APPEAL NO. 980216
FILED APRIL 16, 1998

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 January 2, 1998, in (City), Texas, with (hearing officer) presiding as hearing officer. She determined that the Texas Workers' Compensation Commission (Commission) properly appointed (Dr. M) as designated doctor in this case; that Dr. M's report was entitled to presumptive weight; that the claimant reached maximum medical improvement (MMI) on January 30, 1996, with a 19% impairment rating (IR) as certified by Dr. M; and that the claimant was entitled to supplemental income benefits (SIBS) for the first, second, and third quarters. The appellant (self-insured) appeals these determinations, claiming prejudicial error in the admission and consideration of evidence and that the decision is otherwise not supported by sufficient evidence. The appeals file contains no response from the respondent (claimant), who testified by telephone at the CCH.

DECISION

We reverse and remand.

The claimant sustained a compensable low back injury on (date of injury), which was diagnosed by (Dr. R), the initial treating doctor, on April 18, 1994, as mild degeneration at L5-S1 with minimal bulging. On June 23, 1994, the claimant returned to England, where he continues to permanently reside. On October 13, 1997, (Dr. C), the current treating doctor in England, diagnosed disc degeneration and bulging at L5-S1 causing nerve irritation and apophysial joint dysarthrosis.

By letter of May 27, 1997, the Commission appointed Dr. M, a British chiropractor living and practicing in England, designated doctor in this case to determine IR only.[1] All the claimant's treating doctors, both in Texas and in England, were medical doctors. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.6(b)(4) (Rule 130.6(b)(4)) provides that a designated doctor shall "to the extent possible, be in the same discipline and licensed by the same board of examiners as the employee's doctor of choice." This rule presents obvious complications when applied in the context of foreign doctors. The hearing officer determined that the "Commission properly designated a doctor [sic] in accordance with Rule 130.6." Conclusion of Law 5. This determination was based on findings that the Commission had attempted to appoint a (Dr. L), a medical doctor, as designated doctor, but Dr. L refused to provide a Report of Medical Evaluation (TWCC-69). As a consequence, the Commission then appointed Dr. M.

[1] It was not explained at the CCH why Dr. M was appointed to determine IR only, when MMI was in issue. Despite the limited nature of this appointment, the hearing officer gave presumptive weight to Dr. M's determination of MMI, which, he stated, without apparent disagreement by either party, was the same as the date of statutory MMI pursuant to Section 401.011(30)(B).

In order to resolve the issue of whether Dr. M was properly appointed as designated doctor in compliance with Rule 130.6(b)(4), the hearing officer announced that she would take official notice of the Dispute Resolution Information System (DRIS) notes. Neither party objected to this at the hearing. Now, on appeal, the self-insured objects to her having done so on the grounds that she considered evidence "outside the record" and that the "DRIS notes were never mentioned during the [CCH], were not offered as evidence, nor were they ever exchanged." We conclude, based on our review of the official tape transcript, that the self-insured is in error in stating that DRIS notes were never mentioned by the hearing officer. Moreover, we decline to entertain an appeal of the action of the hearing officer in considering these notes when, as here, the self-insured did not object at the hearing to this announced procedure.

Nonetheless, we are confronted with a more basic problem. Section 410.203(a)(1) provides that the Appeals Panel is to consider the record developed at the CCH. The hearing officer stated in her decision and order that official notice was taken of "DRIS entries." These entries were not attached to the record furnished to us in connection with this appeal. Inquiries have disclosed that there are some 148 DRIS entries in connection with this claim. Without undertaking a detailed, burdensome review of these entries, we have no way of knowing what matters in the "DRIS notes" the hearing officer considered in concluding that the Commission complied with Rule 130.6(b)(4). Even were we to undertake such a review at this level, we could not be sure that the DRIS entries we reviewed were actually considered by the hearing officer. For this reason, we reverse the determination of the hearing officer that the Commission complied with Rule 130.6(b)(4) in the appointment of Dr. M as designated doctor and remand this issue for further consideration and construction of a complete record. On remand, the hearing officer should identify the particular DRIS entries she considered in reaching her decision on this issue and provide the parties the opportunity to comment on this evidence before she issues a new decision and order. *See* Texas Workers' Compensation Commission Appeal No. 93903, decided November 29, 1993. Copies of these entries must be included in the record of the decision on remand. On remand, the hearing officer should also identify from the evidence what factors she considered in determining that the Commission did or did not comply with the rule to the extent possible before selecting a chiropractor as designated doctor. Morrow v. H.E.B., Inc., 714 S.W.2d 297 (Tex. 1986). In this regard, we question whether the refusal, of one doctor to be designated doctor can support a conclusion that the Commission has complied to the extent possible and may then immediately appoint a designated doctor of a discipline different from all the prior treating doctors.

Because the other disputed issues essentially depend for their resolution on the status of Dr. M as a properly designated doctor, we also reverse the determinations of MMI and IR and the award of SIBS for the first three quarters and remand these issues for further consideration in light of the decision on remand regarding compliance with Rule 130.6(b)(4).

Finally, we find no merit in the objection of the self-insured to a series of written statements from the claimant and one from his wife. The strict rules of evidence do not

apply in the conduct of CCHs. Section 410.165(a). The hearing officer could give these statements the weight she deemed appropriate, and was able, we believe, to distinguish in the statements what was and was not relevant. We would, however, question the need to use such statements from the claimant when the claimant himself testified at length. Under these circumstances, the statements to the extent relevant were largely duplicative of the testimony and had no practical effect but to add bulk to the record of the CCH.

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 Texas Workers' Compensation Commission's Division of Hearings, pursuant to Section 410.202. *See* Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

Alan C. Ernst
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Tommy W. Lueders
Appeals Judge