APPEAL NO. 92600

On September 15, 1992, a contested case hearing was held in (city), Texas, with (hearing officer) presiding as the hearing officer. The hearing officer found that the claimant reached maximum medical improvement (MMI) on June 1, 1992, and the carrier is liable for health care provided by (Dr. R) in accordance with the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq.* (Vernon Supp. 1992 (1989 Act). (Carrier) appeals contending: (1) Finding of Fact No. 5 and Conclusion of Law No. 2 are in error in that claimant's abnormal walk did not aggravate a preexisting lower back problem; (2) claimant did not have a disability following a full duty work release on April 13, 1992; (3) claimant reached MMI on April 23, 1992 as certified by (Dr. W); and (4) that (Dr. W) is still the treating doctor. Respondent (claimant herein) filed a timely response.

DECISION

The hearing officer's decision is affirmed.

Claimant is a 22 year old male with no prior history of medical problems or workers' compensation claims. He was employed by (employer) as a security guard on (date) when a metal cart loaded with bags of coins rolled down a ramp, pinning claimant's left knee against the wall with the cart railing "pinching" claimant's abdominal area. Claimant was taken to (Center) and diagnosed as having a left knee strain and contusion. According to claimant, he was referred to (Dr. M), who he saw at least twice, on September 17 and 26, 1991. (Dr. M) diagnosed claimant as having a left knee cruciate ligament strain. According to claimant, continued care with (Dr. M) was too expensive because carrier would only pay mileage instead of cab fare. Claimant testified he then took the recommendation of carrier's adjustor (transcript page 27) and began treatment with (Dr. W). Claimant saw (Dr. W) from late (month year) to early April 1992. On October 4, 1991, (Dr. W) performed arthroscopic surgery on the left knee. Shortly afterward, claimant began using a cane. During the time frame of October 1991, to April 1992, claimant received physical therapy from (GB) and continued to see (Dr. W) periodically. Claimant testified he began to feel the lower back pain "approximately three or four weeks after the accident." The testimony was that this was reported to both (Dr. W) and the therapist. It was also reported to (Dr. Se), a doctor claimant saw during a visit to (state) on January 6, 1992. On March 17, 1992, (Dr. S) did an independent medical evaluation for the carrier regarding claimant's knee injury. By memo dated 3/19/92 (Dr. W) released claimant for full duty effective 4/13/92. (Dr. W) also completed a Report of Medical Evaluation (TWCC-69) wherein he stated he "had nothing further to offer claimant," and according to claimant refused to see him again. The hearing officer found in Finding of Fact No. 13.

13. On April 17, 1992, (Dr. W) stated he had nothing further to offer Claimant with respect to his knee problems and Carrier refused to authorize treatment by (Dr. W) of Claimant's back problems.

The hearing officer also mentioned, and is supported by the testimony, that claimant

walks with a cane, wears a knee brace, and wears a back brace, although there "was no evidence, however, that these items had been prescribed." Further there is evidence and testimony that claimant's use of a cane and "abnormal gait" exacerbated his back injury. According to claimant, because (Dr. W) refused to see him after April 1992 and the carrier refused to authorize treatment for claimant's back, claimant sought treatment from (Dr. R). The parties were unable to resolve their differences at the July 22, 1992 benefit review conference (BRC) and the following issues were framed for the contested case hearing (CCH):

1.Whether the Claimant has a back injury that was caused by his (date of injury), accident;

2.Whether Claimant has disability entitling him to temporary income benefits (TIB's) based on his compensable injury of (date of injury);

3.Whether (Dr. R) is an authorized treating physician;

4.Whether Claimant has reached maximum medical improvement (MMI) and if he has reached MMI, when did he reach it.

Because of the contradicting testimony and evidence, the hearing officer at the conclusion of the CCH selected (Dr. M) as a designated doctor to determine if claimant had reached MMI and to pose some additional questions, the answers to which would not have presumptive weight. The questions posed were:

1.Does [claimant] have a back injury? If so, describe its nature and extent.

2.If [claimant] has a back injury, are you aware of any factors, evidence, or data, other than [claimant's] statement, that would indicate that his back injury was sustained in the (date of injury) accident?

3.If [claimant] has a back injury, do you have an opinion as to whether the back injury could have been caused or exacerbated by the manner in which he walked with a cane (altered gait)?

4.Has [claimant] reached maximum medical improvement (MMI) from any injuries he sustained in, or that were caused by, his accident of (date of injury)? If so, when did he reach MMI?

By a TWCC-69 and narrative report dated 9/30/92, (Dr. M) answered the posed questions, basically finding MMI of 6/1/92 for the back injury, opining that based on the history, claimant sustained a back injury on (date of injury) and that claimant had degenerative disc disease of the lumbar spine with demonstrable soft tissue injury to his back. (Dr. M) added that claimant's back injury could have been exacerbated by his abnormal gait, use of the cane and exaggerated walk.

The hearing officer found, in part:

FINDINGS OF FACT

5.Claimant's injury of (date of injury), caused him to walk in an abnormal manner and walking in an abnormal manner aggravated a preexisting lower back problem.

6.Because of his compensable injury of (date of injury), and his back injury caused by walking in an abnormal manner, Claimant was unable to obtain and retain employment at his preinjury wage from (date of injury), through June 1, 1992.

