APPEAL NO. 131335
FILED JULY 15, 2013

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 April 18, 2013, in [City], Texas, with [hearing officer] presiding as hearing officer. The hearing officer resolved the disputed issues by deciding that: (1) the compensable injury of [date of injury], does not extend to an annular tear at L5-S1 and aggravation of osteoarthritis/degenerative joint disease of the right hip; (2) [Dr. S] is not disqualified as the designated doctor due to a disqualifying association; (3) the appellant (claimant) reached maximum medical improvement (MMI) on February 8, 2012; (4) the claimant's impairment rating (IR) is zero percent; (5) the employer did make a bona fide offer of employment (BFOE) on September 26, 2011; and (6) the claimant had disability only beginning on [date of injury], and continuing through October 4, 2011. The claimant appealed, disputing all of the hearing officer's determinations. The respondent (carrier) responded, urging affirmance of the disputed determinations.

DECISION

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

The parties stipulated that: (1) on [date of injury], the claimant sustained a compensable injury at least in the form of a lumbar sprain/strain and right hip strain; (2) the Texas Department of Insurance, Division of Workers' Compensation (Division)-selected designated doctor, Dr. S, certified that the claimant reached MMI on February 8, 2012, and assigned a zero percent IR; and (3) the carrier's choice of doctor, [Dr. F] certified that claimant reached MMI on February 8, 2012, and assigned a zero percent IR. A review of the record reflects that the parties also stipulated that the first selected designated doctor of the Division, [Dr. T], certified that the claimant had not reached MMI on February 8, 2012, and therefore, did not assign an IR. The hearing officer failed to include this stipulation in her decision and order. The claimant testified that he was working for the employer as a truck driver and injured his hip and back when he slipped while carrying boxes.

EXTENT OF INJURY

The hearing officer's determination that the compensable injury of [date of injury], does not extend to an annular tear at L5-S1 and aggravation of osteoarthritis/ degenerative joint disease of the right hip is supported by sufficient evidence and is affirmed.

BFOE

The hearing officer's determination that the employer did make a BFOE on September 26, 2011, is supported by sufficient evidence and is affirmed.

DISABILITY

The hearing officer's determination that the claimant had disability only beginning on [date of injury], and continuing through October 4, 2011, is supported by sufficient evidence and is affirmed.

DISQUALIFYING ASSOCIATION AND MMI/IR

On February 8, 2012, Dr. T, the first designated doctor, examined the claimant for the purposes of MMI, IR, and extent of injury. Dr. T opined that the claimant had a lumbar strain with posterior annular tear and a right hip strain. Dr. T stated that the claimant reported he has never had a problem with his back before, "so in terms of the benefit of doubt in the assumption of this annular tear, is from this injury." Dr. T then opined that the claimant was not at MMI as of that date but was expected to reach MMI on or about May 8, 2012.

The claimant was examined by Dr. F in his capacity as the carrier required medical examination (RME) doctor, on April 10, 2012, and the address listed on his narrative report was: [Address 1] [Phone No. 1]. Dr. F certified that the claimant reached MMI on February 8, 2012, with a zero percent IR, using 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). Dr. F placed the claimant in Diagnosis-Related Estimate (DRE) Lumbosacral Category I: Complaints or Symptoms for the lumbar sprain/strain and assessed zero percent impairment for the claimant's hip strain based on range of motion (ROM) measurements.

On August 1, 2012, the Division appointed Dr. S as the second designated doctor for the claim, for the purpose of examining the claimant to determine MMI and IR. Dr. S examined the claimant on August 22, 2012, and the following address was listed on the letterhead of his narrative report: [Address 1] [Phone No. 1]. The narrative report listed the location of the examination as [Address 2]. Dr. S certified that the claimant reached MMI on February 8, 2012, with a zero percent IR, using the AMA Guides. Dr. S placed the claimant in Lumbosacral DRE Category I: Complaints or Symptoms, assessing zero percent IR for the lumbar spine and stated ROM deficits of the hip could be attributed to the non-compensable osteoarthritis that is present. Dr. S assessed zero percent impairment for the hip.

28 TEX. ADMIN. CODE § 127.140(a) (Rule 127.140(a))[1] provides in part:

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:

> (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.

The hearing officer noted the positions of both the claimant and the carrier in the Background Information portion of her decision as follows:

> [The] [c]laimant contends Dr. [S's] certification is invalid due to a disqualifying association. More specifically [the] [c]laimant contends that Dr. [S] as the [designated doctor] is disqualified due to his association with Exam Works, the same organization as to which the RME doctor [Dr. F], is associated.
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> [The] [c]arrier contends, there is no impropriety, as the two doctors do not know each other and the [c]laimant was examined at two different locations.

The hearing officer determined that Dr. S is not disqualified as the designated doctor due to a disqualifying association.

