APPEAL NO. 000317

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 November 4, 1999, with the record closing on January 14, 2000, in (City 1), Texas. With respect to the issues before him, the hearing officer determined that a "valid designated doctor's opinion has never been rendered" in this case; that the report of the first designated doctor, Dr. W is "invalid since filed a year late and after appointment of a second designated doctor"; that Dr. V was improperly appointed by the Texas Workers' Compensation Commission (Commission) to serve as the second designated doctor; that the report of Dr. V is "against the great weight of the other medical evidence and invalid"; and that the issue of supplemental income benefits (SIBS) entitlement "is not ripe pending assignment of an impairment rating [IR]." The hearing officer determined that he could not make a determination of whether benefits are due or make an award of benefits; thus, he dismissed the issues in the case, without prejudice and returned the file to the field office "to appoint a pulmonologist to address the issue of whole body impairment and to seek an opinion as to whether the impairment is the result of the compensable injury, a one time chemical exposure." In its appeal, the appellant (carrier) argues that the hearing officer erred in determining that the report of the first designated doctor, Dr. W, was "invalid" and asks that we reverse the hearing officer's decision and render a new decision that the respondent's (claimant) IR is five percent, as certified by Dr. W and that the claimant is not entitled to SIBS. The appeals file does not contain a response to the carrier's appeal from the claimant. In addition, the claimant did not appeal the hearing officer's determinations that she reached maximum medical improvement (MMI) on February 13, 1996; that Dr. V was improperly appointed as a Commission-designated doctor; and that her report is against the great weight of the other medical evidence and invalid.

DECISION

Affirmed.

It is undisputed that the claimant sustained a compensable injury on _____, when she was exposed to sodium thiosulfate and sodium hydroxide in the course and scope of her employment. The claimant was treated by Dr. JS, who apparently certified that she reached MMI on February 13, 1996, with an IR of 80%. The carrier disputed Dr. JS's IR and Dr. W was appointed by the Commission to serve as the designated doctor to address the issue of IR only. Dr. W's office is located in (City 2), Texas, the city where the claimant's claim was initially assigned. In a narrative report dated October 30, 1997, Dr. W notes that he examined the claimant on October 28, 1997. In the diagnosis section of his report, Dr. W states:

> Apparent chemical pneumonitis following reported exposure to sodium thiosulfate and sodium hydroxide. The claimant will be referred to a

> pulmonologist . . . for further pulmonary evaluation and assistance in determination of [IR] based on the [Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association (AMA Guides)]. The patient has previously been determined to be at MMI.
>
> Please see the TWCC [Report of Medical Evaluation (TWCC-69)] for the statement of the patient's [MMI] and [IR].

The carrier introduced the Commission Dispute Resolution Information System (DRIS) notes, which demonstrate the sequence of events after Dr. W made the determination to refer the claimant to a pulmonologist. A DRIS note dated January 14, 1998, reflects that Dr. W referred the claimant to Dr. S and that Dr. S would not schedule an appointment for the claimant "until he is assured that he will get paid." That note also states that the Commission employee making the entry would contact the adjuster assigned to the claimant's claim to discuss the matter. A second January 14, 1998, DRIS note reflects that the Commission employee and the adjuster had a conversation in which the adjuster advised that she had given a verbal assurance of payment to someone on Dr. S's office staff on December 3, 1997; that Dr. S's staff member had asked for a written assurance of payment; and that the adjuster had advised Dr. S's office that a written assurance was not necessary because if the designated doctor made a referral, the carrier had to pay. A third DRIS note of the same date, states that the adjuster asked the Commission employee to call Dr. S's office, that the employee did so and that the staff person at Dr. S's office again requested written assurance of payment. However, it also provides that the staff member would ask Dr. S to contact either the adjuster or the Commission employee about this matter. A January 23, 1998, DRIS note reflects that Dr. S's staff member called the Commission employee and said that Dr. S wanted to talk to the Commission employee; that he was unavailable that day; and that Dr. S would call the Commission employee on January 26, 1998. The next DRIS note is dated March 19, 1998, and it states that the adjuster was calling to check on the status of the designated doctor's report because none had been received from Dr. W. The next DRIS note of April 28, 1998, reflects that the attorney representing the claimant at that time had sent a letter to the Commission stating that the referral doctor would not see the claimant, advising the Commission that the claimant had moved to City 1, and requesting that she be sent to a pulmonologist designated doctor. On July 10, 1998, the Commission appointed Dr. V, whose office is in City 1, to serve as the second designated doctor. In a TWCC-69 dated August 27, 1998, Dr. V assigned an IR of 30%. The carrier paid accrued impairment income benefits to the claimant in a lump sum based on Dr. V's 30% IR. In a TWCC-69 dated September 24, 1998, Dr. W certified that the claimant had a five percent IR. The carrier received Dr. W's report in October 1998 after it had already paid on Dr. V's rating.

The hearing officer held the record open after the hearing. On November 15, 1999, the hearing officer sent a letter to Dr. W, asking him several questions. On December 13, 1999, the Commission received what purports to be Dr. W's response to the hearing

officer's letter. Two questions were not answered and only terse responses were given to the other five questions posed. Dr. W stated that it was "not known" if the claimant was ever examined by a pulmonologist. Dr. W attached his October 30, 1997, narrative report, which states that he will refer the claimant to a pulmonologist for evaluation and assistance in determining her IR, in response to a question asking for the basis of the IR he assigned on September 24, 1998.

As noted above, the hearing officer dismissed the issues before him, without prejudice, based upon his determination that there had not yet been a valid designated doctor's report. The hearing officer determined that the "report from [Dr. W] has no basis since the pulmonology testing requested was never received and [Dr. W's] report was filed after appointment of a second designated doctor and release of that doctor's report." The hearing officer further determined that Dr. W "failed to perform his duties as a designated doctor in a timely fashion." We are not persuaded that Dr. W's delay in completing the TWCC-69 or the fact that his certification came after the certification from Dr. V, the second designated doctor, makes the report "invalid." However, it is more problematic that Dr. W requested that the claimant be referred to a pulmonologist for evaluation to assist him in determining the claimant's IR and that referral was never accomplished. In addition, Dr. W failed to explain the basis of his five percent IR in response to the hearing officer's question requesting that he do so. Where, as here, Dr. W requested a referral, the referral examination was not completed, and Dr. W did not subsequently indicate that the referral was no longer required or provide an explanation as to the basis for his certification of an IR some 11 months after his examination, we cannot agree that the hearing officer erred in determining that a valid designated doctor's report had not been issued in this case. We likewise cannot agree that the hearing officer erred in returning this case for the appointment of another designated doctor, as opposed to obtaining pulmonology testing and forwarding it to Dr. W for him to reconsider his IR. Our determination in that regard is premised upon the fact that the claimant no longer lives in the city where Dr. W is located and that Dr. W's responses to the hearing officer's November 15, 1999, letter were largely nonresponsive and indicate an apparent reluctance on the part of Dr. W to continue his involvement in the designated doctor process. We further note that the hearing officer has not directed that the designated doctor be a pulmonologist, only that a pulmonologist be consulted. Given our affirmance of the hearing officer's determination that he could not resolve the IR issue, we likewise affirm his determination that the issues related to the claimant's entitlement to SIBS are not ripe. The IR issue must be resolved before any issue related to SIBS can be considered and decided.

The hearing officer's decision and order are affirmed.

Elaine M. Chaney
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Alan C. Ernst
Appeals Judge