APPEAL NO. 960454
FILED APRIL 17, 1996

This appeal is brought 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 February 15, 1996. Addressing the single disputed issue, the hearing officer determined that the Texas Workers' Compensation Commission (Commission) improperly appointed a second designated doctor in this case. The appellant (carrier herein) appeals, arguing that the hearing officer erred by applying an improper legal standard to the facts and issue in dispute. The respondent (claimant herein) replies that the decision and order of the hearing officer are correct and should be affirmed.

DECISION

Affirmed.

The claimant sustained a compensable low back injury on _____. On June 30, 1994, Dr. G, a carrier selected doctor, completed a Report of Medical Evaluation (TWCC-69) in which he certified the claimant reached maximum medical improvement (MMI) on that date and assigned a zero percent impairment rating (IR). The claimant apparently disputed this certification and the Commission selected Dr. C to be designated doctor to determine whether the claimant had reached MMI and, if so, what was his IR. On October 28, 1994, Dr. C examined the claimant for these purposes. On December 13, 1994, Dr. C completed a TWCC-69 in which he concluded that the claimant was not at MMI as of the date of the examination and agreed with the treatment plan proposed by Dr. M, the claimant's treating doctor. On May 16, 1995, Dr. G completed a second TWCC-69 in which he changed the date of MMI to the examination date and this time assigned a seven percent IR.

By letter of July 28, 1995, the Commission advised the claimant that it had selected Dr. S as designated doctor to determine both the date of MMI and to assign an IR. Although the attorneys for the parties speculated about how this letter came to be issued, neither party submitted any evidence to answer this question. The claimant testified that when he received the letter, he called the Commission to protest being examined by another designated doctor, and, according to the claimant, was told to report for the examination or be subject to a fine. Dr. S examined the claimant on August 14, 1995. In a TWCC-69, he certified that the claimant reached MMI on this date and assigned a seven percent IR.

The hearing officer concluded that the Commission "improperly designated [Dr. S] as the designated doctor." In support of this conclusion, he made a specific finding of fact that Dr. C "was not unavailable nor did he refuse to cooperate" with the Commission at the time Dr. S was appointed. In his discussion of the evidence, the hearing officer wrote "I find insufficient evidence to show a substantial basis why [Dr. S], the second designated doctor, was appointed designated doctor after the first designated doctor, [Dr. C] was appointed."

In its appeal of this determination, the carrier contends that the proper legal standard for review of the selection of a second designated doctor is abuse of discretion and that the hearing officer clearly applied the wrong standard. The appointment of a second designated doctor should be done only in those rare cases where a designated doctor has demonstrated an inability or unwillingness to comply with the Guides to the Evaluation of Permanent Impairment, 3rd Edition, 2nd printing, February 1989, published by the American Medical Association (AMA Guides) or has otherwise compromised his or her impartiality. *See* Texas Workers' Compensation Commission Appeal No. 93045, decided March 3, 1995.

The Appeals Panel has reviewed the propriety of appointing a second designated doctor in numerous cases. For example, in Texas Workers' Compensation Commission Appeal No. 93852, decided November 4, 1993, the Appeals Panel affirmed the hearing officer's decision to direct the selection of a second designated doctor. There we wrote:

> An anticipated delay of a couple of months in scheduling the necessary [re]examination by the originally selected designated doctor could reasonably be expected, and we find no abuse of discretion by the hearing officer." [Emphasis added.]

In Texas Workers' Compensation Commission Appeal No. 941729, decided February 10, 1995, the Appeals Panel reversed the decision of a hearing officer to appoint a second designated doctor because there was no evidence of the first designated doctor's failure to cooperate with the Commission. In reaching this conclusion, the Appeals Panel wrote:

> We believe the hearing officer acted in error, and abused his discretion by appointing a second designated doctor in this case. [Emphasis added.]

In Texas Workers' Compensation Commission Appeal No. 950289, decided April 11, 1995, the original designated doctor refused to reexamine the claimant and the hearing officer directed the appointment of a second designated doctor. The Appeals Panel affirmed, writing:

> we cannot say that the hearing officer abused his discretion by appointing [a second designated doctor]. [Emphasis added.]

