

APPEAL NO. 100705-s
FILED AUGUST 12, 2010

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 April 28, 2010, with the record closing on May 3, 2010. The issues before the hearing officer were:

- (1) Did the respondent/cross-appellant (claimant) sustain a compensable injury, and if so, on what date?
- (2) Did the claimant have disability resulting from a compensable injury, and if so, for what period(s)?
- (3) Was (Dr. X) properly appointed as the designated doctor to determine maximum medical improvement (MMI) and impairment rating (IR) in accordance with Section 408.0041 and 28 TEX. ADMIN. CODE § 130.5 (Rule 130.5)?
- (4) Whether the appellant/cross-respondent (carrier) is liable for the payments of impairment income benefits (IIBs) according to Section 408.0041(f) based on the decision of the designated doctor appointed to determine extent of injury, MMI, and IR, when the carrier has timely disputed the compensability of the claim in accordance with the Act?

The hearing officer determined that: (1) the claimant sustained a compensable injury on _____; (2) the claimant had disability beginning on February 24, 2005, and continuing through the date of the CCH, but at no other times; (3) Dr. X was not properly appointed as the designated doctor on July 27, 2007, to determine MMI and IR; and (4) the carrier is not liable for the immediate payment of IIBs according to Section 408.0041(f) based on the designated doctor's determination that the claimant reached MMI on February 23, 2007, with a 15% IR.

The carrier appealed the hearing officer's determinations that: (1) the claimant sustained a compensable injury on _____, and (2) the claimant had disability beginning on February 24, 2005, and continuing through the date of the CCH, but at no other times. The claimant cross-appealed the hearing officer's determinations that: (1) Dr. X was not properly appointed as the designated doctor on July 27, 2007, to determine MMI and IR, and (2) the carrier is not liable for immediate payment of IIBs according to Section 408.0041(f) based on the designated doctor's determination that the claimant reached MMI on February 23, 2007, with a 15% IR. Both the claimant and the carrier responded to the other party's appeal, urging affirmance of the issues on which they prevailed.

DECISION

Affirmed in part and reversed and rendered in part.

COMPENSABLE INJURY AND DISABILITY

The hearing officer's determinations that: (1) the claimant sustained a compensable injury on _____, and (2) the claimant had disability beginning on February 24, 2005, and continuing through the date of the CCH, but at no other times, are supported by sufficient evidence and are affirmed.

APPOINTMENT OF DESIGNATED DOCTOR

At issue was whether Dr. X was properly appointed as the designated doctor to determine MMI and IR in accordance with Section 408.0041 and Rule 130.5. It is undisputed that a request for a designated doctor examination was made on July 16, 2007, and that Dr. X was appointed as the designated doctor on July 26, 2007. We note that the issue refers to Rule 130.5 which was repealed and superceded by Rule 126.7 which became effective January 1, 2007. Section 408.0041 was effective for a request for medical examination made to the Texas Department of Insurance, Division of Workers' Compensation (Division) by a carrier on or after the effective date provided by commissioner rule, thus effective January 1, 2007. See House Bill (H.B.) 7 of the 79th Leg., R.S.¹ Given that the carrier requested a designated doctor examination on July 16, 2007,² the relevant statutory and rule provisions applicable in this case are Section 408.0041 and Rule 126.7. We review this case under an abuse-of-discretion standard. See Morrow v. H.E.B., Inc., 714 S.W.2d 297 (Tex. 1986).

Section 408.0041(a) provides that at the request of an insurance carrier or an employee, or on the commissioner's own order, the commissioner may order a medical examination to resolve any question about: (1) the impairment caused by the compensable injury; (2) the attainment of MMI; (3) the extent of the employee's compensable injury; (4) whether the injured employee's disability is a direct result of the work-related injury; (5) the ability of the employee to return to work (RTW); or (6) issues similar to those described by Subdivisions (1)-(5). Section 408.0041(e) provides, in part, that the report of the designated doctor has presumptive weight unless the preponderance of the evidence is to the contrary. Rule 126.7(c) provides that a designated doctor examination shall be used to resolve questions about the following: (1) the impairment caused by the employee's compensable injury; (2) the attainment of

¹ SECTION 8.007. RULES REGARDING MEDICAL EXAMINATIONS. The commissioner of workers' compensation shall adopt rules to implement the changes in law made to Sections 408.004 and 408.0041, Labor Code, as amended by this Act, on or before February 1, 2006. The changes in law made to Sections 408.004 and 408.0041, Labor Code, are effective on the date provided by commissioner rule.

