

APPEAL NO. 081831
FILED JANUARY 29, 2009

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 12, 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 a second designated doctor, Dr. H, on July 17, 2008. The appellant (carrier) appealed, disputing the hearing officer's determination that the Division abused its discretion in appointing a second designated doctor. The respondent (claimant) responded, urging affirmance.

DECISION

Reversed and rendered.

The parties stipulated that the claimant sustained a compensable injury on _____. In a prior CCH held on November 13, 2007, it was noted that the carrier agreed to accept as compensable the claimant's asserted head contusion injury. An extent-of-injury issue was in dispute at the November 13, 2007, CCH and the hearing officer decided that the compensable injury extends to the cervical facet sprain/strain but not to the grade I concussion. Division records indicate that the decision from the November 13, 2007, CCH was appealed to the Appeals Panel and the hearing officer's decision and order became final on January 22, 2008. An additional extent-of-injury issue was resolved in a CCH held on May 30, 2008. In the May 30, 2008, CCH, a hearing officer determined that the _____, compensable injury extends to cervical spine pathology C2-3 through C6-7 and upper extremities paresthesia but does not include post-traumatic headaches. Division records indicate that the decision from the May 30, 2008, CCH was appealed to the Appeals Panel and the hearing officer's decision and order became final on September 8, 2008. Both of the prior CCH decisions were in evidence.

Dr. B, the first designated doctor, was appointed to determine maximum medical improvement (MMI), impairment rating (IR), ability to return to work, the extent of the compensable injury and whether the claimant's disability is a direct result of the work-related injury. Dr. B examined the claimant on January 24, 2008, and certified that the claimant had not yet reached MMI. In evidence is a Dispute Resolution Information System (DRIS) note dated July 15, 2008, which states the "[designated doctor] no longer meets treatment requirements, redesignated." In evidence is a copy of "Health Care Provider" information from the Division's website which identifies Dr. B's medical specialty as hand surgery and plastic surgery. Dr. H was appointed as a second designated doctor and examined the claimant on July 30, 2008, certifying that the claimant reached MMI on that date and assessing an IR. There was no Request for Designated Doctor (DWC-32) treatment matrix in evidence.

The hearing officer erred in finding that the decision to appoint a second designated doctor was made without reference to the statutory guiding rules or principles. The hearing officer erred in concluding that the Division abused its discretion in appointing Dr. H as a second designated doctor.

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),¹ 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 28 TEX. ADMIN. CODE § 126.7 (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 doctor again, if the doctor is still qualified and available. Otherwise,

¹ 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.

the Division shall select the next available doctor on the Division's Designated Doctor List who:

* * * *

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

In APD 081398-s, decided November 12, 2008, the Appeals Panel held that it is not an abuse of discretion to implement a procedure, the treatment matrix, 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.

In the Background Information portion of the decision, the hearing officer noted the case on appeal is similar to APD 061328-s, decided August 21, 2006. The hearing officer's reliance on 061328-s, is misplaced. In APD 061328-s, there was no evidence regarding what any DWC-32 stated or what was considered in appointing the successor designated doctor. In the instant case, there is a DRIS entry in evidence which specifically states that the first designated doctor no longer meets the treatment requirements, necessitating the appointment of a second designated doctor, clearly indicating the appointment was made with reference to guiding rules or principles. The hearing officer's determination that the Division abused its discretion in appointing Dr. H as a second designated doctor is legal error. We reverse the hearing officer's determination that the Division abused its discretion in appointing a second designated doctor, Dr. H, on July 17, 2008, and render a new decision that the Division did not abuse its discretion in appointing Dr. H as a second designated doctor.

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

**MR. RUSTIN POLK
14160 DALLAS PARKWAY, SUITE 500
DALLAS, TEXAS 75254.**

Margaret L. Turner
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Veronica L. Ruberto
Appeals Judge