APPEAL NO. 061223
FILED SEPTEMBER 6, 2006

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing (CCH) was held on November 9, 2005, with the record closing on May 8, 2006. The hearing officer resolved the disputed issues by deciding that: (1) the respondent 1/cross-appellant's (claimant) compensable injury of _____, extends to include a cervical herniation at C6-7 and a lumbar herniation at L5-S1; (2) that the claimant had good cause for failing to attend the required medical examination (RME) on May 10, 2004, but did not have good cause for failing to attend the RME on December 17, 2004, and that he is entitled to temporary income benefits (TIBs) from May 10 through December 17, 2004, and is not entitled to TIBs from December 18, 2004, through February 10, 2005; (3) that the claimant had disability from _____, through February 10, 2005; and (4) that the claimant reached maximum medical improvement (MMI) on October 23, 2005, with a five percent impairment rating (IR) as certified by the second designated doctor. The appellant/cross-respondent (carrier) appealed the hearing officer's determinations on extent of injury, disability, MMI, and IR. With regard to the MMI and IR issues, the carrier contended that it was error to appoint a second designated doctor. Additionally, the carrier notes that the hearing officer's decision contains a typographical error as to the name of the second designated doctor. The claimant cross-appealed that portion of the hearing officer's determination that the claimant did not have good cause for failing to submit to the RME on December 17, 2004. The appeal file does not contain a response from the claimant, carrier, or respondent 2 (subclaimant). That portion of the hearing officer's determination that the claimant had good cause for failing to attend the RME on May 10, 2004, was not appealed and has become final. Section 410.169.

DECISION

Reversed and rendered in part; affirmed in part.

BACKGROUND INFORMATION

The parties stipulated that the claimant sustained a compensable injury on _____, and that he had disability from October 18 through December 15, 2003. The claimant testified that while working inside a guard shack, a truck hit the shack that caused an injury to his neck and low back. The evidence reflects that the first designated doctor is Dr. T, and the second designated doctor is Dr. P, rather than Dr. S as found by the hearing officer.[1]

EXTENT OF INJURY, DISABILITY,

[1] We note that the hearing officer's discussion and Finding of Fact Nos. 4 and 5 contain a typographical error as to the name of the second designated doctor. The evidence indicates that Dr. P was appointed the second designated doctor. The evidence does not indicate that there was a doctor listed with the name "S"; however, the third party administrator of the carrier is listed as "S."

AND GOOD CAUSE FOR FAILURE TO ATTEND RME

The hearing officer's determinations on the issues of the extent of the compensable injury, disability, and good cause for failure to attend the RME of December 17, 2004, are supported by sufficient evidence and are not so against the great weight and preponderance of the evidence as to be clearly wrong and unjust.

MMI, IR, AND,
APPOINTMENT OF SECOND DESIGNATED DOCTOR,

The parties stipulated that Dr. T, the (first) designated doctor, certified that the claimant was at MMI on December 15, 2003, with a zero percent IR. Dr. T examined the claimant on December 15, 2003, and she assessed zero percent IR based on zero percent for Diagnosis-Related Estimate (DRE) Cervicothoracic Category I: Complaints and Symptoms and zero percent for DRE Lumbosacral Category I: Complaints and Symptoms. Dr. T's report indicates she reviewed MRIs dated December 3, 2003, of the cervical and lumbar spine that showed herniated discs at C6-7 and L5-S1, and that there was an absence of cervical radiculopathy.

