordance with Section 408.0041 and Division rules 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, and we render a new decision that the Division's appointment of Dr. H for the March 23, 2016, examination on MMI, IR, and RTW was in accordance with Section 408.0041 and Division rules.

VALIDITY OF DR. H'S MARCH 29, 2016, CERTIFICATION

The hearing officer found in Finding of Fact No. 5 that Dr. H's March 29, 2016, certification that the claimant had not yet reached MMI and therefore assigned no IR was not a valid rating. However, we have reversed the hearing officer's determination that the Division's appointment of Dr. H for the March 23, 2016, examination on MMI, IR, and RTW was not in accordance with Section 408.0041 and Division rules, and we have rendered a new decision that the Division's appointment of Dr. H for the March 23, 2016, examination on MMI, IR, and RTW was in accordance with Section 408.0041 and

Division rules. Dr. H was an authorized doctor under Rule 130.1(a) to certify MMI and assign an IR. Furthermore, Dr. H's March 29, 2016, MMI/IR certification met the requirements of a valid certification contained in Rule 130.12(c). Dr. H's March 29, 2016, MMI/IR certification is a valid certification. Accordingly, we reverse Finding of Fact No. 5.

According to information provided by the self-insured, the true corporate name of the insurance self-insured is **CYPRESS FAIRBANKS INDEPENDENT SCHOOL DISTRICT (a self-insured governmental entity)** and the name and address of its registered agent for service of process is

**DR. MARK HENRY, SUPERINTENDENT
10300 JONES ROAD
HOUSTON, TEXAS 77269.**

Carisa Space-Beam
Appeals Judge

CONCUR:

K. Eugene Kraft
Appeals Judge

Margaret L. Turner
Appeals Judge