APPEAL NO. 020457
FILED APRIL 5, 2002

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 January 25, 2002. The record was closed on February 1, 2002. The hearing officer determined that the appellant's (claimant) impairment rating (IR) is 5%. The claimant appeals, arguing that the determination of the hearing officer was in error and asking for the case to be remanded for the hearing officer "to select another [IR]." In its response, the respondent (carrier) contends that the hearing officer correctly determined the IR.

DECISION

Reversed and rendered.

It is undisputed that the claimant sustained a compensable injury on _____. It was stipulated that the initial IR was certified on May 7, 1997, by Dr. B, a referral doctor, who certified maximum medical improvement (MMI) on May 2, 1997, with a 7% IR. Dr. M was appointed as the designated doctor by the Texas Workers' Compensation Commission (Commission) and he certified on October 23, 1997, that the claimant had not yet reached MMI. It was undisputed that Dr. M became disqualified as the designated doctor because he began treating the claimant. On April 3, 1998, Dr. L, a required medical examination doctor, certified that the claimant reached MMI on March 30, 1998, with a 6% IR. Since Dr. M was disqualified to perform as designated doctor, the Commission appointed Dr. S as a second designated doctor. On November 13, 1998, Dr. S certified that the claimant reached MMI on April 9, 1998, with a 5% IR, based on Table 49, Section (II)(B), of the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association (AMA Guides).

The benefit review conference (BRC) report indicates that the undisputed date of MMI was November 29, 1998. Nonetheless, the hearing officer found that the date of statutory MMI was November 21, 1998. The hearing officer additionally found that the certification by Dr. S on November 13, 1998, that the claimant reached MMI on April 9, 1998, with a 5% IR is not contrary to the great weight of the other medical evidence.

The record reflects that on June 14, 1999, the claimant's second opinion doctor concurred that spinal surgery was necessary and that the claimant had a diskectomy and anterior fusion on August 13, 1999. On November 1, 1999, the Commission sent a letter to Dr. S asking him to "advise all the parties whether [MMI] and the [IR] should change" since the claimant had undergone spinal surgery. After reexamination of the claimant, on November 13, 1999, Dr. S responded to the Commission's inquiry and certified that the claimant had not reached MMI. Dr. S examined the claimant again on March 10, 2000, and certified that the claimant reached MMI on November 15, 1998, with a 10% IR, based on Table 49, Section (II)(E), of the AMA Guides, a rating which included the August 1999

surgery. In correspondence dated October 5, 2000, the Commission forwarded a report from a referral doctor indicating that the claimant's IR should be at least 2% higher "for the ALIF at L5 with hardware" (using Section IV of Table 49 instead of Section II) and assessing a 22% (including 11% for range of motion (ROM)) IR. The Commission asked Dr. S to review and advise if his opinion changed regarding IR. In response, Dr. S maintained that his 10% IR from Table 49 was correct, but he amended the claimant's IR to 13%, adding 3% for two lumbar ankylosed vertebrae, based on Table 50 of the AMA Guides, to the previous 10% IR. The claimant's referral doctor, in a report dated November 10, 2000, assessed a 23% IR based on 10% impairment from Table 49 and 14% impairment for ROM combined to form the 23% whole person IR.

The hearing officer recites that:

> At a BRC held December 5, 2000, the parties apparently agreed to the appointment of a third DD [designated doctor], to be selected by the Commission, because "current DD has not been able to produce valid [Report of Medical Evaluation] TWCC-69," according to the DRIS [Dispute Resolution Information System] note. This agreement between the parties was not put in writing.

The claimant's appeal also states that "the parties made the agreement to a third [designated doctor]." Subsequently, on January 16, 2001, Dr. SI, a Commission-appointed designated doctor (the third designated doctor) certified that the claimant reached MMI on November 29, 1998, with a 14% IR.

