APPEAL NO. 101676-s
FILED JANUARY 14, 2011

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 September 14 and October 14, 2010. The hearing officer resolved the disputed issues by deciding that: (1) the appellant/cross-respondent's (claimant) date of maximum medical improvement (MMI) is August 5, 2009; (2) the claimant's impairment rating (IR) is 18%; (3) (Dr. D) was the properly appointed designated doctor for the issues of MMI and IR; (4) (Dr. M) was the properly appointed designated doctor for the issue of extent of injury to anxiety and depression; and (5) the respondent/cross-appellant (carrier) has not waived the right to contest the compensability of cervical intervertebral disc displacement without myelopathy; cervical intervertebral disc degeneration; facet and uncovertebral anthropathy bilaterally at C3-4; mild spondylosis; facet and uncovertebral hypertrophy bilaterally at C4-5; disc narrowing spondylosis; facet and uncovertebral hypertrophy at C5-6; mild degenerative disc narrowing; uncovertebral and facet hypertrophy bilaterally at C6-7; cervical radicular syndrome; thoracic sprain/strain; mild spondylosis in the anterolateral margins of T5-12; lumbar sprain/strain; brachial neuritis/radiculitis; right knee contusion; injury to the medial collateral ligament of the right knee; mild narrowing of the medial tibial femoral joint compartment with early developing periarticular hypertrophy of the medial compartment; edema within the medial aspect of the patella with associated subtle increased signal surrounding the medial retinaculum; and minimal abnormal signal surrounding the peripheral aspect of the lateral femoral condyle likely representing transient lateral patellar dislocation (hereinafter collectively referred to as conditions alleged to be waived) by not timely contesting the diagnoses in accordance with the Texas Department of Insurance, Division of Workers' Compensation (Division) 28 TEX. ADMIN. CODE § 124.3 (Rule 124.3).

The claimant appealed, disputing the hearing officer's determinations that the carrier did not waive the right to contest the conditions alleged to be waived by not timely contesting the diagnoses in accordance with Division Rule 124.3. The claimant additionally contended that Dr. M was the properly appointed designated doctor. The carrier responded, urging affirmance of the issues disputed by the claimant.

The carrier cross-appealed, disputing the hearing officer's determinations of MMI and IR. Additionally, the carrier on appeal contended there is no proper reason Dr. M should have been appointed as a second designated doctor. The claimant responded, urging affirmance of the hearing officer's MMI and IR determinations.

DECISION

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

The claimant testified that he was injured on _____, when he was involved in a motor vehicle accident. A prior CCH was held on May 11, 2009, to determine two disputed issues regarding the extent of the claimant's injury and carrier waiver of specific conditions pursuant to Sections 409.021 and 409.022. In the May 11, 2009, CCH the hearing officer determined that the compensable injury extended to the same conditions alleged to be waived in the case currently at issue in addition to cervical strain; left elbow contusion; a right knee sprain/strain; aggravation of patellar derangement of the right knee; and aggravation and exacerbation of osteoarthritis of the right knee because the carrier did not timely contest those diagnoses in accordance with Sections 409.021 and 409.022. We note that both the May 11, 2009, CCH and its appeal were completed prior to the Texas Supreme Court's decision in State Office of Risk Mgmt. v. Lawton, 295 S.W.3d 646 (Tex. 2009). The carrier noted in its appeal that the issues of 60-day waiver and extent of injury were appealed by the carrier to district court and that summary judgment is currently pending. However, Section 410.205(b) provides that the decision of the Appeals Panel regarding benefits is binding during the pendency of an appeal under Subchapter F or G (relating to Judicial Review). In Lopez v. Texas Workers' Comp. Ins. Fund, 11 S.W.3d 490 (Tex. App.–Austin 2000, pet. denied), the court held that Section 410.205(b) clearly provides that the ultimate administrative ruling—whether granting or denying benefits—remains in effect until overturned by a final and enforceable judicial decision.

WAIVER PURSUANT TO RULE 124.3

At the CCH, the claimant contended the carrier waived the conditions alleged to be waived, not based on the 60-day waiver which were the subject of the prior CCH, but rather because the carrier did not dispute the conditions at issue within 45 days of receiving the medical bill for the conditions at issue based on Rule 124.3(e). Even if the claimant were to establish that the carrier failed to file a notice of dispute of extent of injury no later than the earlier of the date the carrier denied the medical bill, or the due date for the carrier to pay or deny the bill as provided in Chapter 133, as is required in Rule 124.3(e), such failure by the carrier would not result in the carrier's waiver of the ability to dispute the underlying conditions that were treated in an extent of injury dispute. Rule 124.3(e) specifically states that Section 409.021 and Rule 124.3(a) do not apply to disputes of extent of injury. Such a failure by the carrier may result in a waiver of the right to dispute a particular medical bill under Rule 133.240. The hearing officer's determination that the carrier has not waived the right to contest the compensability of conditions alleged to be waived by not timely contesting the diagnoses in accordance with Division Rule 124.3 is supported by sufficient evidence and is affirmed.