² Rule 126.7(w) provides this section is effective January 1, 2007, and a request for a designated doctor under this section may be made on or after January 1, 2007.

MMI; (3) the extent of the employee's compensable injury; (4) whether the employee's disability is a direct result of the work-related injury; (5) the ability of the employee to RTW; or (6) issues similar to those described by paragraphs (1)-(5) of this subsection.

The claimant testified that she sustained a neck injury while at work on _____. It is undisputed that the carrier filed a Notice of Denial of Compensability/Liability and Refusal to Pay Benefits (PLN-1) on March 21, 2005, disputing compensability of the claimed injury of _____. In evidence is a Notice of Disputed Issue(s) and Refusal to Pay Benefits (PLN-11) dated January 26, 2006, which states that the carrier disputes payment of "[IR] income benefits as the claim compensability is in dispute." Thereafter, the carrier filed a Request for Designated Doctor (DWC-32) on July 16, 2007, requesting a designated doctor examination to determine the claimant's MMI, IR and extent of injury. A designated doctor was appointed on July 27, 2007, to determine the claimant's MMI, IR and extent of injury, and he determined that the claimant reached statutory MMI on February 23, 2007, with a 15% IR. At the CCH and on appeal, the carrier contends that the appointment of a designated doctor by the Division was improper because compensability of the claimed injury was in dispute.

The hearing officer determined that Dr. X was not properly appointed as the designated doctor on July 27, 2007, to determine MMI and IR, based in part on a memorandum dated June 18, 2007, from the Division's Policy Advisor, to workers' compensation system participants, entitled "Guidance on Requesting Designated Doctor Examinations." In evidence is the memorandum dated June 18, 2007, referenced by the hearing officer, that cites to Section 408.0041, and states, in part, that with regard to compensability issues:

There are two components to compensability: 1) **Medical** - is there an injury resulting from the claimed incident; and, 2) **Legal** - did the injury occur in the course and scope of employment. When the compensability of the injury has been denied/disputed the [Division] will not schedule a designated doctor to address the legal issue. The [Division] will only schedule a designated doctor to address the medical issue of whether there is an injury related to the claimed incident, and if so, the extent of the injury. A requestor asking for an examination to address the existence of an injury and extent of injury questions must use the [DWC-32] and should mark "Block C - To determine the extent of the employee's compensable injury" in Section V, and also mark "Block G - Other" and request the examination to "DETERMINE WHETHER THERE IS AN INJURY RESULTING FROM THE CLAIMED INCIDENT."

The report of the designated doctor indicating the existence of an injury, in and of itself, does not obligate the insurance carrier to initiate the payment of income or medical benefits.

In the Discussion section of the decision, the hearing officer states that “the acceptance or adjudication of a compensable injury is a threshold issue that must be addressed before appointment of a designated doctor to determine [MMI] and [IR], since the carrier may choose not to dispute either issue depending on the determination as to compensability.” Further, the hearing officer states that “[b]ased on the carrier’s arguments, a fair reading of H.B. 7 and the Division’s own memorandum providing guidance in this matter, I find that the Division did not properly appoint a designated doctor to render an opinion as to [MMI] and [IR] in a disputed claim that has not been adjudicated in the [c]laimant’s favor.” We disagree with the hearing officer’s rationale that the acceptance or adjudication of a compensable injury must be determined before a designated doctor is appointed.

The preamble to Rule 126.7 states that H.B. 7 amended Section 408.0041 by “expanding the scope of issues a designated doctor may be requested to address” and that Rule 126.7 was necessary to implement amendments in part to Section 408.0041 which established the requirements and processes for requesting and scheduling designated doctor examinations. (See 31 Tex. Reg. 6351, 2006). Further, the preamble states that Rule 126.7 “provides procedural direction and guidance regarding the request for, and selection of, a designated doctor consistent with the amendments to Labor Code § 408.0041.” (31 Tex. Reg. 6352, 2006). The memorandum dated June 18, 2007, which was addressed to “Workers’ Compensation System Participants” provides guidance for requesting designated doctor examinations pursuant to Section 408.0041 and Rule 126.7. As stated in the memorandum dated June 18, 2007, the Division will not schedule a designated doctor examination to address a legal issue (whether the injury occurred in the course and scope of employment),³ but rather will schedule a designated doctor examination to address a medical issue (whether the injury resulted from the claimed incident).

