APPEAL NO. 090361
FILED MAY 11, 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 February 27, 2009. The issues before the hearing officer were:

(1) Who is the correct designated doctor?

(2) Did the Texas Department of Insurance, Division of Workers' Compensation (Division) abuse its discretion in appointing (Dr. Ty) as a second designated doctor and (Dr. C) as a third designated doctor?

(3) Did the first certification of maximum medical improvement (MMI) and impairment rating (IR) assigned by (Dr. Th) (first designated doctor) on July 28, 2005, become final under Section 408.123?

The hearing officer determined that: (1) there is no correct designated doctor as of the date of the CCH; (2) the Division abused its discretion in appointing Dr. Ty as a second designated doctor and in appointing Dr. C as a third designated doctor; and (3) the first certification of MMI and IR assigned by Dr. Th on July 28, 2005, did not become final under Section 408.123.

The appellant/cross-respondent (claimant) appealed the hearing officer's determinations on the issues of "who is the correct designated doctor" and "whether the Division abused its discretion in appointing" Dr. Ty as a second designated doctor and Dr. C as a third designated doctor. Additionally, although the claimant prevailed on the finality issue, the claimant asserts that Dr. Th's certification of MMI and IR did not become final pursuant to Section 408.123(f)(1)(B) and (C). The respondent/cross-appellant (carrier) responded to the claimant's appeal, urging affirmance. The carrier appealed the hearing officer's determination on the issue of finality that the first certification of MMI and IR assigned by Dr. Th on July 28, 2005, had become final. The claimant responded to the carrier's cross-appeal, urging affirmance.

DECISION

Affirmed in part and reversed and rendered in part.

FACTUAL SUMMARY

The parties stipulated that: (1) on _____, the claimant sustained a compensable injury; (2) in a report dated July 28, 2005, Dr. Th certified that the claimant reached MMI on July 28, 2005, with a zero percent IR; and (3) Dr. Th's certification was the first certification of MMI and assigned IR in this claim. It is undisputed that the claimant sustained an injury to his left knee at work.

While neither party requested the hearing officer to take official notice of Division records, the hearing officer read into the record some of the Division's Dispute Resolution Information System (DRIS) notes and the Division's automated system (TXCOMP) notes with regard to the Division's appointment of the three designated doctors in this claim. It is undisputed that the Division appointed three designated doctors to provide an opinion with regard to issues of MMI, IR and extent of injury. We note that neither party objected to the consideration of the Division records in the resolution of the disputed issues.

FINALITY

The hearing officer's determination that the first certification of MMI and IR assigned by Dr. Th on July 28, 2005, did not become final under Section 408.123 is supported by sufficient evidence and is affirmed.

ABUSE OF DISCRETION IN APPOINTING DR. TY AS A SECOND DESIGNATED DOCTOR

In this case, the Division appointed Dr. Th, the first designated doctor, to determine whether the claimant reached MMI and to assign an IR. Dr. Th examined the claimant on March 25, 2004, and certified that the claimant had not reached MMI. Dr. Th re-examined the claimant on July 28, 2005, and certified that the claimant reached MMI on that date with a zero percent IR.

It is undisputed that an extent-of-injury issue subsequently arose regarding whether the claimant's compensable injury extends to include "left knee internal derangement" and "left knee medial meniscus tear." In March 2007, the Division received a Request for Designated Doctor (DWC-32) to determine the extent of the claimant's compensable injury. A DRIS note dated April 5, 2007, states that "prev [Dr. Th, designated doctor] no longer on [Designated Doctor List (DDL)]." and "will [redesignate] w/ qualified [designated doctor]." Another DRIS note dated April 11, 2007, indicates that Dr. Ty was appointed as a second designated doctor to determine the extent of the claimant's compensable injury. Dr. Ty examined the claimant on May 31, 2007, and opined that the claimant's compensable injury extends to left knee internal derangement. In evidence is a Decision and Order dated March 11, 2008, in which the hearing officer determined that the claimant's compensable injury extends to left knee internal derangement, but does not extend to include left knee medial meniscus tear, and that the claimant had disability from June 21, 2005, to July 28, 2005, but not thereafter through the date of the CCH. In that case, the hearing officer specifically found with regard to the extent-of-injury issue that "[Dr. Ty] is the Division selected designated doctor to determine the [c]laimant's extent of injury." In Appeals Panel Decision (APD) 080445, decided May 30, 2008, the Appeals Panel affirmed the hearing officer's extent-of-injury determination, and reversed the hearing officer's disability determination.

