APPEAL NO. 042979
FILED JANUARY 14, 2005

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 October 18, 2004. The hearing officer resolved the disputed issues by deciding the following: (1) that the designated doctor in this case to determine the date of maximum medical improvement (MMI) and the correct impairment rating (IR) is (Dr. L); (2) that Dr. L is qualified to be the designated doctor in this case; (3) that (Dr. H) was not properly appointed designated doctor in this case and is not the designated doctor in this case; (4) that the date of MMI and the respondent's (claimant) correct IR cannot be determined pending further examination of the claimant and certification of a date of MMI; and (5) that the claimant had disability beginning July 10, 2002, through October 8, 2003. The appellant (carrier) appealed, disputing the decision of the hearing officer. The carrier contends that the disability determination is so against the great weight and preponderance of the evidence as to be clearly wrong and unjust; that the hearing officer did not properly apply the law in determining that Dr. H was not properly appointed as a designated doctor; that the hearing officer improperly placed the burden of proof on the carrier; that the great weight of the other medical evidence is not contrary to the report of Dr. H; and that the claimant reached MMI on October 2, 2003, with a 2% IR. The claimant responded, urging affirmance of the disputed determinations.

DECISION

Affirmed in part and reversed and remanded in part.

DISABILITY

The parties stipulated that the claimant sustained a right hand/wrist injury on _____. Disability is defined as "the inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage." Section 401.011(16). The hearing officer found that the claimant had disability beginning July 10, 2002, through October 8, 2003.

There was conflicting evidence regarding the issue of disability. We would note that as a general rule, in workers' compensation cases, disability, as defined in Section 401.011(16), may be established by the testimony of the claimant alone, if believed by the trier of fact. Houston General Insurance Company v. Pegues, 514 S.W.2d 492 (Tex. Civ. App.-Texarkana 1974, writ ref'd n.r.e.). The hearing officer was acting within his province as the fact finder in resolving the conflicts and inconsistencies in the evidence in favor of the claimant. Nothing in our review of the record reveals that the challenged disability determination is so against the great weight of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986). Accordingly, no sound basis exists for us to disturb the disability determination on

appeal. We note that disability as defined in Section 401.011(16) can extend past MMI, but it is temporary income benefits that end at MMI. The stated issue regarding disability at the CCH was limited to the time period found by the hearing officer.

APPOINTMENT OF A SECOND DESIGNATED DOCTOR

It was undisputed that Dr. L was the first appointed designated doctor in this case. Dr. L examined the claimant either on May 29, 2002, or June 3, 2002, and certified that the claimant had not reached MMI. Dr. L again examined the claimant September 9, 2002, and concluded that the claimant reached MMI on May 14, 2002, with a 14% IR. In his report, Dr. L noted that the claimant saw his treating doctor on May 14, 2002, who felt the claimant had reached MMI and assessed an IR. Dr. L noted in correspondence dated April 29, 2003, that he thought it would be appropriate to have the claimant reevaluated upon learning that the claimant had a subsequent operation on his hand on February 19, 2003, a date prior to statutory MMI. Dr. L subsequently withdrew his prior certification. A Report of Medical Evaluation (TWCC-69) dated June 25, 2003, was in evidence, which reflected Dr. L certified the claimant has not yet reached MMI.

A Request for Designated Doctor (TWCC-32) dated September 26, 2003, was in evidence which noted the carrier requested such appointment to determine if the claimant reached MMI, and if so, the correct IR because the claimant was soon to reach statutory MMI. In a letter dated November 21, 2003, the Texas Workers' Compensation Commission (Commission) appointed Dr. H as the designated doctor in this case. Evidence was presented at the CCH to explain the appointment of a second designated doctor in the form of a Dispute Resolution Information System note dated November 17, 2003, which stated that "will have to send to different [designated doctor] for Dr. L is not available during timeframe." However, the claimant testified that after receiving notice of the appointment of Dr. H as the designated doctor, he called Dr. L and asked why Dr. L was not seeing him as the designated doctor. The claimant testified that Dr. L responded that he would be glad to see the claimant again. Dr. H examined the claimant on December 12, 2003, and certified that the claimant reached MMI on October 2, 2003, with a 2% IR. In correspondence to the Commission dated April 29, 2003, prior to the appointment of Dr. H, Dr. L indicated he would like to reevaluate the claimant before assessing another impairment.

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.

