APPEAL NO. 013042-s
FILED JANUARY 17, 2002

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 November 20, 2001. With respect to the issues before him, the hearing officer determined that the appellant's (claimant) date of maximum medical improvement (MMI) is April 7, 2000, and that his impairment rating (IR) is six percent, as certified by the Texas Workers' Compensation Commission (Commission)-selected designated doctor. The claimant appeals, essentially reurging arguments made at the CCH that his doctors were requesting a discogram that was refused, and when the discogram was finally approved, spinal surgery was indicated and performed. It is apparent that the claimant is objecting to the certification of MMI and IR on April 7, 2000, and wants the later MMI date and higher IR that resulted from a reexamination by the designated doctor. The claimant attaches six pages of medical records to his appeal. The respondent (carrier) replies, urging that the claimant's submission is insufficient as an appeal, objecting to three of the items attached to the claimant's appeal, and otherwise urging affirmance.

DECISION

Reversed and remanded.

We first note that the carrier objects that the claimant's "purported appeal" is not a sufficient appeal. No particular form of appeal is required and an appeal, even though terse or inartfully worded, will be considered. Texas Workers' Compensation Commission Appeal No. 91131, decided February 12, 1992; Texas Workers' Compensation Commission Appeal No. 93040, decided March 1, 1993. Generally, appeals which lack specificity will be treated as attacks on the sufficiency of the evidence. Texas Workers' Compensation Commission Appeal No. 92081, decided April 14, 1992. We reject the carrier's argument that the claimant's request for review is insufficient to meet the minimum requirements for an appeal.

Next, we note that the carrier included in its own exhibits presented at the CCH five of the six pages of medical records which the claimant submitted along with his appeal. The objection to those items, which are exact duplicates of the carrier's exhibits, is overruled. The remaining item, a letter dated June 22, 2000, reflecting that a discogram was requested on behalf of the claimant, but denied by the carrier or its agent, was not part of the record developed at the CCH. Documents submitted for the first time on appeal are generally not considered unless they constitute newly discovered evidence. Texas Workers' Compensation Commission Appeal No. 92255, decided July 27, 1992. To determine whether evidence offered for the first time on appeal requires that the case be remanded for further consideration, we consider whether it came to the appellant's knowledge after the hearing, whether it is cumulative, whether it was through lack of

diligence that it was not offered at the hearing, and whether it is so material that it would probably produce a different result. Texas Workers' Compensation Commission Appeal No. 93111, decided March 29, 1993; Black v. Wills, 758 S.W.2d 809 (Tex. App.-Dallas 1988, no writ). The evidence was clearly in existence at the time of the CCH, and our review of the record discloses that the claimant was urging at the CCH that a discogram had been requested prior to the statutory MMI date, but denied by the carrier. We conclude that it was through a lack of diligence by the claimant that the document was not brought to the attention of the hearing officer. Texas Workers' Compensation Commission Appeal No. 980299, decided April 2, 1998. Accordingly, we decline to consider the document attached to the claimant's appeal concerning the denial of the discogram.

Based on the evidence before him, the hearing officer determined that the claimant sustained a compensable injury on _____; that Dr. F was the Commission-selected designated doctor; that Dr. F certified that the claimant reached MMI on April 7, 2000, with an IR of six percent; that the date of statutory MMI is June 29, 2000; that prior to the date of statutory MMI, a discogram had not been requested by any of the claimant's doctors; that the claimant underwent a discogram on October 6, 2000, which indicated the need for spinal surgery; that the claimant opted to undergo spinal surgery on March 1, 2001; that the claimant was reexamined by Dr. F on July 27, 2001; and that Dr. F amended his report and certified that the claimant had reached MMI on July 27, 2001, with a 16% IR. Although not listed as a specific finding by the hearing officer, the evidence also established that the amendment to the designated doctor's report came about when a benefit review officer (BRO) sent a letter to Dr. F on June 6, 2001, along with medical records relating to the claimant's spinal surgery. The BRO asked Dr. F if the records would cause him to amend his previous assessment of MMI and IR. Dr. F responded on June 7, 2001, that both MMI and IR could be reassessed, and the July 27, 2001, reexamination ensued.

The claimant argued at the CCH that the amended report of Dr. F is entitled to presumptive weight, while the carrier argued that the amendment made by the designated doctor was not made for a proper purpose nor within a reasonable time. The hearing officer specifically found that the amendment was not done for a proper purpose and was not done within a reasonable time. Having made those decisions, the hearing officer determined that the great weight of the other medical evidence was not contrary to Dr. F's first certification of MMI and IR on April 7, 2000, and that that report is entitled to presumptive weight.

The Appeals Panel has on numerous occasions stressed the need for finality in MMI and IR determinations, and has developed a body of case law which includes consideration of whether an amendment to MMI and IR was done for a proper purpose and within a reasonable time. *See, for example,* Texas Workers' Compensation Commission Appeal No. 980355, decided April 6, 1998, where a three-year lapse between the designated doctor's first report and a request to amend it was considered an unreasonable delay. That case went on, however, to state the following:

> **In the absence of a Commission rule establishing a time in which a designated doctor may amend a certification of IR**, the Appeals Panel has looked at the circumstances of individual cases in deciding whether the hearing officer erred in determining whether the designated doctor amended the report concerning an IR in a reasonable time. In a case involving a substantial change of medical condition, the Appeals Panel may look to, among other things, when a discovery was made and the diligence used after the discovery was made. [Emphasis added.]

