

APPEAL NO. 081398-s  
FILED NOVEMBER 12, 2008

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 September 2, 2008. With regard to the sole issue before him, the hearing officer determined that the Texas Department of Insurance, Division of Workers' Compensation (Division) abused its discretion in appointing Dr. P as a second designated doctor.

The appellant (claimant) appealed, contending that the totality of Dr. M, the first designated doctor, inability or unwillingness to comply with the Division requests necessitated the appointment of a second designated doctor. The respondent (carrier) responded, contending among other matters that the appointment of a second designated doctor through a matrix process is unwarranted and without authority.

DECISION

Reversed and rendered.

The parties stipulated that the claimant sustained a compensable injury on \_\_\_\_\_. A prior CCH decision issued May 26, 2005, established that the claimant had sustained a compensable repetitive trauma injury in the form of bilateral carpal tunnel syndrome. Dr. M, the first designated doctor, was appointed to determine maximum medical improvement (MMI) and impairment rating (IR). Dr. P, the second designated doctor, was appointed to determine the IR and the claimant's ability to return to work.

The hearing officer found that the appointment of Dr. P "was done because [Dr. M] did not fit the [Request for Designated Doctor (DWC-32)] treatment matrix; otherwise there was no showing [Dr. M] was unqualified or unavailable to serve as [the designated doctor] at any time after his appointment." We note that the 2006 DWC-32 treatment matrix used for the appointment of Dr. M was for the hand and upper extremities while the 2008 DWC-32 treatment matrix used for the appointment of Dr. P also included the back and neck. The hearing officer concluded that the Division abused its discretion in appointing Dr. P as a second designated doctor.

The hearing officer explained his rationale in the Background Information portion of his decision as follows:

According to the Division's internet information, the Division is using the procedure of redesignating to a new DD based on the DWC-32 treatment matrix under authority of Section 408.0041 of the Act and [28 TEX. ADMIN. CODE § 126.7 (Rule 126.7)]. Section 408.0041(b) requires appointment of the next available doctor on the Division's DD list "whose

credentials are appropriate for the issue in question and the injured employee's medical condition as determined by commissioner rule". There is no such rule. Rule 126.7 simply repeats the language "whose credentials are appropriate for the issue in question and the injured employee's medical condition" and does not mention a treatment matrix. Rule 126.7 and former Rule 130.5 require using the same DD as long as he is qualified and available.

An abuse of discretion occurs when an action is taken without reference to any guiding rules or principles. Morrow v. H.E.B., Inc., 714 S.W.2d 297 (Tex. 1986). The Appeals Panel has applied an abuse of discretion standard to the appointment of a subsequent designated doctor. Appeals Panel Decision (APD) 030467, decided April 2, 2003.

Section 408.0041(a) provides that at the request of the insurance carrier or an employee, or on the commissioner's own order, the commissioner may order a medical examination to resolve questions about MMI, the IR, the ability of the employee to return to work, and other matters. Section 408.0041(b) provides that a medical examination requested under Subsection (a) shall be performed by the next available doctor on the Division's list of designated doctors "whose credentials are appropriate for the issue in question and the injured employee's medical condition as determined by commissioner rule." A designated doctor, other than a chiropractor or a dentist, is subject to Section 408.0043 which provides that doctors described in Subsection (a), including a designated doctor who reviews a specific workers' compensation case, "must hold a professional certification in a health care specialty appropriate to the type of health care that the injured employee is receiving."

Section 408.0041(b),<sup>1</sup> which provides that designated doctor's "credentials are appropriate for the issue in question and the injured employee's medical condition as determined by commissioner rule" was implemented by Rule 126.7 effective January 1, 2007. Rule 126.7(h) provides:

(h) If at the time the request is made, the Division has previously assigned a designated doctor to the claim, the Division shall use that

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<sup>1</sup> Section 408.0041(b) was amended by House Bill (H.B.) 7 of the 79th Leg., R.S., ch. 265, § 3.080, in 2005, by adding "as determined by commissioner rule" at the end of the first sentence in Subsection (b). Section 408.0041(b) provides:

A medical examination requested under Subsection (a) shall be performed by the next available doctor on the [D]ivision's list of designated doctors whose credentials are appropriate for the issue in question and the injured employee's medical condition as determined by commissioner rule. (Emphasis added.)

