APPEAL NO. 171154-s
FILED JULY 17, 2017

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 10, 2017, in (city), Texas, with (hearing officer) presiding as hearing officer. The hearing officer resolved the disputed issues by deciding that: (1) (Dr. O) was not appointed as the designated doctor in accordance with Section 408.0041 and 28 TEX. ADMIN. CODE § 127.130 (Rule 127.130); (2) the appellant (claimant) reached maximum medical improvement (MMI) on March 1, 2016; and (3) the claimant's impairment rating (IR) is five percent.

The claimant appealed, disputing the hearing officer's determinations of MMI and IR as well as the hearing officer's determination that Dr. O was not appointed in accordance with Section 408.0041 and Rule 127.130. The respondent (carrier) responded, urging affirmance of the disputed determinations.

DECISION

Reversed and rendered in part and reversed and remanded in part.

The parties stipulated in part that: (1) the claimant sustained a compensable injury on (date of injury); (2) the carrier has accepted a head injury, bilateral shoulder contusions, right shoulder rotator cuff tear, right shoulder labrum tear, and a right bicep injury as the compensable injury; (3) Dr. O was appointed as designated doctor on the issues of MMI and IR; and (4) the statutory MMI date is November 10, 2016. The claimant testified that he was injured when he fell at work.

APPOINTMENT OF DESIGNATED DOCTOR

Rule 127.130(b)(7) provides, in part, that for examinations performed on or after January 1, 2013, a designated doctor must be a licensed medical doctor or doctor of osteopathy to perform an examination of an injured employee who has tendon lacerations. Dr. O was appointed as designated doctor to examine the claimant for purposes of MMI and IR. It is undisputed that Dr. O is a chiropractor. The carrier contends that Dr. O was improperly appointed to examine the claimant to give an opinion of MMI and IR because the claimant's injuries included a tendon laceration. The hearing officer found that the claimant's injuries include tendon lacerations or tears, which injuries require a medical doctor or doctor of osteopathy to examine or treat them. However, Rule 127.130(b) only requires a medical doctor or doctor of osteopathy for tendon lacerations, not tears. Rule 127.130(b) does not prohibit a chiropractor from being appointed as a designated doctor to examine a claimant who has suffered a

tendon tear. No medical records in evidence reflect that the claimant suffered a tendon laceration.

The carrier argued based on dictionary definitions admitted into evidence that a laceration is a tear. We disagree. The dictionary definitions admitted into evidence contain conflicting descriptions of the meaning of laceration. For example, one of the definitions describes a laceration as a torn or jagged wound, or an accidental cut wound while another definition describes a laceration as a torn or jagged wound caused by blunt trauma, incorrectly used when describing a cut. We note that the MDGuidelines (MDG), the current edition of the Medical Disability Advisor, Workplace Guidelines for Disability Duration, excluding all sections and tables relating to rehabilitation published by the Reed Group, Ltd. referenced in Rule 137.10, defines laceration, in part, as a disruption of the skin, commonly called a cut. The MDG goes on to state that lacerations can be shallow cuts or deep gashes that penetrate through the muscle layer to internal organs and bone.

An order of administrative body is presumed to be valid and the burden of producing evidence establishing the invalidity of the administrative action is clearly on the party challenging the action. *Herron v. City of Abilene*, 528 S.W.2d 349 (Tex. Civ. App.-Eastland 1975, writ ref'd). It is undisputed, and the hearing officer noted in her decision that the carrier in this case raised the issue that the Texas Department of Insurance, Division of Workers' Compensation (Division) should not have appointed Dr. O as designated doctor on the issues of MMI and IR. The Division's appointment of Dr. O for the issues of MMI and IR is presumed to be valid, and the carrier had the burden of proof to establish that the Division's appointment of Dr. O was invalid.

The carrier did not meet its burden of proof to establish that the Division should not have appointed Dr. O for the issues of MMI and IR. Therefore, the hearing officer's determination that Dr. O was not appointed as the designated doctor in accordance with Section 408.0041 and Rule 127.130, for the issues of MMI and IR, is so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust. Accordingly, we reverse the hearing officer's determination, and we render a new decision that Dr. O was appointed as the designated doctor in accordance with Section 408.0041 and Rule 127.130.

MMI/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. Rule 130.1(c)(3) provides, in pertinent part, that the assignment of an IR shall be based on the injured employee's condition as of the MMI date considering the medical record and the certifying examination.

Given that the hearing officer's determination that Dr. O was not appointed as the designated doctor in accordance with Section 408.0041 and Rule 127.130 is reversed and a new decision rendered that Dr. O was appointed as the designated doctor in accordance with Section 408.0041 and Rule 127.130, we reverse the hearing officer's determinations that the claimant reached MMI on March 1, 2016, and the claimant's IR is five percent and remand the issues of MMI and IR to the hearing officer for further action consistent with this decision.

SUMMARY

We reverse the hearing officer's determination that Dr. O was not appointed as designated doctor in accordance with Section 408.0041 and Rule 127.130, and render a new decision that Dr. O was appointed as designated doctor in accordance with Section 408.0041 and Rule 127.130.

We reverse the hearing officer's determination that the claimant reached MMI on March 1, 2016, and remand the issue of MMI to the hearing officer for further action consistent with this decision.

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

REMAND INSTRUCTIONS

The certification of MMI/IR should rate the entire compensable injury. The certification of MMI should be 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 considering the physical examination and the claimant's medical records. The parties stipulated that the statutory MMI date is November 10, 2016. The MMI date can be no later than the statutory date of MMI. The assignment of an IR is required to be based on the claimant's condition as of the MMI

date considering the medical records and the certifying examination and according to the rating criteria of 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), and the provisions of Rule 130.1(c)(3). The hearing officer is to give presumptive weight to the certification of MMI/IR from Dr. O and make a determination of MMI and IR supported by the evidence and 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. *See* Appeals Panel Decision 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 J. GERGASKO, PRESIDENT
6210 HIGHWAY 290 EAST
AUSTIN, TEXAS 78723.

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Margaret L. Turner
Appeals Judge

CONCUR:

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K. Eugene Kraft
Appeals Judge

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Carisa Space-Beam
Appeals Judge