PROPERLY APPOINTED DESIGNATED DOCTOR

Dr. D was initially appointed as the designated doctor to examine the claimant for the purposes of determining MMI, IR, ability of the claimant to return to work (RTW), extent of the compensable injury, and whether the claimant's disability is a direct result of the work-related injury. Dr. D examined the claimant and on at least two occasions

determined that the claimant had not yet reached MMI. Dr. D subsequently examined the claimant on October 29, 2008, and certified that the claimant reached MMI on that date with an IR of 0%, 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. D noted that the "musculoskeletal examination of the spine is limited to the cervical area." On June 9, 2009, Dr. D responded to a letter of clarification sent to her. In her response, Dr. D acknowledged that it was determined that the compensable injury extended to the conditions at issue in the May 11, 2009, CCH. Dr. D stated she reviewed the medical records available in the chart and her prior report dated October 29, 2008, but when taking the compensable diagnoses into consideration, they did not warrant a change to her prior assessment.

On September 3, 2009, a Request for Designated Doctor (DWC-32) was filed with the Division by the claimant's attorney, requesting a designated doctor examination to determine the claimant's MMI, IR, and extent of injury noting depression and anxiety were in dispute. A Dispute Resolution Information System (DRIS) note dated September 8, 2009, noted the previous designated doctor, Dr. D, does not have credentials appropriate to the issue in question. Dr. M was appointed as the designated doctor for purposes of MMI, IR, and extent of injury on September 11, 2009.

In a narrative report dated October 28, 2009, Dr. M stated he initially examined the claimant three weeks earlier without medical records but the claimant returned on October 28, 2009, with medical records. Dr. M noted that no records support any psychological involvement of any kind. In his narrative report, Dr. M noted that the claimant reached statutory MMI on September 17, 2009, but his Report of Medical Evaluation (DWC-69) certified that the claimant reached clinical MMI on October 28, 2009. Dr. M certified that the claimant had a 7% IR using the AMA Guides, assessing 0% impairment for the claimant's cervical spine; 5% impairment for the lumbar spine; 1% impairment for loss of range of motion (ROM) for the left elbow; and 1% impairment for loss of ROM for the right knee.

The hearing officer found that the Division's reason for choosing a second designated doctor for extent of injury to anxiety and depression was proper but that the Division's reason for choosing a second designated doctor for MMI and IR was not proper because Dr. D had already addressed the issues of MMI and IR and was qualified to do so at that time.

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 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 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.

In Appeals Panel Decision (APD) 081831, decided January 29, 2009, the evidence established that a DRIS entry specifically stated that the first designated doctor no longer met the treatment requirements, necessitating the appointment of a second designated doctor, clearly indicating the appointment was made with reference to guiding rules or principles. There is no evidence that at the time Dr. D was appointed as designated doctor for the issues of MMI and IR, such appointment was improper. However, when the claimant's attorney subsequently requested a designated doctor examination for the issues of MMI, IR and extent of injury to include depression and anxiety, a DRIS note in evidence stated Dr. D does not have credentials appropriate to the issue in question, clearly indicating that the appointment of Dr. M was made with reference to guiding rules or principles. Both Dr. D and Dr. M, at the time of their respective appointments, were properly appointed as designated doctor to resolve the issues asked of them. That brings up the legal question of which doctor is entitled to presumptive weight on which issues. We hold that there can be only one designated doctor given presumptive weight for each issue in dispute and the last properly appointed designated doctor on any given issue shall be given presumptive weight on that issue. Thus, for every issue Dr. M was appointed to address that overlaps with Dr. D's appointment, Dr. M's opinion shall be given presumptive weight. Dr. D's opinion on any issues that do not overlap with the issues Dr. M was appointed for have presumptive weight. Dr. D's opinions on the overlapping issues are still valid and should be considered, but such opinions do not have presumptive weight.

Accordingly, we reform the hearing officer's determination that Dr. D was the properly appointed designated doctor for the issues of MMI and IR to state both Dr. D and Dr. M, at the time of their respective appointments, were properly appointed as designated doctor to resolve the issues asked of them.

We affirm the hearing officer's determination that Dr. M was the properly appointed designated doctor for the issue of extent of injury to anxiety and depression.