In the instant case, the hearing officer erred in determining that the Division appointed a designated doctor to determine the date of MMI and IR at a time when compensability had not been established, and concluding that Dr. X was not properly appointed as the designated doctor to determine MMI and IR. In evidence is a Division Dispute Resolution Information System (DRIS) note dated July 16, 2007, which states a DWC-32 was received by the Division’s Designated Doctor Scheduling. As previously mentioned, it is undisputed that the carrier filed a DWC-32 on July 16, 2007, requesting a designated doctor examination to address MMI, IR and extent of injury, in which the carrier lists the compensable injury areas to the neck and back on the attached treatment matrix. Based on the information provided on the DWC-32 by the carrier, the Division appointed Dr. X as the designated doctor to determine MMI, IR and extent of injury. In evidence is a DRIS note dated July 27, 2007, and an EES-14 letter dated the same date, appointing Dr. X as the designated doctor to address the disputed issues. In this case, the Division did not abuse its discretion in appointing Dr. X as the designated doctor to determine the disputed issues. Accordingly, we reverse the hearing officer’s determination that Dr. X was not properly appointed as the designated

³ Section 401.011(10) defines a “compensable injury” as an injury that arises out of and in the course and scope of employment for which compensation is payable.

doctor on July 27, 2007, to determine MMI and IR, and we render a new decision that Dr. X was properly appointed as the designated doctor on July 27, 2007, to determine MMI, IR and extent of injury.

PAYMENT OF IIBS

Designated doctors selected to determine, or give an opinion on MMI and IR, directly impact temporary income benefits (TIBs) and possibly IIBs. See Appeals Panel Decision (APD) 090135, decided April 6, 2009, and APD 090307, decided May 11, 2009. If an employee has disability under Section 408.101, pursuant to Section 408.102(a), TIBs continue until the employee reaches MMI. Section 408.121(a) provides that an employee's entitlement to IIBs 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(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. See also Rule 126.7(r) which provides that the insurance carrier shall pay any accrued income benefits, and shall begin or continue to pay weekly income benefits, in accordance with the designated doctor's report for the issue(s) in dispute, not later than five days after receipt of the report or five days after receipt of notice from the Division, whichever is earlier.

Regarding the payment of IIBs, the memorandum dated June 18, 2007, correctly states that "[t]he report of the designated doctor indicating the existence of an injury, in and of itself, does not obligate the insurance carrier to initiate the payment of income or medical benefits." However, under the facts of this case, the hearing officer determined that the claimant sustained a compensable injury on _____, and we have affirmed that determination. Further, we have rendered a new decision that Dr. X was properly appointed as the designated doctor to determine MMI and IR, and that the parties stipulated that Dr. X determined that the claimant reached statutory MMI on February 23, 2007, with a 15% IR, therefore the carrier is liable for payment of benefits in accordance with the filing date of this decision, the Texas Workers' Compensation Act, and the Commissioner's Rules.

Accordingly, we reverse the hearing officer's determination that the carrier is not liable for the immediate payment of IIBs according to Section 408.0041(f) based on the designated doctor's determination that the claimant reached statutory MMI on February 23, 2007, with a 15% IR, and we render a new decision that the carrier is liable for payment of IIBs according to Section 408.0041(f) based on the designated doctor's determination that the claimant reached statutory MMI on February 23, 2007, with a 15% IR.

SUMMARY

We affirm the hearing officer's determination that the claimant sustained a compensable injury on _____, and had disability beginning on February 24, 2005, and continuing through the date of the CCH, but at no other times.

We reverse the hearing officer's determination that Dr. X was not properly appointed as the designated doctor on July 27, 2007, to determine MMI and IR, and we render a new decision that Dr. X was properly appointed as the designated doctor on July 27, 2007, to determine MMI, IR and extent of injury.

We reverse the hearing officer's determination that the carrier is not liable for the immediate payment of IIBs according to Section 408.0041(f) based on the designated doctor's determination that the claimant reached statutory MMI on February 23, 2007, with a 15% IR, and we render a new decision that the carrier is liable for payment of IIBs according to Section 408.0041(f) based on the designated doctor's determination that the claimant reached statutory MMI on February 23, 2007, with a 15% IR.

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

**CT CORPORATION SYSTEM
350 NORTH ST. PAUL STREET
DALLAS, TEXAS 75201.**

Veronica L. Ruberto
Appeals Judge

CONCUR:

Cynthia A. Brown
Appeals Judge

Thomas A. Knapp
Appeals Judge