In Texas Workers' Compensation Commission Appeal No. 952195, decided February 12, 1996, the hearing officer was unsuccessful in repeated attempts to clarify the report of the first designated doctor. On appeal, we wrote:

> Nor can we agree the hearing officer abused his discretion in appointing a second designated doctor after repeated attempts to obtain a response [from the first designated doctor] were unsuccessful. [Emphasis added.]

Finally, in Texas Workers' Compensation Commission Appeal No. 960121, decided March 4, 1996, the hearing officer afforded statutory presumptive weight to the report of a second designated doctor because the first designated doctor declined to examine the claimant for a third time. The Appeals Panel affirmed and, in doing so, wrote:

> claimant contends that the relevant standard of review is 'abuse of authority [sic], not substantial evidence rule.' We will review the hearing officer's factual determinations on the basis of whether they are so against the great weight and preponderance of the evidence as to be manifestly wrong or unjust. [Citations omitted.]

An abuse of discretion occurs when a decision is made without reference to any guiding rules or principles. *See* Morrow v. H.E.B., 714 S.W.2d 297 (Tex. 1986); *See also* Texas Workers' Compensation Commission Appeal No. 931034, decided December 27, 1993.

We agree with the carrier that an abuse of discretion is the proper standard to use in reviewing a decision to appoint a second designated doctor. Although the hearing officer does not appear to have applied this standard, the inquiry into whether this constituted reversible error does not end there. As noted above, the Appeals Panel has consistently stated that the relevant guiding rules in determining whether a second designated doctor is appropriate are whether the first designated doctor is unable or unwilling to comply with the AMA Guides and directives of the Commission. Such occasions are rare. In the case we now consider, the hearing officer made an express finding of fact that Dr. C, the first designated doctor "was not unavailable, nor did he refuse to cooperate, as Designated Doctor, at the time [Dr. S] was appointed [the second] Designated Doctor." Consistent with our decision in Appeal No. 960121, *supra*, we review these factual determinations on a sufficiency of the evidence basis. At the CCH there was no explanation of why Dr. S came to be appointed a second designated doctor, nor was there any evidence that Dr. C refused to reexamine the claimant or correctly apply the AMA Guides. Indeed, the carrier does not expressly appeal these findings. As a result, we find the evidence clearly sufficient to support these factual determinations and affirm them. Given these factual findings, the discretion to appoint a second designated doctor was extremely circumscribed. While not expressly applying an abuse of discretion standard, the hearing officer looked to a "substantial basis" for Dr. S's designation. We conclude that this approach was consistent with an abuse of discretion standard and with the applicable rule that a second designated doctor is proper only in rare circumstances where the first designated doctor is unable or unwilling to act as such and that no useful purpose would be served by a remand. Having reviewed the record in this case, and applying the applicable abuse of discretion standard, we find that the hearing officer correctly concluded that the second designated doctor was improperly selected in this case.

The carrier, as an independent basis for this appeal, argues that there was, in effect, no designated doctor at the time Dr. S was selected because Dr. C fulfilled his

role as designated doctor and ceased functioning as such when he determined the claimant was not yet at MMI. Thus, the carrier would argue that after the claimant underwent therapy as recommended by Dr. C and the treating doctor, there arose a "new issue" of MMI and IR for which the appointment of a new designated doctor was appropriate. In support of this statement, the carrier writes in its appeal that the "[city] office of the [Commission] adopted this interpretation and applied it across the board to all cases." There was not even a scintilla of evidence to this effect produced at the CCH, nor was other authority cited by the carrier for this proposition. The claimant testified that he disagreed with the need to appoint a second designated doctor. Under these circumstances, we too disagree that a new issue of MMI arose in this case. There was obviously a continuing dispute between the parties about the date of MMI and IR. Dr. C's opinion that MMI had not arrived at the time of his examination hardly resolves the issue, but only delays a determination. To adopt the carrier's argument in this case ignores the reality of the issue and would lead to unnecessary and wasteful duplication in the number of designated doctors required to conduct the business of the Commission. *See* Texas Workers' Compensation Commission Appeal No. 951854, decided December 20, 1995.

The decision and order of the hearing officer are affirmed.

Alan C. Ernst
Appeals Judge

CONCUR:

Tommy W. Lueders
Appeals Judge

Elaine M. Chaney
Appeals Judge