

APPEAL NO. 160697-s  
FILED MAY 25, 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 March 14, 2016, in Houston, Texas, with (hearing officer) presiding as hearing officer. The hearing officer resolved the disputed issue by deciding that pursuant to Section 408.0041 and Texas Department of Insurance, Division of Workers' Compensation (Division) rules, a second designated doctor examination of the appellant (claimant) by (Dr. S) should not have been scheduled.

The claimant appealed the hearing officer's determination, contending that the hearing officer's determination is so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust, and that the hearing officer erroneously found good cause did not exist for a second designated doctor appointment. The respondent (carrier) responded, urging affirmance of the hearing officer's decision.

DECISION

Reversed and rendered.

The parties stipulated that the claimant sustained a compensable injury on (date of injury), in the form of a left knee strain, and that the Division appointed Dr. S for purposes of extent of injury, maximum medical improvement (MMI), impairment rating (IR), return to work, and disability.

The claimant testified that he sustained an injury to his left knee at work on (date of injury), and that he returned to work for his employer on a light duty basis after the date of injury. Although the claimant could not recall the exact date on which he returned to work, he testified that he worked for the employer on a light duty basis with restrictions through the end of 2015. The claimant testified that he began to have heart problems towards the end of 2015, and he had a pacemaker inserted in January 2016. The claimant has not returned to work since the placement of the pacemaker. The record reveals that the carrier has not at this time accepted a compensable heart condition.

Section 408.0041(b) provides, in part, that an examination under Section 408.0041 may not be conducted more frequently than every 60 days, unless good cause for more frequent examinations exists, as defined by commissioner rules.

28 TEX. ADMIN. CODE § 127.1(c) (Rule 127.1(c)) provides the following:

(c) If a party submits a request for a designated doctor examination under subsection (b) of this section that would require the [D]ivision to schedule an examination within 60 days of a previous examination of the injured employee that party must provide good cause for scheduling that designated doctor examination in order for the [D]ivision to approve the party's request. For the purposes of this subsection, the commissioner or the commissioner's designee shall determine good cause on a case by case basis and will require at a minimum:

- (1) if that requestor also requested the previous examination, a showing by the requestor that the submitted questions could not have reasonably been included in the prior examination and a designated doctor examination is reasonably necessary to resolve the submitted question(s) and will affect entitlement to benefits; or
- (2) if that requestor did not request the previous examination, a showing by the requestor a designated doctor examination is reasonably necessary to resolve the submitted question(s) and will affect entitlement to benefits.

Rule 127.1(d) provides, in part, that the Division shall deny a request for a designated doctor examination and provide a written explanation for the denial to the requestor if the request does not comply with any of the requirements of Rule 127.1(c).

The claimant filed a Request for Designated Doctor Examination (DWC-32) on November 11, 2015, for extent of injury, and disability and return to work from October 1, 2015, through the present. On December 9, 2015, the carrier filed a DWC-32 for MMI and IR. The Division appointed Dr. S to determine extent of injury, MMI, IR, and disability and return to work from October 1, 2015, through the present.

Dr. S examined the claimant on December 23, 2015, for extent of injury, MMI, IR, and disability and return to work from October 1, 2015, through the date of his examination. Dr. S submitted alternate Reports of Medical Evaluation (DWC 69), rendered an opinion regarding the extent of the claimant's compensable injury, and opined that the claimant's disability during the requested period of October 1 through December 23, 2015, was a direct result of the claimant's work-related injury. Dr. S also submitted a Work Status Report (DWC-73) taking the claimant off work beginning October 1, 2015, through the date of the December 23, 2015, examination.

We note that the 60th day after Dr. S's December 23, 2015, examination is Sunday, February 21, 2016, so pursuant to Rule 102.3 the 60th day is extended to the next working day, which is Monday, February 22, 2016.