In a similar situation in Appeals Panel Decision (APD) 091210, decided October 16, 2009, the Appeals Panel cited several cases which basically held that there is a disqualifying association where the RME doctor and the designated doctor shared the same office space and telephone line. In APD 971088, decided July 28, 1997, a case involving disqualifying association under a different rule, the Appeals Panel commented on the "Commission's," now Division, concerns about even an appearance of impropriety. In that case, the Appeals Panel further commented that "the mere fact that the carrier doctor and the designated doctor shared offices, telephone numbers, and perhaps support personnel was sufficient to establish a reasonable perception of a disqualifying association to a lay claimant not knowledgeable in how complex medical management services may work." In APD 971088, *supra*, both the designated doctor and the RME doctor had contracted with a service "which offered not only billing

[1] We note that Rule 127.140 became effective on September 1, 2012, but the cited provisions were previously codified in Rule 180.21.

services but 'facilities to work at and a structured environment.'" *See also* APD 091660, decided December 30, 2009, and APD 101194, decided October 14, 2010.

Rule 127.140(a) (formerly Rule 180.21(a)(2)) 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 which includes agreement for space, personnel services or any other services related to the management of the doctor's practice. In this case, it is undisputed that Dr. S and Dr. R listed the same address, the same suite number, and the same telephone and fax number on their narrative reports.

Accordingly, the hearing officer's determination that Dr. S is not disqualified as the designated doctor due to a disqualifying association to be so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust. We reverse the hearing officer's determination that Dr. S is not disqualified as the designated doctor due to a disqualifying association and we render a new decision that Dr. S is disqualified as the designated doctor due to a disqualifying association.

The hearing officer found that the February 8, 2012, date of MMI and zero percent IR certified by Dr. S is not contrary to the preponderance of the evidence. The hearing officer determined that the claimant reached MMI on February 8, 2012, with a zero percent IR based on the certification of Dr. S. However, as noted above, the hearing officer's determination that Dr. S is not disqualified as the designated doctor due to a disqualifying association has been reversed. Although the disqualifying association relates to the qualifications to serve as a designated doctor, in this case Dr. S's opinion does not have presumptive weight. Parties should receive the benefit of an impartial examination by a designated doctor. *See* APD 020026, decided February 20, 2002. Accordingly, we reverse the hearing officer's determination that the claimant reached MMI on February 8, 2012, and that the claimant's IR is zero percent. We remand the issues of MMI and IR for the appointment of another designated doctor.

SUMMARY

We affirm the hearing officer's determination that the compensable injury of [date of injury], does not extend to an annular tear at L5-S1 and aggravation of osteoarthritis/degenerative joint disease of the right hip.

We affirm the hearing officer's determination that the employer did make a BFOE on September 26, 2011.

We affirm the hearing officer's determination that the claimant had disability only beginning on [date of injury], and continuing through October 4, 2011.

We reverse the hearing officer's determination that Dr. S is not disqualified as the designated doctor due to a disqualifying association and render a new decision that Dr. S is disqualified as the designated doctor due to a disqualifying association.

We reverse the hearing officer's determination that the claimant reached MMI on February 8, 2012, and remand the MMI issue to the hearing officer for further action consistent with this decision.

We reverse the hearing officer's determination that the claimant's IR is zero percent and remand the IR issue to the hearing officer for further action consistent with this decision.

REMAND INSTRUCTIONS

On remand another designated doctor should be appointed to examine the claimant for the purpose of MMI and IR.

The hearing officer is to advise the newly appointed designated doctor that the compensable injury of [date of injury], includes lumbar sprain/strain and right hip strain but does not extend to an annular tear at L5-S1 and aggravation of osteoarthritis/degenerative joint disease of the right hip.

The hearing officer is to advise the designated doctor that Rule 130.1(c)(3) provides that the doctor assigning the IR shall: (A) identify objective clinical or laboratory findings of permanent impairment for the current compensable injury; (B) document specific laboratory or clinical findings of an impairment; (C) analyze specific clinical and laboratory findings of an impairment; and (D) compare the results of the analysis with the impairment criteria and provide the following: (i) [a] description and explanation of specific clinical findings related to each impairment, including zero percent [IR]; and (ii) [a] description of how the findings relate to and compare with the criteria described in the applicable chapter of the AMA Guides.

The designated doctor is to be requested to examine the claimant and to determine whether the claimant has reached MMI, and if so, assign an IR for the claimant's compensable injury of [date of injury], based on the claimant's condition as of the MMI date considering the claimant's medical record and the certifying examination. After the designated doctor examines the claimant and submits a certification of MMI and IR, the parties are to be provided with the designated doctor's Report of Medical Evaluation (DWC-69) and narrative report. The parties 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. APD 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.

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Margaret L. Turner
Appeals Judge

CONCUR:

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Veronica L. Ruberto
Appeals Judge

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Carisa Space-Beam
Appeals Judge