It is undisputed that spinal surgery was not under active consideration at the time of statutory MMI and that statutory MMI was not extended pursuant to Section 408.104. In the past, we have held that it is inappropriate for a designated doctor to amend a certification after statutory MMI, if surgery was not under active consideration at the time of statutory MMI. Texas Workers' Compensation Commission Appeal No. 002929-s, decided January 23, 2001; Texas Workers' Compensation Commission Appeal No. 992951, decided February 14, 2000; Texas Workers' Compensation Commission Appeal No. 991081, decided July 8, 1999; and Texas Workers' Compensation Commission Appeal No. 990833, decided June 7, 1999.

The Commission adopted Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.6(i) (Rule 130.6(i)), effective January 2, 2002. Rule 130.6(i) provides that a designated doctor's response to any Commission request for clarification is considered to have presumptive weight, as it is part of the designated doctor's opinion. In Texas Workers' Compensation Commission Appeal No. 013042-s, decided January 17, 2002, we held that Rule 130.6(i) "does not permit the analysis of whether an amendment was made for a proper purpose or within a reasonable time." The preamble to Rule 130.6(i) specifically addresses a comment regarding situations where a claimant "has received post-statutory MMI surgery" stating that if the designated doctor determines that the additional documentation is supportive of a change in his original recommendation, then the opinion

should also carry presumptive weight. Accordingly, we reverse the hearing officer's finding that Dr. S's amendments after November 13, 1998, "were not made within a reasonable time and for a proper purpose."

Section 408.125(a) and (b) provide that if an IR is disputed, the employee is to be examined "by a designated doctor chosen by mutual agreement of the parties" and if the parties are unable to agree on a designated doctor, the employee is examined by a designated doctor chosen by the Commission. In this case, after Dr. B rendered the first assessment of MMI and IR, the parties apparently were unable to agree on a doctor chosen by mutual agreement and the Commission chose the designated doctor. Once a designated doctor has been chosen by the Commission, neither the 1989 Act, as amended, nor the Commission rules provide for a procedure whereby the parties can agree to have the Commission appoint a successor designated doctor, particularly where the properly designated doctor has not been disqualified. The hearing officer found that the Commission abused its discretion in appointing a third designated doctor in this case. Appointment of a second (or, in this case, a third) 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). In that there are no rules or authority for the appointment of a successor designated doctor based on an agreement by the parties, we agree with the hearing officer's determination that the Commission abused its discretion in appointing a third designated doctor.

We reverse the hearing officer's 5% determination. As previously noted, we interpret Rule 130.6(i) as overruling the proper reason/reasonable time rationale that had been applied prior to January 2, 2002, the effective date of Rule 130.6(i). Applying that rule and Appeal No. 013042-s, *supra*, we will give presumptive weight to the most recent, valid amendment of Dr. S, the properly appointed designated doctor. An award of impairment income benefits must be based on an IR that uses the AMA Guides. Section 408.124(a). Dr. S's last amendment dated October 23, 2000, while confirming his assessment of a 10% impairment from Table 49 (the claimant's referral doctor's report of November 10, 2000, notwithstanding), and his invalidation of ROM, Dr. S improperly added 3% impairment as "a fair assessment to award the claimant Table 50 for two lumbar ankylosised [sic] vertebrae." The parties appear to agree, and the Appeals Panel is firmly on record, that the use of Table 50 to apportion loss of ROM, absent radiographic evidence of ankylosis, is not appropriate. Texas Workers' Compensation Commission Appeal No. 992450, decided December 16, 1999. Applying Rule 130.6(i) and according presumptive weight to the designated doctor's most recent, valid IR, assessed in accordance with the AMA Guides, we reverse the hearing officer's decision that the claimant had a 5% IR and render a new decision that the claimant has a 10% IR as assessed by the designated doctor in his March 10, 2000, report.

The hearing officer's decision is reversed and a new decision that the claimant's IR is 10% is rendered.

The true corporate name of the insurance carrier is **TEXAS PROPERTY & CASUALTY INSURANCE GUARANTY ASSOCIATION for Reliance National Indemnity Company, an impaired carrier,** and the name and address of its registered agent for service of process is

MARVIN KELLEY, EXECUTIVE DIRECTOR
9120 BURNET ROAD
AUSTIN, TEXAS 78758.

Thomas A. Knapp
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Edward Vilano
Appeals Judge