In the instant case, the hearing officer determined that the Division abused its discretion in appointing Dr. Ty because the hearing officer found that Dr. Th, the first designated doctor, was qualified as a designated doctor at all pertinent times until August 2007, when he went off the DDL. The hearing officer based this determination on his review of TXCOMP Health Care Provider Credential History for Dr. Th, which shows that Dr. Th was on the DDL from September 1, 2003, through August 12, 2007. Therefore, the hearing officer concluded that because Dr. Th was qualified as a designated doctor until August 2007, it was improper to appoint Dr. Ty in April 2007, to give an opinion on the extent of the claimant's compensable injury.

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. APD 030467, decided April 2, 2003. The hearing officer erred in determining that the Division abused its discretion in appointing Dr. Ty as a second designated doctor.

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.

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, the Division shall select the next available doctor on the [DDL] who:
>
> * * * *
>
> (3) has credentials appropriate to the issue in question and the employee's medical condition.

Section 408.1225(a) provides that to be eligible to serve as a designated doctor, a doctor must meet specific qualifications, including training in the determination of IRs and demonstrated expertise in performing examinations and making evaluations as described by Section 408.0041. Section 408.1225(b) provides that the commissioner shall ensure the quality of designated doctor decisions and reviews through active monitoring of the decisions and reviews, and may take action as necessary to: (1) restrict the participation of a designated doctor; or (2) remove a doctor from inclusion on the department's list of designated doctors. Section 408.1225 applies to this case

because the CCH was held on or after September 1, 2005. *See also* Rule 180.21(d)(3), which provides that to be on the DDL on or after January 1, 2007, the doctor shall at a minimum:

> (3) have successfully completed Division-approved training and examination on the assignment of [IRs] using the currently adopted edition of the American Medical Association Guides, medical causation, extent of injury, functional restoration, return to work, and other disability management topics.

See also Rule 180.21(b) which provides that in order to serve as a designated doctor, a doctor must be on the DDL. Rule 180.21(d) provides a list of minimum qualifications to be on the DDL on or after January 1, 2007. Rule 180.21(e) provides a doctor shall renew an application status biennially and shall have completed and submitted to the Division information verifying 12 additional credit hours of training in accordance with subsection (d)(3) of this section with each renewal application.

We note that TXCOMP Health Care Provider Training Details lists the latest Division-approved training completed by Dr. Th was July 31, 2003. Pursuant to Rule 180.21(d)(3) and (e), Dr. Th did not meet the required training to remain on the DDL. The hearing officer's determination that Dr. Th was qualified as a designated doctor at all pertinent times until August 2007, when he went off the DDL was in error. The DRIS note dated April 5, 2007, specifically states that Dr. Th, the first designated doctor is no longer on the DDL, clearly indicating the appointment of Dr. Ty, the second designated doctor, was made with reference to guiding rules or principles. As previously noted, TXCOMP records reflects that Dr. Th did not have the required training to remain on the active DDL at the time that Dr. Ty was appointed as the second designated doctor. Accordingly, we reverse the hearing officer's determination that the Division abused its discretion in appointing Dr. Ty as a second designated doctor and we render a new decision that the Division did not abuse its discretion in appointing Dr. Ty as a second designated doctor.

ABUSE OF DISCRETION IN APPOINTING DR. C AS A THIRD DESIGNATED DOCTOR

As previously noted, in a Decision and Order dated March 11, 2008, the hearing officer determined that the claimant's compensable injury extends to left knee internal derangement. In APD 080445, *supra*, the Appeals Panel affirmed in part the hearing officer's extent-of-injury determination. In March 2008, the Division received a DWC-32 to request that a designated doctor be appointed to determine the claimant's MMI and IR. A DRIS note dated March 24, 2008, states "[The designated doctor, Dr. Ty] no longer fits treatment requirements, redesignated." Another DRIS note dated March 27, 2008, indicates that Dr. C was appointed as a third designated doctor. It is undisputed that the carrier objected to the appointment of Dr. C as a third designated doctor. Dr. C examined the claimant on April 4, 2008, and certified that the claimant reached MMI

statutorily on December 7, 2005, with a zero percent IR. A DRIS note dated August 20, 2008, states in part that "as far as not using [designated doctor, Dr. Ty] the reason was because [designated doctor, Dr. Ty] did not meet matrix on treatment" and that "'[Dr. Ty, the second designated doctor] had a treatment matrix that was modified after [Office of Medical Advisor (OMA)] sent out letters to all [designated doctors] to update their treatment matrix.'" The hearing officer determined that the Division abused its discretion in appointing Dr. C as a third designated doctor.

