APPEAL NO. 090135
FILED APRIL 6, 2009

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 December 18, 2008. The issue before the hearing officer: "[w]as [(Dr. R)] properly appointed as the second designated doctor and if not, should his report be invalidated and should [appellant/cross-respondent (claimant)] be re-examined?" The hearing officer determined that "[t]here is no jurisdiction to decide the issue of whether [Dr. R] was properly appointed as the second designated doctor, whether his report should be invalidated, and whether [c]laimant should be re-examined."

The claimant appealed the hearing officer's jurisdiction determination and argued that the "hearing officer cites no legal authority" for her findings of fact with regard to jurisdiction. Additionally, the claimant contends that: (1) the Texas Department of Insurance, Division of Workers' Compensation (Division) abused its discretion in appointing a second designated doctor to determine the claimant's date of maximum medical improvement (MMI) and impairment rating (IR); (2) the "improper appointment of a second designated doctor directly affects benefits"; and (3) the "question of which doctor is the proper designated doctor must be resolved before the decision on how to proceed on the benefits issue can be made." The respondent/cross-appellant (self-insured) responded to the claimant's appeal and stated that the hearing officer's findings with regard to jurisdiction are "supported by the law and by legally and factually sufficient evidence." The self-insured also filed a conditional appeal, arguing that the hearing officer "erred as a matter of law by phrasing the disputed issue in a manner which allows the determination of whether [Dr. R's] report should be invalidated and whether [c]laimant should be re-examined." The self-insured requests on appeal that if the Appeals Panel reverses the hearing officer's decision, then it instruct the "[h]earing [o]fficer to amend the disputed issue." The claimant did not respond to the self-insured's appeal.

DECISION

Reversed and rendered in part and reversed and remanded in part.

FACTUAL SUMMARY

It is undisputed that the claimant sustained a compensable injury on _____. The claimant testified that she injured her back when lifting a table in the course and scope of her employment.

In evidence is a Request for Designated Doctor (DWC-32) which reflects that: (1) the self-insured requested a designated doctor examination to determine MMI and IR; and (2) the treatment matrix listed the back and neck as injured areas and that "[p]hysical [m]edicine" and "[p]rescription [m]edication" had been provided to these

areas. A Dispute Resolution Information System (DRIS) note dated December 4, 2007, shows that (Dr. W) was appointed as the designated doctor.[1] Dr. W examined the claimant on December 18, 2007, and he determined that the claimant had not yet reached MMI. In a narrative report dated December 18, 2007, Dr. W opined that the claimant "should indeed have electrodiagnostic studies (an EMG) of the lumbar region. [The claimant] should also have a course of actual physical therapy by a physical therapist for her low back." Dr. W diagnosed the claimant with "[r]ight S1 radiculopathy."

In evidence is a second DWC-32 which shows that: (1) the self-insured again requested a designated doctor examination to determine MMI and IR; and (2) the treatment matrix listed the "[h]and and [u]pper [e]xtremities" as injured areas and that physical medicine and prescription medication had been provided to these areas. A DRIS note dated April 29, 2008, noted that Dr. R was appointed as a second designated doctor.[2] Dr. R examined the claimant on June 3, 2008, and he certified that the claimant reached MMI on that date with a zero percent IR. At issue at the CCH was whether Dr. R was properly appointed as the second designated doctor.

JURISDICTION

Pursuant to Section 402.001(b) the Division was established "to administer and operate the workers' compensation system of this state as provided by this title." Pursuant to Section 410.002 and 28 TEX. ADMIN. CODE § 140.1 (Rule 140.1) the Hearings Division is given the authority to resolve benefits disputes, which are defined as a dispute regarding compensability or eligibility for, or the amount of, income or death benefits. Section 401.011(5) defines "benefit" to mean a medical benefit, an income benefit, a death benefit, or a burial benefit based on a compensable injury.

In the Background Information section of the decision, the hearing officer states that "hearing officers do not have jurisdiction to rule on the sole issue of whether a designated doctor is properly appointed because that issue does not affect benefits." The hearing officer found that: (1) "[t]he issue of whether [Dr. R] was properly appointed as the second designated doctor does not affect benefits"; and (2) "[h]earing officers do not have jurisdiction to hear a sole issue that does not affect benefits." We hold that the hearing officer erred in determining that "[t]here is no jurisdiction to decide the issue of whether [Dr. R] was properly appointed as the second designated doctor, whether his report should be invalidated, and whether [c]laimant should be re-examined."

