APPEAL NO. 92206

A contested case hearing was held at (city), Texas, on April 14, 1992, (hearing officer) presiding as hearing officer. He decided that a doctor who determined that the respondent no longer suffered a disability was not her treating doctor, was not a "required medical examination" doctor, and had no authority to make the determination. Accordingly, the hearing officer concluded that the respondent's entitlement to temporary income benefits continued. The appellant excepts (1) to the "method and manner that the issues were outlined before the hearing officer and as they are recited in" his DECISION AND ORDER, (2) to the recitation of the facts as stated in the statement of evidence, (3) to the recitation of the facts as stated in the Findings of Fact, and (4) to the Conclusions of Law and decision rendered by the hearing officer.

DECISION

Finding the evidence sufficient to support the findings, conclusions and decision of the hearing officer, we affirm.

The issues stated at the beginning of the hearing and agreed to by the parties were:

1.Whether (Dr. K) is the treating physician for (respondent), and

2.Whether temporary income benefits are due from October 1, 1991 through the present.

With regard to the appellant's complaint concerning the framing of the issues, it is apparent from the record that some confusion existed regarding the last weeks in September and the matter that temporary income benefits (TIBS) had not been paid from September 18, 1991, when Dr. K determined that the respondent could go back to work (a letter in the record seems to indicate the date as September 13th rather that September 18th) and October 1, 1991, the effective date of an interlocutory order directing the resumption of the payment of TIBS. The appellant indicated it has not paid any TIBS from September 18 until October 1, and it was clear that the respondent was also contesting the nonpayment for this period of time. In view of the hearing officer's decision on the question of the efficacy of Dr. K's return to work determination, the issue is moot. If there is no valid or binding return to work determination, or other end to disability (the passage of 104 weeks or the reaching of maximum medical improvement was not in question), then TIBS would be payable for the entire period including the last two weeks of September, 1991. Article 8308-4.23, Texas Workers' Compensation Act (TEX.REV.CIV.STAT.ANN. art.8308-4.23 (Vernon Supp 1992)) provides that "an employee who has disability and who has not attained maximum medical improvement is entitled to temporary income benefits" and that such benefits shall continue until maximum medical improvement is reached. We find no merit in appellants first assertion of error.

The respondent testified that she injured her back in (date of injury) (not in dispute)

and saw her family physician, (Dr. F), who remains her treating doctor. She stated that in early April she was called and subsequently sent a letter by (Mr. M), the appellant's claims adjustor. Mr. M told her he wanted to send her to a specialist, (Dr. K). According to the respondent, Mr. M did not indicate to her that she could refuse and said she had to go to keep her benefits. She stated she only saw Dr. K about three times but that he put her in a work hardening program. Carrier's Exhibit C a report on the work hardening program, indicates a treatment admission date of August 19, 1991 and a discharge date of September 13, 1991. The respondent said the work hardening program did not help her and only aggravated her condition. She acknowledged that Dr. K released her to go back to work on September 18th. However, she also stated she remained under Dr. F's treatment during this time, although she indicated that her condition was not being help by him. She testified that on August 19, 1991, and after talking to him about not getting any better, Dr. F referred her to a (Dr. M), a specialist. Because of Dr. M's heavy schedule, the respondent did not get an appointment until October 1. Dr. M's report indicated, *inter alia*, that he "would not find her fit for work based on her physical findings today" and, according to the respondent, he felt she needed back surgery. Respondent testified that Dr. F never released her to go back to work and that she only saw Dr. K at Mr. M's request.

The appellant called Mr. M who testified that he never told the respondent she had to go to Dr. K and never said her benefits would be stopped if she did not go. He stated this would be wrong both morally and ethically. The reason he suggested she see Dr. K, a specialist, is because she told him she was not getting any better. He stated that the carrier continued to pay doctor bills from Dr. F while the respondent was seeing Dr. K. He stated he only recommended Dr. K to the respondent but acknowledged he made the appointment to "cut through red tape." He stated that it isn't unusual for an injured person to see more than one doctor, and that the respondent did not say to him that she wanted to change doctors and no longer wanted Dr. F. Mr. M stated he felt the respondent "also had a treating doctor in Dr. K."

We have carefully reviewed the hearing officer "recitation" of facts in both his Statement of Evidence and Findings of Fact, and conclude that they accurately and fairly set forth the evidence of record. Appellant cites no examples, is not otherwise specific in his exception to the "recitation" of facts by the hearing officer, and presents no discussion, argument or citation of authority in support of his position. Accordingly, we reject his exceptions and find no basis to grant any relief.