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 APD 081831, decided January 29, 2009, the evidence established that a DRIS entry specifically stated that the first designated doctor no longer met the treatment requirements, necessitating the appointment of a second designated doctor, clearly indicating the appointment was made with reference to guiding rules or principles.

In this case, a DRIS note dated March 24, 2008, states that Dr. Ty no longer fits treatment matrix requirements, clearly indicating that the appointment of Dr. C, the third designated doctor, was made with reference to guiding rules or principles. Accordingly, we reverse the hearing officer's determination that the Division abused its discretion in appointing Dr. C as a third designated doctor, and we render a new decision that the Division did not abuse its discretion in appointing Dr. C as a third designated doctor.

CORRECT DESIGNATED DOCTOR

In APD 041835-s, decided September 20, 2004, Dr. E examined the claimant on June 30, 2003, and in his capacity as designated doctor certified MMI and assigned an IR. The Division sent letters of clarification to Dr. E on October 21, 2003, and January 29, 2003, and Dr. E responded to the letters of clarification. Division records showed that Dr. E was not on the DDL after August 31, 2003. The Appeals Panel held that "when a designated doctor is asked to respond to inquiries regarding his or her report, asked to defend his or her report, or asked to review medical reports from other health care providers and comment on them as they relate to a claimant's condition, that doctor is by definition 'serving' in the role of designated doctor." In that case, the Appeals Panel held that Dr. E "could not serve as designated doctor after that time to consider whether the claimant's IR should be changed." Additionally, the Appeals Panel held that "a designated doctor's response to a [Division] request for clarification has presumptive weight as it is part of the doctor's opinion."

In the instant case, there are DRIS notes that show that Dr. Th, the first designated doctor, was no longer on the DDL, and that Dr. Ty, the second designated doctor, did not fit the treatment matrix requirements. *See* Rules 126.7(h), and 180.21(c) and (d). Division records indicate that Dr. Th did not have the required training to remain on the active DDL; therefore, Dr. Th is not currently qualified and available to serve in the role of designated doctor. However, we note that the evidence established

that at the time Dr. Th examined the claimant on July 28, 2005, and certified that the claimant reached MMI on that date with a zero percent IR, Dr. Th was the proper designated doctor to certify MMI and assign an IR.

Division records indicate that Dr. Ty did not meet the treatment matrix requirements and he is no longer on the DDL as of December 29, 2008; therefore, Dr. Ty is not currently qualified and available to serve in the role of designated doctor. However, we note that the evidence established that at the time Dr. Ty examined the claimant on May 31, 2007, and opined that the claimant's compensable injury extends to left knee internal derangement, Dr. Ty was the proper designated doctor to opine on the extent of the claimant's compensable injury.

The hearing officer's finding that the Dr. C was on the DDL at all pertinent times is supported by sufficient evidence. Given that we have reversed the hearing officer's abuse of discretion determination, and rendered a new decision that the Division did not abuse its discretion in appointing Dr. C as a third designated doctor, and Division records indicate that Dr. C is qualified and available to serve in the role of designated doctor, we reverse the hearing officer's determination that there is no correct designated doctor as of the date of the CCH. Accordingly, we render a new decision that the correct designated doctor is Dr. C, as of the date of the CCH.

SUMMARY

We affirm the hearing officer's determination that the first certification of MMI and IR assigned by Dr. Th on July 28, 2005, did not become final under Section 408.123

We reverse the hearing officer's determination that the Division abused its discretion in appointing Dr. Ty as a second designated doctor and in appointing Dr. C as a third designated doctor, and we render a new decision that the Division did not abuse its discretion in appointing Dr. Ty as a second designated doctor and in appointing Dr. C as a third designated doctor.

We reverse the hearing officer's determination that there is no correct designated doctor as of the date of the CCH, and we render a new decision that the correct designated doctor is Dr. C, as of the date of the CCH.

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

CT CORPORATION SYSTEM
350 NORTH ST. PAUL STREET
DALLAS, TEXAS 75201.

_____
Veronica L. Ruberto
Appeals Judge

CONCUR:

_____
Thomas A. Knapp
Appeals Judge

_____
Margaret L. Turner
Appeals Judge