On November 21, 2005, 12 days after the CCH, the hearing officer sent a letter of clarification (LOC) to Dr. T asking whether the claimant was at MMI given that his condition improved with steroid injections; whether the disc herniations at C6-7 and L5-S1 would change the IR; and whether she wished to reexamine the claimant. Additionally, the hearing officer stated that she was attaching a copy of an EMG report for the designated doctor to consider. On November 30, 2005, the designated doctor replied that an EMG report was not attached to the LOC for her review, and she explained that under the DRE model the claimant's IR was not based on the "presence or absence" of disc herniations, but rather the IR was based on whether the "herniations resulted in clinically reproducible or verified radiculopathy as defined in Table 71, page 109" of 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) (AMA Guides). The designated doctor explained that when she examined the claimant on December 15, 2003, there was an absence of radiculopathy, and that the medical documentation did not indicate "any lasting effect or improvement in his condition after steroid injections were provided." Dr. T stood by her certification of MMI and IR and stated that if the hearing officer wanted her to reexamine the claimant, she needed to be provided with complete medical records subsequent to December 2003.

On January 18, 2006, the hearing officer sent another LOC to the designated doctor asking that if it was determined that the lumbar and cervical herniations were part of the compensable injury, would the claimant's impairment fall under DRE Cervicothoracic Category II: Minor Impairment and DRE Lumbosacral Category II: Minor Impairment; thereby changing her certification of MMI and IR. On January 26, 2006, the designated doctor replied that she could not speculate as to whether the claimant would qualify for a DRE Cervicothoracic Category II: Minor Impairment and DRE Lumbosacral

Category II: Minor Impairment based on the presence or absence of a herniated disc "as the '*differentiating factor*' in the assignment of impairment" referencing Table 70, page 108 of the AMA Guides. Dr. T did not indicate that the MMI and IR would change from her previous certification. On February 8, 2006, the claimant responded that because the designated doctor had not been responsive to the hearing officer's LOCs and that she had incomplete medical records, a second designated doctor should be appointed to determine MMI and IR. On February 17, 2006, the carrier responded that it objected to the appointment of a second designated doctor arguing that Dr. T had provided full and adequate responses to each of the hearing officer's LOCs. A Dispute Resolution Information System note dated March 1, 2006, states "CCH IS SET FOR HEARING OFFICER ONLY. PARTIES ARE NOT REQUIRED TO APPEAR AS THE CLMT IS GOING TO A NEW DD. THIS IS JUST TO ALLOW TIME FOR APPT TO TAKE PLACE, RESPONSE TO BE RECVD AND TO GET RESPONSES FROM PARTIES."

The evidence indicates that a second designated doctor, Dr. P, was appointed and that he examined the claimant on March 30, 2006. Dr. P's report states "the date of [MMI] has been established as October 23, 2005. This is not under dispute." The Report of Medical Evaluation (DWC-69), showed that the claimant reached statutory MMI on October 23, 2003, with a five percent IR. Dr. P assessed a five percent IR based on zero percent DRE Cervicothoracic Category I: Complaints and Symptoms and five percent DRE Lumbosacral Category II: Minor Impairment.

On April 21, 2006, the carrier responded to the second designated doctor's report stating that Dr. P was misled to believe that the date of MMI was not in dispute and that Dr. P was not provided with complete medical records to determine MMI and IR. In evidence is a Request for a Benefit Review Conference (DWC-45) from the carrier dated April 21, 2006, stating that a "CCH held on 11/9/05, but no decision rendered yet. Multiple letters since between parties and Hearing Officer" and attached to the DWC-45 is a letter from the carrier's third party administrator, Sedgwick Claims Management Services, Inc., disputing the extent of injury, MMI, IR and appointment of a second designated doctor. In evidence is another DWC-45 from the third party administrator dated April 24, 2006, disputing the second designated doctor's MMI and IR certification, and appointment of a second designated doctor. We note that the hearing officer signed the Decision and Order on May 11, 2006.

