APPEAL NO. 042669-s
FILED DECEMBER 2, 2004

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 20, 2004. The hearing officer resolved the disputed issue by deciding that Dr. M was not properly appointed as a second designated doctor in accordance with Section 408.0041 and Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.5 (Rule 130.5). The appellant (claimant) appeals, requesting reversal. The respondent (carrier) requests affirmance.

DECISION

Reversed and rendered.

BACKGROUND INFORMATION

It is undisputed that the claimant sustained a compensable injury on _____. The medical reports reflect that he injured his back on that day picking up computer boxes. It is undisputed that the Texas Workers' Compensation Commission (Commission) appointed Dr. P as the designated doctor to determine maximum medical improvement (MMI) and impairment rating (IR). Dr. P examined the claimant on October 24, 2002, and reported that the claimant reached MMI on May 21, 2002, with a 5% IR. Dr. P noted on his report that he is the designated doctor selected by the Commission. In November 2002, the Commission requested Dr. P to consider questions raised in a letter from the treating doctor. Dr. P responded in November 2002 that he found no reason to amend his previous report. In January 2003, the claimant underwent surgery consisting of a fusion at L3-4. In February 2003, the Commission sent the operative report to Dr. P and asked him if that information changed his opinion on MMI and/or IR. Dr. P responded in February 2003 that the operative report did not alter his opinion on the IR. In September 2003, the Commission sent Dr. P medical records and asked him questions regarding MMI and IR. Dr. P responded on September 26, 2003, that the January 2003 surgery would not alter the 5% IR, but that based on the surgery, it was reasonable to conclude that the MMI date of May 21, 2002, required amendment and that the claimant would be anticipated to reach clinical MMI on December 4, 2003, which he said the Commission had previously advised him was the date of statutory MMI.

A Request for Designated Doctor (TWCC-32) is not in evidence, but is mentioned in Commission Dispute Resolution Information System (DRIS) notes in evidence. A DRIS note reflects that on October 16, 2003, the carrier's adjustor called the Commission and inquired about the designated doctor's schedule. A DRIS note dated November 14, 2003, states: "WILL HAVE TO SEND TO DIFFERENT DD FOR [DR. P] CANNOT MEET TIME FRAME UNTIL FURTHER NOTICE." A DRIS note dated November 18, 2003, states: "TWCC-32 RECEIVED." The November 18, 2003, DRIS

note reflects that Box A of the TWCC-32 was marked for "MMI/IR" and that the carrier was the initiator of the TWCC-32. A DRIS note dated November 19, 2003, reflects that an "EEFS-14" letter was mailed that day, that Dr. M is now the designated doctor, and that the appointment is for December 3, 2003.

Dr. M examined the claimant on December 3, 2003, and reported that the claimant reached statutory MMI on either December 3, 2003, or December 4, 2003, and that he has an IR of either 12% or 16%. It appears from Dr. M's narrative report that he meant to assign a 16% IR. Dr. M noted on his reports that he is the designated doctor selected by the Commission.

The disputed issue at the CCH was whether Dr. M was properly appointed as a second designated doctor in accordance with Section 408.0041 and Rule 130.5. The hearing officer found that the Commission appointed Dr. P as the designated doctor in 2002; that Dr. P did not refuse to serve and is not otherwise disqualified to serve as the designated doctor; that the Commission appointed Dr. M as the second designated doctor in 2003; that the Commission's decision to appoint Dr. M as the second designated doctor was made without reference to any guiding rules or principles; and that the Commission abused its discretion in appointing Dr. M as the second designated doctor. The hearing officer concluded that Dr. M was not properly appointed as a second designated doctor in accordance with Section 408.0041 and Rule 130.5.

We note that an abuse of discretion occurs when an action is taken without reference to any guiding rules and principles. Downer v. Aquamarine Operators, Inc., 701 S.W.2d 238 (Tex. 1985). The Appeals Panel has applied an abuse of discretion standard to the appointment of a second designated doctor. Texas Workers' Compensation Commission Appeal No. 030467, decided April 2, 2003.

Sections 408.122(c) and 408.125(c) provide that the report of the designated doctor has presumptive weight, and the Commission shall base its determinations of MMI and IR on the designated doctor's report unless the great weight of the other medical evidence is to the contrary. Rule 130.6(i) provides that the designated doctor's response to a Commission request for clarification is considered to have presumptive weight as it is part of the doctor's opinion. Rule 130.1(c)(3) provides that assignment of an IR shall be based on the injured employee's condition as of the MMI date. In Texas Workers' Compensation Commission Appeal No. 040313-s, decided April 5, 2004, the Appeals Panel wrote that the preamble to Rule 130.1(c) noted that in the event the MMI date is changed, the IR would have to be based on the injured employee's condition as of the changed MMI date.

Sections 408.0041(a) and (b) provide as follows:

> (a) At the request of an insurance carrier or an employee, the commission shall order a medical examination to resolve any question about:

(1) the impairment caused by the compensable injury; or

(2) the attainment of [MMI].

(b) A medical examination requested under Subsection (a) shall be performed by the next available doctor on the commission's list of designated doctors whose credentials are appropriate for the issue in question and the injured employee's medical condition. The designated doctor doing the review must be trained and experienced with the treatment and procedures used by the doctor treating the patient's medical condition, and the treatment and procedures performed must be within the scope of practice of the designated doctor. The commission shall assign a designated doctor not later than the 10th day after the date on which the request under Subsection (a) is received, and the examination must be conducted not later than the 21st day after the date on which the commission issues the order under Subsection (a). An examination under this section may not be conducted more frequently than every 60 days, unless good cause for more frequent examinations exists, as defined by commission rules.