As provided in Section 8.007 of H.B. 7 of the 79th Leg., the changes in law made to Section 408.0041 were to be effective on the date provided by commissioner rule. Subsequently, Rule 126.7 effective January 1, 2007, was implemented. Section 408.0041 was amended by H.B. 2004, of the 80th Leg., R.S., ch. 1218, § 3 in 2007, effective September 1, 2007, however, the quoted language of Section 408.0041(b) remained exactly the same.

doctor again, if the doctor is still qualified and available. Otherwise, the Division shall select the next available doctor on the Division's Designated Doctor List who:

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- (3) has credentials appropriate to the issue in question and the employee's medical condition.

The carrier challenged the appointment of Dr. P as the second designated doctor and the hearing officer correctly placed the burden of proof on the carrier to show that the Division abused its discretion in appointing Dr. P. The carrier argued at the CCH that the appointment of a second designated doctor through a matrix process is unwarranted and without authority and the hearing officer agreed.

While it is true that the term matrix or treatment matrix is not used in Rule 126.7 and the language of Rule 126.7(h) tracks the language of Section 408.0041(b), in order to implement the requirements that the credentials of the doctor are appropriate for the issue in question and the injured employee's medical condition, the treatment matrix was established. An order of an administrative body is presumed to be valid and the burden of producing evidence establishing the invalidity of the administrative action is clearly on the party challenging the action, in this case, the carrier. Herron v. City of Abilene, 528 S.W.2d 349 (Tex. Civ. App.-Eastland 1975, writ ref'd). APD 042669-s, decided December 2, 2004. The fact that the term matrix is not included in Rule 126.7(h) does not preclude the use of a procedure to determine if the designated doctor's credentials are appropriate for the issue in question and the injured employee's medical condition. The courts have recognized that an administrative agency has the power to interpret its own rules, and its interpretation is entitled to great weight and deference. Gulf States Utils. Co. v. Public Util. Comm'n, 784 S.W.2d 519, 527 n.5 (Tex. App.-Austin 1990), *aff'd*, 809 S.W.2d 201, 207 (Tex. 1991) (citing Udall v. Tallman, 380 U.S. 1, 85 S. Ct. 792, 13 L. Ed. 2d 616 (1965)). We hold that it is not an abuse of discretion to implement a procedure which fulfills the mandate of Sections 408.0041(b) and 408.0043 and Rule 126.7(h) even if that procedure is not specifically mentioned in the statute or implementing rule.

The hearing officer cites APD 061328-s, decided August 21, 2006, for the proposition that it is an abuse of discretion for the Division to appoint a new designated doctor on the basis of the DWC-32 treatment matrix. The hearing officer's reliance on APD 061328-s is misplaced and that case is clearly distinguishable from the present case. In APD 061328-s, no DWC-32's were in evidence and the sequence of appointed subsequent designated doctors was documented by Dispute Resolution Information System (DRIS) notes. The DRIS notes indicated that the claimant and carrier in that case had both filed DWC-32 requests for a designated doctor. The only mention of a "matrix T32" was in discussing the parties' positions at the CCH. Specifically, APD 061328-s states: "The carrier theorizes [speculates] that the claimant's attorney had 'submitted a [m]atrix T32' and 'this 32 was based on a surgical matrix . . .'" That case

was reversed because the hearing officer failed to apply Rule 130.5(d)(2) (since repealed, now see Rule 126.7(h)) which required the Division to use the same designated doctor if he is still qualified and available. In APD 061328-s, there was no evidence what any DWC-32 stated or what was considered in appointing the successor designated doctors.

We hold that the hearing officer's determination that the Division abused its discretion in appointing Dr. P as a second designated doctor is legal error. We reverse the hearing officer's determination that the Division abused its discretion in appointing Dr. P as a second designated doctor and render a new decision that the Division did not abuse its discretion in appointing Dr. P as a second designated doctor.

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

**ROBIN M. MOUNTAIN  
6600 CAMPUS CIRCLE DRIVE EAST, SUITE 300  
IRVING, TEXAS 75063-2732.**

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Thomas A. Knapp  
Appeals Judge

CONCUR:

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Veronica L. Ruberto  
Appeals Judge

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Margaret L. Turner  
Appeals Judge