If an employee has disability under Section 408.101, pursuant to Section 408.102(a), temporary income benefits continue until the employee reaches MMI.

[1] We note that Dr. W's narrative report dated December 18, 2007, lists his medical specialty in "Neurological Surgery." In evidence is a document entitled "Health Care Provider Detail" from the Division's website that shows Dr. W's specialty as neurological surgery.

[2] We note that Dr. R's narrative report dated June 3, 2008, lists his medical specialty in "Orthopedic Surgery."

Section 408.121(a) provides in part that an employee's entitlement to impairment income benefits begins on the day after the date the employee reaches MMI and ends on the earlier of: (1) the date of expiration of a period computed at the rate of three weeks for each percentage point of impairment; or (2) the date of the employee's death. Section 408.0041(a) provides, in part, that at the request of the insurance carrier or an employee, or on the commissioner's own order, the commissioner may order a medical examination to resolve questions about MMI, IR and other matters. Section 408.0041(f) provides in part that unless otherwise ordered by the commissioner, the insurance carrier shall pay benefits based on the opinion of the designated doctor during the pendency of any dispute. Section 408.0041(h)(1) provides that the insurance carrier shall pay for an examination required under Subsection (a) or (f).

In the instant case, the issue of whether Dr. R was properly appointed as the second designated doctor does affect the claimant's benefits because: (1) the self-insured requested a designated doctor examination to determine MMI and IR; (2) Dr. R was appointed by the Division as the designated doctor to determine MMI and IR; (3) the claimant was examined by Dr. R, the designated doctor; and (4) Dr. R gave an opinion regarding MMI and IR. The hearing officer incorrectly found that "[t]he issue of whether [Dr. R] was properly appointed as the second designated doctor does not affect benefits" and concluded that there was no jurisdiction to decide the disputed issue. We agree with the claimant's contention in this case that the "improper appointment of a second designated doctor directly affects benefits." Accordingly, the resolution of whether Dr. R was properly appointed affects the claimant's benefits.

We reverse the hearing officer's determination that there is no jurisdiction to decide the issue of whether Dr. R was properly appointed as the second designated doctor, whether his report should be invalidated, and whether the claimant should be re-examined and we render a new decision that the Division does have jurisdiction to resolve the issue of whether Dr. R was properly appointed as the second designated doctor.

PROPERLY APPOINTED DESIGNATED DOCTOR

We agree with the self-insured's contention on appeal that the issue should be limited to whether Dr. R was properly appointed as the second designated doctor. Because of the hearing officer's resolution of the jurisdiction issue, the hearing officer did not make findings of fact, conclusions of law, or a decision on the merits of the disputed issue before her. Whether the Division abused its discretion in appointing Dr. R as the second designated doctor was a fact question for the hearing officer to resolve from the evidence presented at the CCH.

Because we have rendered a new decision that the Division does have jurisdiction to resolve the issue of whether Dr. R was properly appointed as the second designated doctor, we remand this case to the hearing officer to make a determination on whether Dr. R was properly appointed as the second designated doctor. It should be

noted that the properly appointed designated doctor should clarify whether there is a need for the claimant to be re-examined.

SUMMARY

We reverse the hearing officer's determination that there is no jurisdiction to decide the issue of whether Dr. R was properly appointed as the second designated doctor, whether his report should be invalidated, and whether the claimant should be re-examined and we render a new decision that the Division does have jurisdiction to resolve the issue of whether Dr. R was properly appointed as the second designated doctor.

Because we have rendered a new decision that the Division does have jurisdiction to resolve the issue of whether Dr. R was properly appointed as the second designated doctor, we remand to the hearing officer to make a determination on whether Dr. R was properly appointed as the second designated doctor.

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 **(a self-insured governmental entity)** and the name and address of its registered agent for service of process is

(NAME)
(ADDRESS)
(CITY), TEXAS (ZIP CODE).

_____
Veronica L. Ruberto
Appeals Judge

CONCUR:

_____
Thomas A. Knapp
Appeals Judge

_____
Margaret L. Turner
Appeals Judge