On February 5, 2016, within 60 days of the date of Dr. S's December 23, 2015, designated doctor examination, the claimant filed a DWC-32 on the issues of disability and return to work for the period beginning January 28, 2016, through the present. We note this is a different period than the period requested of and opined by Dr. S in his December 23, 2015, examination. Box 40 of the DWC-32 instructs the requestor that if the approval of the request would result in the Division scheduling an examination within 60 days of a previous designated doctor examination, the requestor is to provide good cause as to why it is necessary to schedule the requested examination within 60 days. The claimant noted in Box 40 that "[the] [c]laimant's condition has worsened and he needs a new assessment for disability/return to work." Box 41 of the DWC-32 instructs the requestor to explain any change of medical condition since the most recent designated doctor examination. Box 41 of the claimant's DWC-32 is blank.

On February 12, 2016, within 60 days of Dr. S's December 23, 2015, designated doctor examination, the Division approved the claimant's DWC-32 and scheduled a second designated doctor examination for March 7, 2016, with Dr. S for the issues of disability and return to work. We note that the March 7, 2016, examination is more than 60 days after Dr. S's first designated doctor examination on December 23, 2015. On February 16, 2016, the carrier filed a motion for an expedited CCH "to address the propriety of allowing [the] [c]laimant an additional [d]esignated [d]octor examination. . . ."

The hearing officer determined that pursuant to Section 408.0041 and Division rules a second designated doctor examination of the claimant with Dr. S should not have been scheduled, and canceled the March 7, 2016, designated doctor examination with Dr. S. The hearing officer cited Rule 127.1 in her Discussion, and stated the following:

Although [the] [c]laimant's representative asserts that there is a change in his medical condition, no proof of this change or medical evidence was provided to support his assertion. There was no explanation or testimony offered by [the] [c]laimant regarding the nature of the claimed change. For this reason, the [h]earing [o]fficer finds that a second designated doctor examination of [the] [c]laimant by [Dr. S] should not have been scheduled, and, consequently, the stay previously issued is vacated, and the examination is canceled.

The claimant points out on appeal that Section 408.0041(b) and Rule 127.1(c) specifically provide that the controlling date in the question of whether a requested

designated doctor examination occurs within 60 days of a previous designated doctor examination is the date of the actual subsequent examination rather than the date the request is made. The carrier, on the other hand, contends in its response that the controlling date is the date of the request rather than the date of the examination. Section 408.0041(b) specifically provides that “[a]n examination under this section may not be conducted more frequently than every 60 days. . . .” Rule 127.1(c) specifically provides that “[i]f a party submits a request for a designated doctor examination . . . that would require the [D]ivision to schedule an examination within 60 days of a previous examination of the injured employee. . . .” Section 408.0041(b) and Rule 127.1(c) both specifically discuss the date of the actual designated doctor examination rather than the date the request for a designated doctor examination is made. Therefore, we hold that the controlling date in determining whether a requested designated doctor examination takes place within 60 days of a previous designated doctor examination is the date of the actual subsequent designated doctor examination. Furthermore, as noted above the claimant’s February 5, 2016, DWC-32 requests a designated doctor examination to opine on a different disability and return to work period than what was addressed in the first designated doctor examination requested by the claimant.

The hearing officer found that good cause for the claimant’s request for a second designated doctor examination was not established, and determined that the second designated doctor examination of the claimant with Dr. S should not have been scheduled. The hearing officer required a showing of good cause by the claimant under Rule 127.1(c) because she based her analysis on the date of the claimant’s request, which was made within 60 days after the first designated doctor examination. However, as explained above the controlling date is the date of the subsequent designated doctor examination, and in this case the scheduled date for the second designated doctor examination was after the 60-day period. Because the evidence established the second designated doctor examination was not within 60 days of the first designated doctor examination, the claimant was not required to show good cause for scheduling the second designated doctor examination under Rule 127.1(c). Accordingly, we reverse the hearing officer’s determination, and we render a new determination that pursuant to Section 408.0041 and Division rules, a second designated doctor examination of the claimant with Dr. S should have been scheduled.

The true corporate name of the insurance carrier is **NEW HAMPSHIRE 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 78701-3218.**

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Carisa Space-Beam  
Appeals Judge

CONCUR:

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K. Eugene Kraft  
Appeals Judge

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Margaret L. Turner  
Appeals Judge