The carrier contends that the Texas Department of Insurance, Division of Workers' Compensation (Division) erred in appointing a second designated doctor and also contends that the claimant reached MMI on December 15, 2003, with a zero percent IR as certified by the first designated doctor. An abuse of discretion occurs when a decision is made without reference to any guiding rules or principles. *See* Morrow v. H.E.B., Inc., 714 S.W.2d 297 (Tex. 1986); *See also* Appeals Panel Decision (APD) 931034, decided December 27, 1993. The Appeals Panel has applied an abuse-of-discretion standard to the appointment of a second designated doctor. APD 030467, decided April 2, 2003. In APD 011607, decided August 28, 2001, the Appeals Panel held that normally the appointment of a second designated doctor is appropriate only in

those cases where the first designated doctor is unable or unwilling to comply with the required AMA Guides or requests from the Commission (now Division) for clarification, or if he or she otherwise compromises the impartiality demanded of the designated doctor. If a designated doctor cannot or refuses to comply with the requirements of the 1989 Act, a second designated doctor may be appointed. APD 961436, decided September 5, 1996. 28 TEX. ADMIN. CODE § 130.5(d)(2) (Rule 130.5(d)(2)) provides that if a designated doctor has been previously assigned, the [Division] shall use that doctor again, if the doctor is still qualified and available.

The hearing officer states in her discussion that Dr. T's response dated November 30, 2005, indicated that Dr. T "did not appear to be willing to assign an [IR]," and "[s]ince it was determined at the [CCH] that Claimant suffered herniations as a result of the injury and since the designated doctor had not assigned an [IR] for the herniations, Claimant was sent to a second designated doctor for evaluation. [Dr. S], designated doctor, examined Claimant on March 30, 2006." The hearing officer's finding that Dr. T's assigned IR and MMI date did not account for the herniations at C6-7 and L5-S1 is in error. Dr. T specifically detailed her findings upon examination of the claimant and acknowledged review of the MRIs of the cervical and lumbar spine that were sent to her. The evidence reflects that Dr. T responded to every LOC and explained her reasons for assessing the zero percent IR by referencing to the AMA Guides. It was improper for the Division to appoint a second designated doctor in this case.

We hold that the Division abused its discretion in the appointment of a second designated doctor because it appointed him without reference to any guiding rules or principles. Accordingly, Dr. P's report is not entitled to presumptive weight.

Section 408.1225(c) provides that the report of the designated doctor has presumptive weight, and the Division shall base its determination of whether the employee has reached MMI on the report of the designated doctor unless the preponderance of the other medical evidence is to the contrary. Section 408.125(c) provides that the report of the designated doctor shall have presumptive weight, and the Division shall base the IR on that report unless the preponderance of the other medical evidence is to the contrary, and that, if the preponderance of the medical evidence contradicts the IR contained in the report of the designated doctor chosen by the Division, the Division shall adopt the IR of one of the other doctors. Both Sections 408.1225(c) and 408.125(c) apply to this case because the CCH was held on or after September 1, 2005. Rule 130.6(i) provides that the designated doctor's response to a Division request for clarification is considered to have presumptive weight as it is part of the doctor's opinion. In this case, the report of Dr. T, the first designated doctor, is entitled to presumptive weight and should be adopted unless the preponderance of the medical evidence is to the contrary. As previously stated, the certification of Dr. P was based on a mistaken belief that MMI was not in dispute. Dr. P did not certify an IR based on his assessment of the claimant's MMI but rather assessed an IR as of the MMI date he believed to be established for the claimant. To the contrary, the record

reflects that the MMI date was in dispute and had not been established as October 23, 2005. Under these circumstances, the certification of Dr. P cannot be adopted.

Accordingly, we reverse the hearing officer's MMI and IR determinations that are based on Dr. P's assessment, and render a decision that the claimant's date of MMI is December 15, 2003, with a zero percent IR as certified by the first designated doctor, Dr. T. Pursuant to Section 408.101(a), the claimant is not entitled to TIBs after reaching MMI on December 15, 2003.

The true corporate name of the insurance carrier is **ZURICH AMERICAN INSURANCE COMPANY** and the name and address of its registered agent for service of process is

LEO F. MALO
12222 MERIT DRIVE SUITE 700
DALLAS, TEXAS 75251-2237.

_____
Veronica L. Ruberto
Appeals Judge

CONCUR:

_____
Thomas A. Knapp
Appeals Judge

_____
Margaret L. Turner
Appeals Judge