APPEAL NO. 061328-s
FILED AUGUST 21, 2006

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 May 16, 2006. The unresolved issues were:

1. Did [appellant] Claimant have disability resulting from the compensable injury sustained on _____, from January 13, 2004, through September 15, 2004?

2. What is the impairment rating (IR)?

3. Was [Dr. RR] properly appointed as the designated doctor in accordance with TEXAS LABOR CODE ANN., § 408.0041?

The hearing officer determined that the claimant did not have disability, from January 13 through September 14, 2004, that the claimant did have disability on September 15, 2004, that the claimant's IR is 5% and that Dr. RR was properly appointed as the (third) designated doctor.

The claimant appealed the determinations regarding disability, contending that she had disability as defined by Section 401.011(16), the determinations regarding the appointment of a second and third designated doctor and the determination of a 5% IR contending that Dr. RR's first report was contradictory and that her IR should be 18% as assessed by her treating doctor. The respondent (carrier) responded, urging affirmance.

DECISION

Affirmed in part and reversed and remanded in part.

The parties stipulated that the claimant sustained a compensable left shoulder and cervical spine injury on _____, that Dr. P was appointed as the first designated doctor, that Dr. M was appointed as the second designated doctor, that Dr. RR was appointed as the third designated doctor, and that the claimant reached statutory maximum medical improvement (MMI) on August 12, 2005. The claimant testified how a 16-foot metal gate fell on her, injuring her left shoulder and cervical spine.

DISABILITY

The hearing officer's decision on disability as defined in Section 401.011(16) is supported by sufficient evidence and is affirmed.

IR AND THE APPOINTMENT OF DR. RR AS THE THIRD DESIGNATED DOCTOR

Dr. S, the first treating doctor, certified the claimant at MMI on September 22, 2003, with a 4% IR based on Table 75, Section II the Guides to the Evaluation of Permanent Impairment, fourth edition (1st, 2nd, 3rd, or 4th printing, including corrections and changes as issued by the American Medical Association prior to May 16, 2000) (AMA Guides). We note that Dr. S used the range of motion (ROM) model rather than the favored Diagnoses-Related Estimate (DRE) Injury Model (S*ee* Section 3.3 page 94 of the AMA Guides). Dr. S's rating was disputed and Dr. P was appointed as the first designated doctor. In a Report of Medical Evaluation (DWC-69) and narrative dated November 25, 2003, Dr. P certified MMI as of that date with a 5% IR. Dr. P had an impression of "Acute cervical strain and shoulder pain that have been treated surgically." In fact, the claimant had not had shoulder surgery. Dr. P found no left shoulder impairment and while he does not specifically explain his 5% IR we note that DRE Cervicothoracic Category II: Minor Impairment has a 5% IR.

In December 2003 the claimant was sent out for a surgical consult and a cervical diskectomy with fusion and instrumentation was recommended. The claimant changed treating doctors in June 2004 to Dr. O. The claimant was given an initial epidural steroid injection (ESI) on September 17, 2004. A letter of clarification (LOC) dated September 20, 2004, containing additional medical records and some of Dr. O's comments was sent to Dr. P. Dr. P replied by letter dated September 22, 2004, commented on claimant's alleged nerve root impingement and concluded that the claimant had been given an ESI with good results and with two more injections scheduled "the claimant would not be considered to be at [MMI]." In a DWC-69 dated September 22, 2004, Dr. P certified that the claimant was not at MMI. Dr. O performed NCV/EMG testing on October 22, 2004, and another doctor did EMG/NCV testing on November 4, 2004, concluding there was C5-6 nerve root irritation consistent with radiculopathy or stenosis.

The claimant had C5-6 spinal surgery on April 21, 2005. (The operative report has a pre and post operative diagnosis of left cervical radiculopathy.) By letter dated May 4, 2005, the Texas Department of Insurance, Division of Workers' Compensation (Division) sent Dr. P another LOC noting that the claimant had received additional medical treatment and enclosing a letter from Dr. O and the operative report of April 21, 2005. Dr. P reexamined the claimant on July 6, 2005, and in a DWC-69 and narrative of that date noted that the claimant "has recently begun physical therapy," certified that the claimant was not at MMI and projected an estimated MMI date of September 22, 2005. The date of MMI was not an issue and the parties stipulated that the claimant reached statutory MMI on August 12, 2005. It is undisputed that August 12, 2005, is the date that the claimant reached MMI pursuant to Section 401.011(30)(B).

