APPEAL NO. 040998-s
FILED JUNE 16, 2004

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 March 16, 2004. The hearing officer resolved the disputed issues by deciding that the appellant's (claimant) date of maximum medical improvement (MMI) is March 26, 2002, and that his impairment rating (IR) is 10%. The claimant appealed, arguing that the determinations of MMI and IR are against the great weight and preponderance of the evidence. The respondent (carrier) responded, urging affirmance.

DECISION

Reformed, reversed and remanded.

The parties stipulated that on _____, the claimant sustained a compensable injury to the lumbar region of his spine. We also note that although stipulation 1.E. was omitted from the decision and order, a review of the record reflects that the parties stipulated that the date of statutory MMI is October 1, 2002. We reform the decision and order to include the omitted stipulation.

The claimant testified, and the evidence reflects, that the claimant underwent spinal surgeries after October 1, 2002. There is an operative report in evidence dated March 11, 2003, and a second operative report dated July 15, 2003, which describes a revision surgery. The claimant's treating doctor initially certified that the claimant reached MMI on January 21, 2002, with a 10% IR. Subsequently, the claimant was examined by a designated doctor who certified that the claimant reached MMI on March 26, 2002, with a 10% IR. The designated doctor responded on November 17, 2003, to a letter of clarification and changed his opinion of the date the claimant reached MMI due to additional findings and procedures that were performed, and specifically stated that the IR would change since surgery was performed.

Sections 408.122(c) and 408.125(e) provide that where there is a dispute as to the date of MMI and the IR, the report of the Texas Workers' Compensation Commission (Commission)-selected designated doctor is entitled to presumptive weight unless it is contrary to the great weight of the other medical evidence. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.6(i) (Rule 130.6(i)) provides that the designated doctor's response to a request for clarification is also considered to have presumptive weight, as it is part of the designated doctor's opinion. *See also*, Texas Workers' Compensation Commission Appeal No. 013042-s, decided January 17, 2002. We have previously discussed the meaning of "the great weight of the other medical evidence" in numerous cases. We have held that it is not just equally balancing the evidence or a preponderance of the evidence that can overcome the presumptive weight given to the designated doctor's report. Texas Workers' Compensation Commission Appeal No. 92412, decided September 28, 1992. We have also held that no other doctor's report,

including the report of the treating doctor, is accorded the special, presumptive status accorded to the report of the designated doctor. Texas Workers' Compensation Commission Appeal No. 92366, decided September 10, 1992; Texas Workers' Compensation Commission Appeal No. 93825, decided October 15, 1993.

The hearing officer found that despite the claimant's requests, the Commission did not have a proper or legal reason to return the claimant to the designated doctor in November or December of 2003 for reconsideration of the doctor's determination of clinical MMI. The hearing officer erred by failing to apply Rule 130.6(i) and give presumptive weight to the designated doctor's amended report.

In Appeal No. 013042-s, *supra*, we held that Rule 130.6(i) "does not permit the analysis of whether an amendment was made for a proper purpose or within a reasonable time." Rule 130.6(i) provides that a designated doctor's response to a Commission request for clarification is considered to have presumptive weight, as it is part of the designated doctor's opinion. The hearing officer failed to apply Rule 130.6(i). We reverse the hearing officer's determination of MMI and IR, and remand for further action as outlined below.

We note that October 1, 2002, was stipulated as the statutory date of MMI and that the designated doctor's amended report dated November 17, 2003, stated that he no longer believed the claimant reached MMI on March 26, 2002, and requested reexamination of the claimant. MMI, as defined in Section 401.011(30)(B), is statutorily the latest date of MMI that may be certified unless extended under Section 408.104 (there is no evidence that an extension was requested or granted). On remand, the hearing officer should advise the designated doctor that the statutory MMI date is October 1, 2002, and specifically tell him that he is to find the MMI date (which can be no later than the statutory date), and determine the IR based on the claimant's condition as of the MMI date.

The hearing officer cites Rule 130.1(c)(3) and Rule 130.6(i) in his Background Information as alternate theories, leading to the same result. We disagree. Rule 130.1(c)(3) provides that the "[a]ssignment of an [IR] for the current compensable injury shall be based on the injured employee's condition as of the MMI date considering the medical record and the certifying examination." That rule has been interpreted to mean that the IR shall be based on the condition as of the MMI date and is not to be based on subsequent changes, including surgery. The preamble of Rule 130.1(c)(3) clarifies that IR assessments "must be based on the injured employee's condition as of the date of MMI." 29 Tex Reg. 2337 (2004). However, with respect to the MMI date, in response to public comment, the Commission in the preamble responded that "In situations where a claimant reaches MMI clinically, rather than with the expiration of 104-weeks or the extended date in the event of spinal surgery, future changes in the injured workers condition may cause the MMI date to change." "[I]n the event the MMI date is changed due to a post-MMI change in the injured employee's conditions, there should be a re-evaluation of the IR as of the new MMI date." The preamble also notes that in the event that the MMI date is changed the IR would have to be based on the injured employee's

condition as of the changed MMI date. *See* Texas Worker's Compensation Commission Appeal Panel No. 040313-s, decided April 5, 2004, and Texas Workers' Compensation Commission Appeal No. 040583-s, decided May 3, 2004.

Pursuant to Section 408.0041 and Rule 130.5(d)(2), the Commission is charged with the responsibility of ensuring that a designated doctor is still qualified before scheduling an appointment with the designated doctor to reexamine the claimant. Rule 130.5(d)(2) became effective on January 2, 2002, and does not provide exceptions for claims in progress prior to that time. Indeed, the wording of Rule 130.5(d)(2) contemplates using a previously selected designated doctor "if the doctor is still qualified." However, if the doctor is no longer qualified, selection of a new designated doctor is mandated. *See* Texas Workers' Compensation Commission Appeal No. 022277, decided October 23, 2002.

Section 408.0041(b) provides in relevant part that the designated doctor should be one:

> [W]hose credentials are appropriate for the issue in question and the injured employee's medical condition. The designated doctor doing the review must be trained and experienced with the treatment and procedures used by the doctor treating the patient's medical condition, and the treatment and procedures performed must be within the scope of practice of the designated doctor.

See also, Texas Workers' Compensation Commission Appeal No. 040633-s, decided May 7, 2004.

We reverse the determination that the claimant's date of MMI is March 26, 2002, with an IR of 10% and remand for further proceedings consistent with this decision. We note that after the claimant is reexamined and the MMI date is certified with an IR by the designated doctor, or from a second designated doctor if necessary, the hearing officer should allow comment by the parties. The hearing officer should then issue a new decision regarding the date of MMI and the 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 Commission's Division of Hearings, 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* Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

The true corporate name of the insurance carrier is **GREAT AMERICAN INSURANCE COMPANY OF NEW YORK** and the name and address of its registered agent for service of process is

RAY WILSON
9602 CABIN CREEK DRIVE
HOUSTON, TEXAS 77064.

_____
Margaret L. Turner
Appeals Judge

CONCUR:

_____
Thomas A. Knapp
Appeals Judge

_____
Robert W. Potts
Appeals Judge