Rules 130.5(d)(1) and (2) provide in pertinent part as follows:

(d) The following provisions apply to selection and scheduling of an examination by a designated doctor:

(1) The commission, within 10 days of receipt of a valid request, shall issue a written order assigning a designated doctor; set up a designated doctor appointment for a date no earlier than 14 days, but no later than 21 days from the date of the commission order; and notify the injured employee and the insurance carrier that the designated doctor will be directed to examine the injured employee. The commission's written order shall also: . . . .

(2) If at the time the request is made, the commission has previously assigned a designated doctor to the claim, the commission shall use that doctor again, if the doctor is still qualified as described in this subsection and available. Otherwise, the commission shall select the next available doctor on the commission's Designated Doctor List who: . . ..

In the Background Information section of the decision, the hearing officer wrote:

Rule 130.5(d)(1) requires the Commission to appoint a designated doctor and set up the initial appointment no earlier than 14 days but no later than

21 days from the date of a valid request for a designated doctor. Rule 130.5(d)(2) provides that the Commission shall use the same designated doctor if he/she is still qualified per subsections (A), (B), and (C) and available.

The "timeframe" referred to in Rule 130.5(d)(1) applies only to the initial designated doctor appointment. It does not apply to subsequent examinations by the same designated doctor. No time frame is established by Commission Rule as to when a subsequent examination by the same doctor must be held. Therefore the Commission acted without reference to guiding principles or rules when it selected [Dr. M] as designated doctor when [Dr. P] was still qualified to serve and did not refuse to do so.

APPLICATION OF RULE 130.5(d)(1) APPOINTMENT TIME FRAME TO SUBSEQUENT REQUEST FOR DESIGNATED DOCTOR

The claimant asserts that the hearing officer erred in determining that the time frame set forth in Rule 130.5(d)(1) applies only to the initial designated doctor's appointment. The claimant asserts that the time frame also applies to subsequent requests for a designated doctor and because the Commission found that Dr. P was "unavailable," it properly appointed Dr. M as the designated doctor. Although the DRIS note of November 14, 2003, does not state that Dr. P was "unavailable," we nevertheless agree with the claimant's contention regarding the application of the appointment time frame in Rule 130.5(d)(1) to a subsequent request for a designated doctor examination.

The preamble to Rule 130.5(d) at 26 Tex. Reg. 10919 (2001) reflects that the Commission agreed that the original designated doctor should remain in that role as long as the doctor is still qualified and available, but did not elaborate on availability. With regard to the time frame for setting up a designated doctor's appointment, 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." There is no contention that the carrier's TWCC-32 received by the Commission on November 18, 2003, was not a valid request for a designated doctor examination. Thus, in construing the word "available" as used in Rule 130.5(d)(2), the time frame for setting up a designated doctor's appointment must be considered because Rule 130.5(d)(1) does not make any exception for the time frame imposed therein when the appointment is being ordered pursuant to a subsequent request for a designated doctor's examination for MMI and/or IR. We are mindful that the Appeals Panel may not informally amend a rule through an Appeals Panel decision to provide for an exception to a rule. *See* Rodriguez v. Service Lloyds Insurance Company, 997 S.W.2d 248 (Tex. 1999). Consequently, we hold that the hearing officer erred in determining that the time frame for setting up a designated doctor's appointment as set forth in Rule 130.5(d)(1) applied only to the initial designated doctor's appointment and did not apply to the carrier's subsequent request in November 2003 for a designated doctor examination.

BURDEN OF PROOF ON ONE CHALLENGING ORDER

The claimant also asserts that it was the carrier's burden to show that the Commission abused its discretion in appointing Dr. M as the second designated doctor and that there is no evidence that supports the hearing officer's finding that the Commission abused its discretion in appointing Dr. M as the second designated doctor. We again agree with the claimant's contention.

With regard to the burden of proof, at the CCH the hearing officer stated that she was placing the burden of proof on the carrier with regard to the issue in dispute. We believe that was the correct thing to do in this case because the carrier was challenging the appointment of Dr. M as the second designated doctor. Although the Commission order appointing Dr. M as the designated doctor is not in evidence, it is undisputed that the Commission did appoint Dr. M as the second designated doctor in response to the TWCC-32 filed by the carrier. 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* Appeal No. 030467, *supra*.

In the instant case, the only evidence regarding why Dr. M was appointed as the second designated doctor is the Commission's DRIS note that reflected that the claimant would have to be sent to a different designated doctor because the initial designated doctor, Dr. P, could not meet the "time frame until further notice." We have held in this decision that the time frame set forth in Rule 130.5(d)(1) for setting up a designated doctor appointment also applies to a subsequent request for a designated doctor examination for MMI and/or IR. The carrier presented no evidence that the Commission did not follow Section 408.0041 or Rule 130.5 in appointing Dr. M as the second designated doctor. There was no showing by the carrier that the Commission abused its discretion in appointing Dr. M as the second designated doctor. We reverse the hearing officer's decision that Dr. M was not properly appointed as a second designated doctor and render a decision that based on the evidence adduced at the CCH, Dr. M was properly appointed as the second designated doctor.

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

CORPORATION SERVICE COMPANY
800 BRAZOS STREET, SUITE 750, COMMODORE 1
AUSTIN, TEXAS 78701-2554.

_____
Robert W. Potts
Appeals Judge

CONCUR:

_____
Thomas A. Knapp
Appeals Judge

_____
Margaret L. Turner
Appeals Judge