Dr. O, on an unsigned DWC-69 indicated that he had examined the claimant on August 8, 2005, certified that date as the statutory MMI date and assessed an 18% IR. Dr. O's 18% IR is calculated by assessing a 15% impairment "from DRE III as seen on page 104 of the Guides" and 5% impairment for left shoulder loss of ROM (5%

impairment of the left upper extremity which results in a 3% whole person impairment) which are combined for an 18% IR. Dr. O's 18% IR cannot be adopted because the DWC-69 was not signed and it is not based on the claimant's condition as of the August 12, 2005, statutory MMI date. *See* Appeal Panel Decision (APD) 061017, decided July 14, 2006.

Dispute Resolution Information System (DRIS) notes in evidence indicated that on August 31, 2005, the Division received a Request for Designated Doctor (DWC-32) from the attorney then representing the claimant "Requesting DD to determine MMI/IR since IW is at STAT." Another DRIS note dated September 1, 2005, indicates that the attorney had left a message "that they withdraw request for DD since trtg dr has given MMI/IR and carr has not disputed." A DRIS note of September 14, 2005, indicates that the Division "Rec'd 32 form from adj wanting to dispute IR only." A DRIS note of September 19, 2005, indicates that Dr. M was appointed as the designated doctor. DRIS notes and the claimant's testimony indicate that the claimant failed to appear at the scheduled appointment with Dr. M because of car problems and that on November 4, 2005, the claimant called the Division inquiring why her designated doctor appointment had not been rescheduled. A DRIS note of November 4, 2005, indicates that the claimant "had probably called the carrier" attempting to reschedule her appointment and that Dr. M "is a traveling dr and he wouldn't be coming back in town for another 8 or so weeks." To expedite the process and as an accommodation to the claimant, Dr. RR, an associate of Dr. M and the next designated doctor on the list, was appointed as the third designated doctor. In a DWC-69 and narrative report dated November 17, 2005, Dr. RR certified MMI as "statutory . . . on 08/08/2005." The DWC-69 indicated a 5% IR, while the narrative indicated a "15% whole person impairment under DRE cervicothoracic Category III." In an amended DWC-69 and narrative, also dated November 17, 2005, Dr. RR listed the same MMI date as his original report and assessed a 5% IR. In the amended narrative Dr. RR wrote:

> After considering the above differentiators, the examinee's subjective symptoms and the medical records, it is determined the examinee's injury is best rated under DRE (Diagnosis Related Estimate) Category II, for 5% whole person impairment of the cervical spine.

Dr. RR was sent letters of clarification dated January 6, 2006, and January 19, 2006, asking why he had not rated the claimant at cervicothoracic DRE III as originally rated and enclosing electrodiagnostic testing dated December 5, 2005, and October 22, 2004. Dr. RR replied by letters dated January 11, 2006, and January 31, 2006, stating that the "examinee does not have greater than 2 cm of atrophy to support radiculopathy" and even with the additional medical records he has no reason to change the previous date of MMI or IR.

The hearing officer, at the CCH, several different times asked the parties to address why three different designated doctors were "involved" (appointed). The claimant's response was that "for some reason" the Division had selected Dr. M and it was the claimant's position in closing that there was "no reason to change from [P] to

[M] and even less reason to change from [P] to [M] to [RR] . . . . There's nothing to support the change." (Transcript page 67). The carrier theorizes that the claimant's attorney had "submitted a Matrix T32" and "this 32 was based on a surgical matrix that could possibly have warranted a different designated doctor to fit that matrix." (Transcript page 68).

An abuse of discretion is the standard to use in reviewing a decision to appoint a second designated doctor. APD 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* APD 931034, decided December 27, 1993. In APD 011607, decided August 28, 2001, the Appeals Panel held that normally the appointment of a second designated doctor is appropriate only in those cases where the first designated doctor is unable or unwilling to comply with the required AMA Guides or requests from the Commission (now Division) for clarification, or if he or she otherwise compromises the impartiality demanded of the designated doctor. If a designated doctor cannot or refuses to comply with the requirements of the 1989 Act, a second designated doctor may be appointed. APD 961436, decided September 5, 1996. *See also* APD 050649, decided May 3, 2005. 28 TEX. ADMIN. CODE § 130.5 (Rule 130.5) regarding "Entitlement and Procedure for Requesting Designated Doctor Examinations related to [MMI] and [IR]," in Rule 130.5(d)(2) provides in pertinent part that:

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

See also APD 042669-s, decided December 2, 2004. In that Dr. P had previously been appointed as the first designated doctor Rule 130.5(d)(2) requires that the Division shall use that doctor again if he is still qualified and available.