The hearing officer noted in the Background Information portion of the Decision and Order that "[i]t was not established by the Carrier that Dr. [L] was unable or

[un]willing to continue as designated doctor." The carrier contends that the hearing officer improperly placed the burden of proof on the carrier. We agree. In the instant case, the claimant was the party who was challenging the appointment of the second designated doctor. It has been held that an order of an administrative body is presumed to be valid and that the burden of producing evidence establishing the invalidity of the administrative action is clearly on the party challenging the action. Herron v. City of Abilene, 528 S.W.2d 349 (Tex. Civ. App.-Eastland 1975, writ ref'd). *See also* Texas Workers' Compensation Commission Appeal No. 042669-s, decided December 2, 2004. Because the hearing officer incorrectly placed the burden of proof on the carrier, we remand this case back to the hearing officer for further development and consideration of the evidence applying the correct burden of proof.

We note that in Appeal No. 042669-s, *supra*, additionally held that Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.5(d)(1) (Rule 130.5(d)(1)) does not distinguish between an initial request and a subsequent request for a designated doctor examination, but only refers to the receipt of a "valid request." Conflicting evidence was presented regarding whether Dr. L was available with in the time frame required by the Rules. The credibility and weight to be given to the evidence presented is a matter for the hearing officer to decide.

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., Inc., 714 S.W.2d 297 (Tex. 1986); *See also* Texas Workers' Compensation Commission Appeal No. 931034, decided December 27, 1993. The hearing officer correctly notes that a second designated doctor is rarely to be appointed. *See* Texas Workers' Compensation Commission Appeal No. 040531, decided April 12, 2004, and Texas Workers' Compensation Commission Appeal No. 022492, decided November 13, 2002.

MMI AND IR CANNOT BE DETERMINED

Section 410.251 requires a party to exhaust its administrative remedies and be aggrieved by a final decision of the Appeals Panel before it seeks judicial review. Although the evidence as presented precluded the hearing officer from being able to make a final determination regarding MMI and IR, Section 410.163(b) requires that a hearing officer shall ensure the preservation of the rights of the parties *and the full development of facts required for the determinations to be made*. [*Emphasis added.*] Until a determination is made regarding MMI and IR there can be no final decision from which judicial review may be sought. Albertson's, Inc. v. Ellis, 131 S.W.3d 245 (Tex. App.-Fort Worth 2004, pet. denied).

It is undisputed that the statutory date of MMI was in October of 2003. The hearing officer found that the date of MMI and IR cannot be determined pending further examination of the claimant and certification of a date of MMI and IR by Dr. L. We remand this case back to the hearing officer for further development of the evidence. If

on remand the hearing officer should determine that Dr. H was properly appointed as the designated doctor, the hearing officer should determine MMI and IR based on the existing record. In the event the hearing officer determines that Dr. H was not properly appointed and Dr. L is the designated doctor in this case, both parties should be allowed an opportunity to respond to the amended certification and rating provided by Dr. L. If Dr. L is now no longer qualified or is unwilling to provide the certification and rating as requested, then another designated doctor should be appointed and the parties given an opportunity to respond to the certification and rating provided by the newly appointed designated doctor.

We affirm the hearing officer's determination that the claimant had disability beginning July 10, 2002, through October 8, 2003. We reverse the hearing officer's determinations that Dr. H was not properly appointed designated doctor in this case; that the designated doctor in this case to determine the date of MMI and the correct IR is Dr. L and remand back to the hearing officer for further development of the evidence and make a determination regarding whether Dr. H was properly appointed as the designated doctor in accordance with Section 408.0041, Rule 130.5, and Rule 130.6, applying the proper burden of proof. We reverse the hearing officer's determination that the date of MMI and IR cannot be determined and remand the case for further development of the evidence by the hearing officer.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Commission's Division of Hearings, pursuant to Section 410.202 which was amended June 17, 2001, to exclude Saturdays, Sundays, and holidays listed in Section 662.003 of the Texas Government Code in the computation of the 15-day appeal and response periods. *See* Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

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

BETTYE ANN ROGERS WESLEY
1612 FM 2244 (BEE CAVES ROAD), BLDG 1, SUITE 200
AUSTIN, TEXAS 78738.

_____
Margaret L. Turner
Appeals Judge

CONCUR:

_____
Thomas A. Knapp
Appeals Judge

_____
Robert W. Potts
Appeals Judge