APPEAL NO. 020991
FILED JUNE 10, 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 March 12, 2002, with the record closing on March 27, 2002. The hearing officer determined that the respondent (claimant) reached maximum medical improvement (MMI) on October 27, 2001; that under the circumstances of this case there was no valid report from a designated doctor; that the claimant's impairment rating (IR) could not be determined from the evidence presented; and that the Texas Workers' Compensation Commission (Commission) shall appoint a new designated doctor to assess the correct IR. The appellant (self-insured) contends on appeal that it did not, as reflected by the hearing officer in the decision, stipulate that the claimant reached MMI on October 27, 2001. The self-insured further argues that the correct date of MMI is October 20, 2000; that the correct impairment rating is 0%; and that the hearing officer exceeded her authority by ordering the Commission to appoint another designated doctor to assess the claimant's IR. The appeal file contains no response from the claimant.

DECISION

Affirmed in part and reversed and rendered in part.

The evidence reflects that the claimant was examined by Dr. A, the self-insured's choice of doctor for a required medical examination (RME). Dr. A saw the claimant at least twice and ultimately prepared a Report of Medical Evaluation (TWCC-69), certifying that the claimant reached MMI on October 20, 2000, with a 0% IR. The claimant disputed the RME doctor's certification of MMI/IR, and Dr. S was appointed by the Commission to serve as the designated doctor to resolve the MMI/IR dispute. Dr. S examined the claimant on May 9, 2001, at which time he certified that the claimant had reached MMI on that date with a 22% IR. Subsequently, the self-insured obtained the peer review report of Dr. O, who reviewed the designated doctor's report and disputed its validity. The self-insured requested that a letter of clarification be sent to the designated doctor. The Commission sent the letter of clarification, and on July 11, 2001, the designated doctor replied, confirming his initial IR of 22%. The self-insured was still dissatisfied, and asked that further questions be sent to the designated doctor, along with the peer review report of Dr. D. On October 10, 2001, the Commission sent another letter to Dr. S, requesting that he answer questions posed by the self-insured and that he review a surveillance video taken of the claimant. In a letter dated October 12, 2001, a staff member from the designated doctor's office informed the Commission that Dr. S had suffered a stroke on _____, was hospitalized in critical condition, was unresponsive, and was unable to respond at that time to the second clarification letter.

With this evidence before her, the hearing officer determined that the designated doctor's response to the first clarification letter, dated July 11, 2001, inadequately explained his reasoning for not assigning a rating for neurological impairment, and that the designated doctor was unable to respond to the Commission's second request for clarification due to personal illness. She further determined that no valid designated doctor's report is available; that there needs to be a designated doctor's report in evidence in order to determine an IR; and that the claimant's IR cannot be determined from the evidence presented. She concluded that it was necessary that a second designated doctor be appointed. The hearing officer noted in her decision that the parties stipulated that the claimant attained MMI on October 27, 2001.

Dealing with the MMI date first, we agree with the self-insured that the parties did not stipulate that the claimant attained MMI on October 27, 2001. The parties did stipulate that statutory MMI would occur on October 27, 2001, which does not establish the actual MMI date, only the latest date that MMI could occur. We therefore reverse the decision of the hearing officer that the claimant attained MMI on October 27, 2001, and render a decision that the MMI date has not yet been established.

As to other issues, we affirm the action of the hearing officer in ordering that a second designated doctor be appointed. The unfortunate illness of the designated doctor resulted in his being unable to complete his duties as designated doctor. We view the hearing officer's comment that "there is no valid designated doctor's report available" as meaning that the designated doctor's report is incomplete under the circumstances of this case. The report of the designated doctor chosen by the Commission is given presumptive weight and the Commission shall base its determination on that report unless the great weight of the other medical evidence is to the contrary. Section 408.125(e). Under Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.6(i) (Rule 130.6(i)) and Texas Workers' Compensation Commission Appeal No. 013042-s, decided January 17, 2002, the designated doctor's responses to requests for clarification made by the Commission are also afforded presumptive weight. In the present case, the self-insured initiated the request for clarification of the designated doctor's report, but the designated doctor was unable to provide a response to the request for clarification because of his own serious illness. Although we have stated that appointing a second designated doctor should be done rarely, the inability of the first designated doctor to respond to the request for clarification is certainly a valid reason for appointing a second designated doctor. We decline to accept the self-insured's position that under Section 408.125(e) the only proper course of action was for the hearing officer to accept the report of another doctor. We believe that provision speaks to weighing evidence when the designated doctor process has properly run its course. Here, the self-insured made a choice to seek further clarification from Dr. S rather than using the dispute resolution process to argue its current position that Dr. S was wrong and the rating assigned by Dr. A should be accepted. Since there has been no final resolution of the MMI and IR issues by a designated doctor, we believe it is necessary that a second designated doctor be appointed to resolve the issues of MMI and IR. We perceive no error in the hearing officer's decision to order the field office to appoint a second designated doctor.

As noted above, we reverse the decision concerning attainment of MMI, but otherwise affirm the decision and order of the hearing officer.

The true corporate name of the insurance carrier is **(a certified self-insured)** and the name and address of its registered agent for service of process is

C. T.C.
(address)
(CITY), TEXAS (ZIPCODE).

Michael B. McShane
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Robert E. Lang
Appeals Panel
Manager/Judge