MMI AND IR

Section 401.011(30)(A) defines MMI as "the earliest date after which, based on reasonable medical probability, further material recovery from or lasting improvement to an injury can no longer reasonably be anticipated." Section 408.1225(c) provides that the report of the designated doctor has presumptive weight, and the Division shall base its determination of whether the employee has reached MMI on the report of the

designated doctor unless the preponderance of the other medical evidence is to the contrary. Section 408.125(c) provides that the report of the designated doctor shall have presumptive weight, and the Division shall base the IR on that report unless the preponderance of the other medical evidence is to the contrary, and that, if the preponderance of the medical evidence contradicts the IR contained in the report of the designated doctor chosen by the Division, the Division shall adopt the IR of one of the other doctors.

As previously noted, there was a discrepancy between the narrative report and DWC-69 of Dr. M. The parties did not stipulate to the date of statutory MMI and the hearing officer did not make a specific finding on what the date of statutory MMI is. The hearing officer noted in the Background Information portion of his decision and order that "[a]ccording to the claimant, the correct statutory MMI date should be September 17, 2009." The hearing officer then noted that the carrier did not deny that this was the correct statutory date. However, a review of the record indicates that the claimant asserted that the statutory MMI date was September 21, 2009, and that the claimant's benefits began to accrue on September 25, 2007. No evidence was presented regarding these assertions. The carrier stated that it believed the date of statutory MMI was September 17, 2009.

The hearing officer found that Dr. D, the first designated doctor, did not examine the claimant's thoracic and lumbar spine and therefore her MMI date and IR cannot be adopted. Additionally, the hearing officer found that the MMI date chosen by Dr. M is past the date of statutory MMI and therefore neither his MMI date nor his IR can be adopted.

The hearing officer found that the claimant's date of MMI is August 5, 2009, with an 18% IR as certified by the claimant's treating doctor, (Dr. Dg). Dr. Dg certified that the claimant reached MMI on August 5, 2009, with an 18% IR using the AMA Guides. Dr. Dg based his IR on 5% impairment for the cervical spine; 5% impairment for the lumbar spine; 3% impairment for loss of ROM for the right knee; and 5% for the left upper extremity impairment. Rule 130.1(c)(3) provides, in part, that the doctor assigning the IR shall: identify objective clinical or laboratory findings of permanent impairment for the current compensable injury and document specific laboratory or clinical findings of an impairment. While Dr. Dg noted that the claimant had a ROM deficit, his narrative report did not include measurements of the ROM deficits performed in his physical examination. Therefore, his certification of IR cannot be adopted. *See* APD 100394, decided June 3, 2010.

Accordingly, we reverse the hearing officer's determination that the claimant reached MMI on August 5, 2009, with an 18% IR and remand the issues of MMI and IR to the hearing officer for further actions consistent with this decision. Further, as previously noted, Dr. M's narrative report stated the MMI date was September 17, 2009, while the accompanying DWC-69 listed the MMI date as October 28, 2009.

REMAND INSTRUCTIONS

On remand the hearing officer should allow the parties an opportunity to stipulate to the date of statutory MMI. If the parties are unable to stipulate, the hearing officer should take additional evidence to determine the date of statutory MMI. The hearing officer is to determine if Dr. M, the designated doctor previously appointed in this case is still qualified and available to be the designated doctor, and if so, request that the designated doctor examine the claimant and certify an MMI date not later than the statutory date of MMI and assign an IR on a signed DWC-69 and narrative in accordance with Rule 130.1. If the designated doctor is no longer qualified or available to serve as the designated doctor then another designated doctor is to be appointed pursuant to Rule 126.7(h) to determine MMI and IR for the compensable injury. The parties are to be provided with the hearing officer's letter to the designated doctor and the designated doctor's response and allowed an opportunity to present evidence and respond.

SUMMARY

We affirm the hearing officer's determination that the carrier has not waived the right to contest the compensability of conditions alleged to be waived by not timely contesting the diagnoses in accordance with Division Rule 124.3.

We affirm the hearing officer's determination that Dr. M was the properly appointed designated doctor for the issue of extent of injury to anxiety and depression.

We reform the hearing officer's determination that Dr. D was the properly appointed designated doctor for the issues of MMI and IR to read that at the time of their respective appointments, both Dr. D and Dr. M were properly appointed designated doctors for the issues of MMI and IR.

We reverse the hearing officer's determination that the claimant reached MMI on August 5, 2009, with an 18% IR and remand the issues of MMI and IR to the hearing officer.

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* APD 060721, decided June 12, 2006.

The true corporate name of the insurance carrier is **INDEMNITY INSURANCE COMPANY OF NORTH AMERICA** and the name and address of its registered agent for service of process is

ROBIN M. MOUNTAIN
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IRVING, TEXAS 75063.

_____
Margaret L. Turner
Appeals Judge

CONCUR:

_____
Cynthia A. Brown
Appeals Judge

_____
Thomas A. Knapp
Appeals Judge