

APPEAL NO. 002043

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 August 1, 2000. With respect to the single issue before him, the hearing officer determined that the Texas Workers' Compensation Commission (Commission) abused its discretion in appointing a second designated doctor. In her appeal, the appellant (claimant) asserts that the hearing officer erred in finding that the Commission abused its discretion because at the time the second designated doctor was appointed, the first designated doctor was unavailable to conduct a reexamination of the claimant. In its response to the claimant's appeal, the respondent (carrier) urges affirmance.

DECISION

Affirmed.

The facts in this case are largely undisputed. The claimant sustained a compensable injury on _____. In September 1997, the claimant's then treating doctor apparently certified maximum medical improvement (MMI) and assigned an impairment rating (IR). The carrier disputed that certification and Dr. S was selected by the Commission to serve as the designated doctor. In a Report of Medical Evaluation (TWCC-69) dated January 23, 1998, Dr. S certified that the claimant reached MMI on August 26, 1997, with an IR of nine percent.

On November 22, 1998, Dr. S responded to a request for clarification from the Commission and did not change his nine percent IR. On October 14, 1999, the Commission sent a second letter to Dr. S advising him that the claimant has undergone additional treatment since his examination and forwarding unidentified medical record for his review. In a letter dated December 2, 1999, Dr. S responded that in his view the knee and lumbar surgeries that the claimant had undergone since his examination were not related to the compensable injury. However, Dr. S stated that if those procedures were considered part of the compensable injury, then he needed to reexamine the claimant. On December 17, 1999, the Commission scheduled the claimant's reexamination appointment with Dr. S in (city) on January 6, 2000. On January 3, 2000, the Commission had a conversation with Dr. S's office concerning Dr. S's unavailability for the January 6th appointment. A Dispute Resolution Information System-Contact Data note of January 3rd records the substance of that conversation, as follows:

I called and spoke with [M], [Dr. S's] office. I exp that the ltr he wrote to [benefit review officer], BRO, states that he will reexamine the I/W, however, I have been told by Mrs. M, that he is not coming to (city) anymore. She states that he is looking for office to do [designated doctor] exams, but is planning to come here again. I exp that we need to schedule appt with him, as he is the [designated doctor] on this claim.

On January 6, 2000, the Commission scheduled a designated doctor appointment with a second designated doctor, Dr. C for January 20, 2000. On January 27, 2000, Dr. S's office contacted the Commission and advised that Dr. S would be in (city) on February 18, 2000, and could reexamine the claimant at that time. In a TWCC-69 dated February 7, 2000, Dr. C certified that the claimant reached MMI on August 26, 1997¹, with an IR of 17%.

Appointment of a second designated doctor is reviewed under an abuse of discretion standard. Texas Workers' Compensation Commission Appeal No. 960454, decided April 17, 1996. An abuse of discretion occurs when a decision is made without reference to appropriate guiding rules or principles. Morrow v. H.E.B., Inc., 714 S.W.2d 297 (Tex. 1986). Selection of a second designated doctor may be made where the first designated doctor will be unavailable for a period of time to conduct an additional examination. Texas Workers' Compensation Commission Appeal No. 992104, decided November 10, 1999; Texas Workers' Compensation Commission Appeal No. 93852, decided November 4, 1993. Selection of another designated doctor may also be upheld where the first doctor refuses to cooperate or to render a report consistent with the 1989 Act. Texas Workers' Compensation Commission Appeal No. 961228, decided August 8, 1996.

In this instance, the hearing officer determined that the Commission abused its discretion in appointing Dr. C as the second designated doctor because when the Commission appointed him, it "had not established that [Dr. S] would either be completely unavailable or unreasonably delayed in his ability to [reexamine] the claimant." Rather, the hearing officer noted that the only information available to the Commission at that time was that Dr. S was looking for office space in which to conduct designated doctor examinations and that he was planning on coming to (city) but just would not be available on January 6, 2000. The hearing officer determined that before the extraordinary action of appointing a second designated doctor was taken, the Commission had an obligation to establish a time frame of when Dr. S would be available to reexamine the claimant. There is no indication that any such effort was made in this case. To the contrary, the record reflects that the Commission appointed the second designated doctor three days after it was advised that Dr. S was looking for office space and planned to return to (city) without having any further contact with Dr. S's office concerning his availability to conduct the reexamination. Accordingly, we cannot agree that the hearing officer erred in determining that the Commission abused its discretion in appointing a second designated doctor in this case.

¹Apparently, both Dr. S and Dr. C were only appointed to determine the claimant's IR.

The hearing officer's decision and order are affirmed.

Elaine M. Chaney
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Tommy W. Lueders
Appeals Judge