The hearing officer's conclusions of law are clearly backed by his findings of fact and reflect a correct application of the law to those facts. The pertinent conclusions with which the appellant apparently takes exception are:

CONCLUSIONS OF LAW

3.Dr. K is not and had not been Claimant's treating doctor (Article 8308-1.03(46)).

4.Dr. K, who is neither the treating doctor nor a required medical examination doctor, has no authority under the Texas Workers' Compensation Act to determine that Claimant no longer suffers a disability (Article 8308-4.16 and 4.62).

5.Claimant's disability, and thus her entitlement to temporary income benefits, continues from her date of injury to the present date (Article 8308-4.23).

Article 8308-1.03(46) provides the definition of treating doctor as "the doctor who is primarily responsible for the employee's health care for an injury." The threshold question in this case is whether Dr. K comes within this definition under the particular facts present. While the evidence was in conflict on this issue, the hearing officer was in the best position to resolve the conflicts. As provided in Article 8308-6.34(e), "[t]he hearing officer is the sole judge of the relevance and materiality of the evidence offered and of the weight and credibility to be given the evidence...." In resolving conflicts in the testimony of witnesses, he may believe all, part or none of the testimony of any one witness and he may believe one witness and disbelieve other witnesses whose testimony is in conflict with the one. Cobb v. Dunlap, 656 S.W.2d 550 (Tex. App.- Corpus Christi 1983, writ ref'd n.r.e.); Taylor v. Lewis, 553 S.W.2d 156 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.). The respondent testified that Dr. F was her treating doctor throughout the treatment of her injury and that she only went to Dr. K because she thought she had to and would jeopardize her benefits if she did not do so. She stated that she did not chose Dr. K and did not consider him to be her treating doctor. It is clear that she continued to see Dr. F throughout the period of time involved in this issue and that the appellant continued to pay bills submitted for such treatment by Dr. F. We do not believe the hearing officer's findings on this issue ascribes nefarious or wrongful conduct on the part of the adjustor, Mr. M; rather, there is room for a conclusion of a breakdown in communication or a misunderstanding between Mr. M and the respondent. The record gives support to an inference that Mr. M was sincerely concerned with the respondent's well-being. Nonetheless, the evidence is sufficient to support the hearing officer's conclusions insofar as they determine an end to disability had not occurred, under the circumstances of this case, and his decision that Dr. K was not the respondent's treating doctor, and his finding that Dr. K was a doctor selected by the carrier.

In his Conclusion of Law No. 4, the hearing officer's use of the term "no authority" in stating that Dr. K had no authority to determine that the respondent no longer suffers a disability, is not entirely accurate. It is true that the effect of a doctor selected by a carrier returning an injured employee to work is not to end disability but is cause for the initiation of a benefit review conference on the next available docket. Article 8308-4.16(e). Of course, even though Dr. K was not the respondent's choice of a treating doctor, his evaluation report returning the respondent to work was certainly evidence on the matter that could be appropriately considered in determining the factual issue of an end of disability by a return to full work. *See* Texas Workers's Compensation Commission Appeal No. 91023 (Docket No. redacted) decided on October 16, 1991; Texas Workers' Compensation Commission

Appeal No. 91024 (Docket No. redacted) decided October 23, 1991. Dr. K's report likewise, did not have the effect, in and of itself, of ending the respondent's disability and, hence, her continued entitlement to TIBs.

In view of the hearing officer's factual findings that Dr. K was not the respondent's choice of a treating doctor but was rather a doctor selected by the appellant, Rule 126.7(f) (Tex W.C.Comm'n, 28 TEX ADMIN CODE § 126.7(f)), as urged at the hearing, did not come into play. That rule provides:

> (f)The receipt of health care from a doctor selected by the employer or carrier does not, by itself, constitute the injured employee's initial choice of a treating doctor. The employee should choose a treating doctor and notify the commission of that choice as soon as possible. However, if this doctor continues to treat the injured employee for a period of sixty (60) days, the doctor is then deemed to be the injured employee's first choice of treating doctor.

The respondent here made her first choice of a treating doctor, Dr. F, who remained her treating doctor throughout the time from her injury to the date of the hearing. Dr. F, as her respondent's treating doctor, was primarily responsible for her health care for the injury. Article 8308-1.03(46).

Determining the evidence to be sufficient to support the hearing officer's essential Findings of Fact and Conclusions of Law and not finding any other basis to disturb his decision, we affirm.

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Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

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Joe Sebesta
Appeals Judge

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Philip F. O'Neill
Appeals Judge