

APPEAL NO. 030467  
FILED APRIL 2, 2003

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 29, 2003. The hearing officer determined that it was an abuse of discretion for the Texas Workers' Compensation Commission (Commission) to appoint Dr. RM, as a second designated doctor, to replace the first designated doctor, Dr. WM. The appellant (claimant) appeals urging reversal, arguing that the first designated doctor's reply to a Commission request for clarification was nonresponsive and that Dr. WM was unavailable to serve as a designated doctor because he had moved out of the area. The respondent (carrier) urges affirmance, asserting that the first designated doctor adequately responded to the request for clarification, and thus the Commission abused its discretion in appointing a second designated doctor.

DECISION

Reversed and rendered.

The claimant sustained a back injury on \_\_\_\_\_. On March 1, 2001, the carrier's required medical examiner, Dr. B, certified the claimant had reached maximum medical improvement (MMI) on March 1, 2001, with a 0% whole body impairment rating (IR). The Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association (AMA Guides) were used. On April 12, 2001, the designated doctor, Dr. WM, certified that the claimant reached MMI on March 12, 2001, with a 0% whole person IR. Again, the third edition of the AMA Guides was used. On July 13, 2001, a Commission Dispute Resolution Officer (DRO) forwarded a letter dated June 29, 2001, to the designated doctor from the treating doctor, which stated that diagnostic tests had been ordered and an MRI revealed evidence of bilateral sclerotic post-traumatic facet arthropathy at L-3 and L4-5 and a 2 mm broad based disc bulge. It further stated that NCV revealed evidence of bilateral L5 radiculopathy. The letter stated that a referral neurosurgeon had ordered a myelogram CT and four weeks of therapy. A Nerve Conduction and DSEP Study report, dated April 12, 2001, was included that the DRO said was previously unavailable. The treating doctor's opinion was that with such positive findings, a 0% IR was unfair and that he believed the claimant was not at MMI. The DRO's letter of clarification to Dr. WM inquired if the treating doctor's report would change the MMI date or IR that Dr. WM had assigned. Dr. WM responded that the report did not change his opinion.

On August 2, 2002, a Commission DRO forwarded a Procedure Report, describing a surgical procedure the claimant underwent on May 20, 2002, and a copy of a Post Discography Computed Tomogram (CT) Report to Dr. WM for his review. Also included was a letter of clarification asking if Dr. WM would change his report, now a year old. The relevant portion of Dr. WM's response follows:

The examinee [claimant] was initially seen by me on 04-12-01, and it was determined that she had 0% disability rating. From papers I received, the examinee underwent a discogram on 05-2-02. This shows some problems with the disc.

Since this was a year later than the time that the examinee was seen by me, I will not be able to alter the disability rating since something could easily have happened to the examinee between the time I saw her and the time she had her discogram.

I would suggest at this point that the examinee be re-examined by another examiner as I am no longer in the [ ] area.

On January 8, 2003, the Commission appointed Dr. RM as a second designated doctor, and he certified the claimant as reaching MMI on November 16, 2002, with a 10% whole body IR. The record showed that Dr. RM used the Guides to the Evaluation of Permanent Impairment, fourth edition (1st, 2nd, 3rd, or 4th printing, including corrections and changes as issued by the American Medical Association prior to May 16, 2000) to perform his evaluation. This matter will be discussed below.

A second designated doctor can be appointed if the current designated doctor will be unavailable for a period of time to conduct an examination. Texas Workers' Compensation Commission Appeal No. 002043, decided October 6, 2000. In that case, the Commission was found to have abused its discretion when it appointed a second designated doctor because, when it appointed him, it had not established that the first designated doctor would either be completely unavailable or unreasonably delayed in his ability to reexamine the claimant. If a designated doctor cannot or refuses to comply with the requirements of the 1989 Act, a second designated doctor may be appointed. Texas Workers' Compensation Commission Appeal No. 961436, decided September 5, 1996. Here, Dr. WM clearly states, "I would suggest at this point that the examinee be re-examined by another examiner as I am no longer in the [ ] area." There was no need for the Commission to investigate further. There is no abuse of discretion for the Commission to proceed with the appointment of a second designated doctor.

The hearing officer's Finding of Fact No. 10 states that: "Claimant has not shown good cause for the appointment of a second designated doctor." This finding improperly shifts the burden of proof to the claimant to show good cause for the appointment, when the burden should be on the carrier to show abuse of discretion of the Commission in appointing the designated doctor. An abuse of discretion is the standard to use in reviewing a decision to appoint a second designated doctor. Texas Workers' Compensation Commission Appeal No. 960454, decided April 17, 1996. An abuse of discretion occurs when a decision is made without reference to any guiding rules or principles. See Morrow v. H.E.B., 714 S.W.2d 297 (Tex. 1986); See also Texas Workers' Compensation Commission Appeal No. 931034, decided December 27, 1993. The carrier was well aware of its burden in this case as it complained of it at length in its

opening statement. We believe that it failed to carry its burden in this case. We find that the hearing officer erred in finding that the Commission abused its discretion in appointing a second designated doctor. We reverse that decision and render a new decision that the Commission did not abuse its discretion in appointing a second designated doctor.

Next we must address another matter that came to our attention during the review of this case. Dr. RM used the AMA Guides, 4th Edition, to reach his IR for the claimant in this case. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.1(c)(2)(B)(ii) (Rule 130.1(c)(2)(B)(ii)) provides that the appropriate edition of the AMA Guides to use for certifying examinations conducted on or after October 15, 2001, is the third edition, second printing, dated February, 1989 if, at the time of the certifying examination, there is a certification of MMI by a doctor pursuant to subsection (b) of this section made prior to October 15, 2001, which has not been previously withdrawn through agreement of the parties or previously overturned by a final decision; *see, also*, Texas Workers' Compensation Commission Appeal No. 023251, decided January 27, 2003. Given that the first MMI certification was made in this case in March 2001, and there is no evidence to suggest that this certification was withdrawn through agreement of the parties or overturned by a final decision, we direct that the second designated doctor be directed to rate the entire compensable injury, in accordance with the proper edition of the AMA Guides.

The true corporate name of the insurance carrier is **INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA** and the name and address of its registered agent for service of process is

**CORPORATION SERVICE COMPANY  
800 BRAZOS, SUITE 750, COMMODORE 1  
AUSTIN, TEXAS 78701.**

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Michael B. McShane  
Appeals Panel  
Manager/Judge

CONCUR:

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Thomas A. Knapp  
Appeals Judge

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Terri Kay Oliver  
Appeals Judge