Before January 2, 2002, there was no Commission rule which specifically discussed a designated doctor's amendment of IR. The hearing officer obviously applied the precedent which was previously developed, in the absence of a Commission rule. However, the Commission has now promulgated a rule which specifically refers to amendments by designated doctors. That rule is Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.6(i) (Rule 130.6(i)), which provides, in relevant part:

> The designated doctor shall respond to any commission requests for clarification not later than the fifth working day after the date on which the doctor receives the commission's request. **The doctor's response is considered to have presumptive weight as it is part of the doctor's opinion.** [Emphasis added.]

The rule does not provide any time limits, nor does it have any qualifications on it, such as "for a proper purpose." When this rule was under consideration for adoption, Appeal No. 980355, *supra*, was raised by a commenter as an example of why a response to a clarification should not always be given presumptive weight. The Commission disagreed, and responded: **"The intent is to ensure that the doctor's clarification has presumptive weight,"** and **"If the designated doctor determines that the additional documentation is supportive of a change in his original recommendation, then the opinion should also carry presumptive weight."** [Emphasis added.] The Commission has left no doubt about its position on this issue.

The bottom line of this discussion is that we have a rule that went into effect on January 2, 2002, and that rule does not permit the analysis of whether an amendment was made for a proper purpose or within a reasonable time. The hearing officer did not have reason to know of this rule at the time he made his decision, and we have considered at length the question of how and when to apply this new rule. Since the new rule became effective on January 2, 2002, it can be argued that it should be applied to cases in which hearings are held after January 2, 2002. We believe, however, that the better course of action is for the Appeals Panel to immediately apply this rule, for the reason that there was no Commission rule covering this issue before, and now we have a rule. Since the Commission has spoken, we will give immediate effect to what they have said. We analogize this situation to that which occurred when new Rule 124.3 was promulgated by the Commission, with an effective date of March 13, 2000. We said in Texas Workers'

Compensation Commission Appeal No. 000784, decided May 30, 2000:

> Although the CCH in the case we consider was held on February 29, 2000, before the effective date of the new Rule 124.3, and although [Texas Workers' Compensation Commission]Appeal No. 000713[, decided May 17, 2000,] held that the new rule applies to cases in which a CCH is convened on or after March 13, 2000, the Appeals Panel itself cannot impose a waiver by affirming the hearing officer, given the essential rationale expressed by the Commission in the preamble of the new Rule 124.3 to the effect that the Commission construes Section 409.021 as not providing for waiver of extent of injury. The preamble states, in part, that "Texas Labor Code, § Section 409.021 is intended to apply to the compensability of the injury itself or the carrier liability for the claim as a whole, not individual aspects of the claim" and that "[w]hen a carrier disputes the extent of an injury, it is not denying the compensability of the claim as a whole, it is disputing an aspect of the claim." The preamble further states as follows: "Though the rule gives a carrier a time frame to file the dispute of extent of injury, failure to do so timely is a compliance issue. It does not create liability."
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> Given the Commission's construction of Section 409.021 of the 1989 Act, as set forth, in part, in the preamble to Rule 124.3, a construction we feel bound to accept notwithstanding that Rule 124.3 did not become effective until March 13, 2000, we reverse the challenged conclusion and findings of the hearing officer and render a new decision that the carrier did not waive its right to contest the compensability of the claimed bowel and erectile dysfunction conditions.

In this case, we do not believe it appropriate to reverse and render the hearing officer's decision, as the new rule affects evidentiary weight, rather than prohibiting certain actions. We do, however, reverse and remand this case to the hearing officer with directions that he consider the amended designated doctor's report and give it presumptive weight as required by Rule 130.6(i). We note that statutory MMI was stipulated to be June 29, 2000, and that Dr. F's amended report set the MMI date as July 27, 2001, the same date as his reexamination. Since statutory MMI is the latest date of MMI that may be certified (the hearing officer implicitly found that Section 408.104 did not apply to extend the statutory MMI date), Dr. F's certification of a later date is tantamount to certifying statutory MMI. On remand, the hearing officer has to determine whether the great weight of the other medical evidence contradicts Dr. F's amended report, considering the presumptive weight afforded to that report under the new Rule 130.6(i), and if so, he may seek further clarification from Dr. F, adopt another MMI/IR certification of Dr. F, or adopt an MMI/IR certification from another 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 Texas Workers' Compensation Commission's Division of Hearings, pursuant to Section 410.202, which was amended June 17, 2001, to exclude Saturdays, Sundays, and holidays listed in the Texas Government Code in the computation of the 15-day appeal and response periods.

The true corporate name of the insurance carrier is **TEXAS PROPERTY & CASUALTY GUARANTY ASSOCIATION** and the name and address of its registered agent for service of process is

MARVIN KELLY
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AUSTIN, TEXAS 78758.

FOR RELIANCE NATIONAL INDEMNITY COMPANY, an impaired insurer.

Michael B. McShane
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Chris Cowan
Appeals Judge