APPEAL NO. 92575

A hearing on remand was held in (city), Texas, on September 25, 1992, (hearing officer) presiding as hearing officer. The remand was ordered in Texas Workers' Compensation Commission Appeal No. 92345, decided September 1, 1992, because of an incomplete record resulting from lapses in the electronic recording tapes of the original hearing. The records have been satisfactorily reconstructed and the hearing officer adhered to her previous decision in this case which ordered the appellant (carrier) to accept the respondent's (claimant) third choice of treating doctor. Carrier urges that the claimant failed to comply with "Section 126.7 of the Workers' Compensation Statute" (apparently referring to Commission Rules), that he had already seen several doctors and is not entitled to seek treatment from additional doctors at this time.

DECISION

The decision of the hearing officer is affirmed.

The hearing officer fairly and adequately set forth the evidentiary background of the case in her decision and we adopt it for purposes of this decision. The limited language skills of the claimant, as noted in the hearing officer's Decision and Order, probably accounts for much of the confusion in the treatment history of the claimant. Briefly, he injured his back on the job and received emergency treatment and was hospitalized for a period of time. During this hospitalization he was seen by a number of doctors. He subsequently was under the care of a (Dr. S) who referred him to another doctor, (Dr. L), for a second opinion. Dr. L opined that the claimant could go back to work. Claimant was referred to a (Dr. M) by an attorney he contacted. Claimant testified that he was treated with physical therapy by Dr. M but that the carrier refused to pay for this. The claimant continued to suffer severe back pain and subsequently went to the emergency room of a hospital where after some diagnostic tests he was eventually referred to (Dr. H) who performed surgery for a pinched nerve. Dr. H related the pinched nerve to the on-the-job injury.

The claimant stated that a form in evidence indicating a second choice of doctor by the name of (Dr. E) was prepared by someone in Dr. S's office but that he never saw a Dr. E. (Claimant is not able to read or write and can only sign his name). Also in evidence was an Employee's Request for Third or Subsequent Treating Doctor (TWCC Form 50) which was prepared with the assistance of the ombudsman and lists Dr. S as the initial treating doctor, Dr. L as the second treating doctor, and Dr. M as the third or subsequent treating doctor. The form is not signed by the claimant. The carrier denied the claimant's request for Dr. H stating that the claimant had already chosen three previous doctors.

The hearing officer determined that Dr. S was claimant's first choice of treating doctor, that Dr. M was his second choice, but that the carrier did not pay for Dr. M, that Dr. H was his third choice, and that the preponderance of the evidence established that claimant was entitled to select Dr. H as his third treating doctor.

We believe there is sufficient evidence to support the hearing officer's decision. It appears from the evidence that the earlier treatment of the claimant did not uncover the main cause of his severe back pain and that there was sufficient justification for his ultimate request to have Dr. H as his treating doctor. Of course, the 1989 Act and implementing rules contemplate some reasonable restrictions on the movement from one treating doctor to another. Article 8308-4.62; Tex. W. C. Comm'n, 28 TEX. ADMIN. CODE § 126.7 (Texas Workers' Compensation Commission Rule 126.7). Article 8308-4.62, provides that a third or subsequent doctor selected by the employee is subject to the approval of the insurance carrier or the Commission. (Article 8308-4.62 is only effective until January 1, 1993 when a new, more restrictive article becomes effective). Rule 126.7 provides that the injured employee may request review of a denial (beyond the employee's second choice) by the carrier to change doctors upon written request. The review provision does not impose a time limit, nor does it provide that a request for review must precede any treatment by the requested doctor.

The issue presented was a factual one, a matter within the hearing officer's role as fact finder. Article 8308-6.34(e) provides that the hearing officer is the sole judge of the relevance and materiality of the evidence and of the weight and credibility to be given the evidence. Clearly, there were communication difficulties and problems that made the fact finder's role challenging in this case. However, the evidence does support her finding that Dr. H was not more that the third choice of treating doctor and that, under the circumstances, there was a sufficient basis to approve the third choice. We find no basis to disturb her findings and conclusion in this case. *See* Texas Workers' Compensation Commission Appeal No. 92232, decided July 20, 1992. Accordingly, the decision is affirmed.

Stark O. Sanders,
Chief Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

CONCURRING OPINION:

I concur that the decision should be affirmed. The hearing officer's decision should not

have indicated that claimant was entitled to a third choice of doctors. *See* Article 8308-4.62(a) and (b) of the 1989 Act. The decision could have considered that an attempt at selection of Dr. M, as claimant's second choice of a treating doctor, was thwarted by the action of the carrier and therefore Dr. H was the second choice. *See* Texas Workers' Compensation Commission Appeal No. 92526, dated November 25, 1992. Viewing the evidence from a different perspective, the hearing officer could have stated that under Article 8308-4.62(b) of the 1989 Act, Dr. H was "approved" by the Commission. The decision can be upheld on either of these theories which are supported by the evidence, so I would affirm. *See* Daylin Inc v. Juarez, 766 S.W.2d 347 (Tex. App.-El Paso 1989, writ denied).

Joe Sebesta
Appeals Judge