In the instant case, the hearing officer cited and relied on the language in APD 022184, decided October 8, 2002. In that case the Appeals Panel noted that there were questions about the validity of the first designated doctor's report, and there was no issue of whether the Division had abused its discretion in appointing a second designated doctor. The hearing officer commented that in APD 022184, *supra*, citing APD 93706, decided September 27, 1993, and APD 93501, decided August 2, 1993, the Appeals Panel had stated it would not condone a parties' action in awaiting the second designated doctor's report and then raising the complaint that the appointment of the second designated doctor was an abuse of discretion. The hearing officer commented that the Appeals Panel stated the time to protest the appointment of the designated doctor is prior to the examination and that "there is an element of estoppel when both parties allow a dispute to proceed to appointment of a designated doctor before raising a complaint." The hearing officer, in an appealed finding, found that the claimant is estopped from objecting to the Division's appointment of Dr. RR as the third

designated doctor because the claimant did not timely object to the appointment of Dr. RR until the claimant had been evaluated by Dr. RR, and Dr. RR had issued his certification. (Finding of Fact No. 17). We hold that finding in error. In a similar situation in APD 060834, decided June 14, 2006, the Appeals Panel cited Rule 130.5(d)(2) and APD 022277, decided October 23, 2002, holding that if a designated doctor has been previously assigned the Division shall use that doctor again, if the doctor is still qualified and available. In APD 042589, decided December 8, 2004, and APD 040982, decided June 18, 2004, the Appeals Panel pointed out that the Division has an obligation to ensure that a designated doctor is qualified for the appointment. Under Rule 130.5(d)(2) where a designated doctor has previously been assigned the Division "shall use that doctor again" if the doctor is still qualified and available. We find no authority for relieving the Division of its obligation in that regard, even if the party's challenge comes after the results of the examination are known. APD 060834, *supra*.

In this case Dr. P had properly been appointed as the designated doctor. After initially certifying MMI with a 5% IR, upon being given additional information that the claimant was receiving ESI treatment, Dr. P rescinded his MMI and IR. After the claimant had cervical spinal surgery Dr. P again examined the claimant and stated that she was not at MMI because she was receiving rehabilitation subsequent to the spinal surgery. The then treating doctor, Dr. O, shortly before statutory MMI, assessed MMI with an 18% IR. Instead of sending the claimant back to Dr. P to request evaluation as of the time of MMI, the Division appointed a second and then a third designated doctor, apparently because one or both parties filed DWC-32 forms. We hold that the Division abused its discretion in the appointment of the subsequent designated doctors by failing to comply with Rule 130.5(d)(2). There is no indication that Dr. P was unable or unwilling to comply with the required AMA Guides or requests for clarification and there is no evidence that Dr. P was not available to reexamine the claimant at the time of MMI.

We reverse the hearing officer's decision that the claimant's IR is 5% and that Dr. RR was properly appointed as the designated doctor and remand the case for reconsideration by the hearing officer. The hearing officer is to determine whether Dr. P is still qualified and available to be the designated doctor, and if so, advise Dr. P that he is to reexamine the claimant to assess an IR for the compensable injury of _____, based on the claimant's condition as of the stipulated August 12, 2005, date of statutory MMI considering the medical records and the certifying examination. If Dr. P is no longer qualified to be the designated doctor then another designated doctor is to be appointed pursuant to Rule 130.5(d)(2) to determine the claimant's IR based on the claimant's condition as of the stipulated August 12, 2005, date of statutory MMI considering the medical records and certifying examination. The hearing officer is to provide the designated doctor's response to the parties and allow the parties an opportunity to respond and then make a determination regarding the IR.

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 Division, pursuant to Section 410.202 which was amended June 17, 2001, to exclude Saturdays and 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* APD 92642, decided January 20, 1993.

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

CORPORATION SERVICE COMPANY
701 BRAZOS STREET, SUITE 1050
AUSTIN, TEXAS 78701-3232.

_____
Thomas A. Knapp
Appeals Judge

CONCUR:

_____
Veronica L. Ruberto
Appeals Judge

_____
Margaret L. Turner
Appeals Judge