7.On June 1, 1992, Claimant reached a point after which no further material recovery could be anticipated from his compensable injury of (date of injury), and from his back injury that was brought on by walking in an abnormal manner.

13. On April 17, 1992, (Dr. W) stated he had nothing further to offer Claimant with respect to his knee problems and Carrier refused to authorize treatment by (Dr. W) of Claimant' back problems.

CONCLUSIONS OF LAW

2.Claimant had disability as a result of his compensable injury of (date of injury), and resulting back injury from the date of injury until June 1, 1992.

3.On June 1, 1992, Claimant reached maximum medical improvement from his compensable injury of (date of injury), and the resulting back injury.

The carrier appealed alleging error in Finding of Fact Nos. 5, 6, 7 and 13, and Conclusion of Law Nos. 2 and 3, quoted above. Carrier's first issue alleges error in Finding of Fact No. 5 and Conclusion of Law No. 2 arguing that claimant only made a claim for a left knee injury and "[a]s a matter of law, claimant is not entitled to now claim a back injury . . ." Carrier seems to imply it had no notice of the back injury and the issue was not raised at the BRC. Factually, at the BRC claimant's back injury was raised and carrier's position was recorded as "[t]he carrier contends no back injury was reported . . ." Clearly the claimant has the burden to prove, through a preponderance of the evidence, that an injury occurred in the course and scope of employment, Reed v. Aetna Casualty & Surety Co., 535 S.W.2d 377 (Tex. Civ. App.-Beaumont 1976, writ ref's n.r.e.), and the hearing officer is the sole judge of the weight and credibility of the evidence, Article 8308-6.34(e). Select Insurance Company v. Patton 506 S.W.2d 677 (Tex. Civ. App.-Amarillo, 1974) stated the function of the claim is to give information as to what happened and to serve as a proper basis for investigation, hearing and determination of the claim. "It is not intended that the claim filed

be governed by any strict rules or formalities." Here carrier had notice of claimant's back problems via the medical records as early as October 1991. If the claimant's testimony is believed, as the hearing officer obviously did, the carrier instructed (Dr. W) not to treat the back condition. Certainly the back problem was discussed at the BRC on June 22, 1992, and claimant at that time requested benefits for the back injury. As quoted above, carrier then said no back injury was reported and the compensable injury is limited to the knee. Whether the back was injured in the (date of injury) accident is a legitimate issue for the trier of fact and was certainly raised and discussed at the BRC. Alleging the carrier did not know about the back condition is contrary to many of the medical reports and BRC report.

The carrier's second issue is that Finding of Fact No. 6 and Conclusion of Law No. 2 are in error because "the claimant had no disability following the full work release by (Dr. W) on April 13, 1992." This is clearly a fact issue for the trier of fact. Certainly claimant's testimony contradicts carrier's assertion. Claimant's testimony has medical support from the physical therapist's April 9, 1992 report which states claimant is to undergo work hardening and biofeedback and the designated doctor's certification of MMI of June 1, 1992 as to the back condition. The hearing officer's finding that claimant had disability, as defined by the Act, due to his back injury is amply supported by the claimant's testimony, the physical therapist's report and by the designated doctor's detailed narrative. Carrier's contention is not meritorious.

Carrier's third issue is that Finding of Fact No. 7 is in error in that (Dr. W), as the treating doctor, certified MMI as April 23, 1992, and there was no dispute as to MMI and no need for a designated doctor. Claimant certainly disputed the April 23, 1992 MMI date on both the knee and the back. (Dr. W) had not treated the back condition and therefore was in no position to certify an MMI as to the back. Article 8308-4.25(b) states "[i]f a dispute exists as to whether the employee has reached maximum medical improvement, the commission shall direct the employee to be examined by a designated doctor . . ." If the parties are unable to agree on a designated doctor, the Texas Workers' Compensation Commission (Commission) will select the designated doctor and the designated doctor's report shall have presumptive weight. The hearing officer clearly believed there was a dispute. The Act then states the Commission will select a designated doctor. There is no reference to specific person or title as to who in the Commission will make the selection. The hearing officer as a member of the Commission has authority to act for the Commission baring any restrictions. The record does not reveal any such restrictions and there is no other indication that the hearing officer exceeded his authority. The hearing officer's Finding of Fact No. 7 and Conclusion of Law No. 2 are supported by the designated doctor's MMI certification and claimant's testimony.

Carrier's last alleged error is in Finding of Fact No. 13 and Conclusion of Law No. 2 in that (Dr. W) is still the treating doctor. The argument is that (Dr. M) was the first choice of treating doctor, (Dr. W) was the second treating doctor, and under Article 8308-4.62(b) a third or subsequent doctor is subject to the approval of the insurance carrier or the Commission. Carrier alleges the hearing officer's Conclusion of Law No. 4 "is non-sensical in that . . . the change to (Dr. R) did not constitute the selection of an ‘alternate doctor for the

purpose of Section 4.62' of the . . . Act." Clearly the hearing officer was considering (Dr. W's) report which said that (Dr. W) "had nothing further to offer claimant." This supports claimant's testimony that he called (Dr. W's) office to schedule appointments but the appointments were canceled and that (Dr. W), whether instructed by carrier or whatever reason, was refusing to treat the claimant. As claimant points out in the response, under normal circumstances it is customary for the treating doctor to provide reasonable and necessary medical treatment related to the original injury or at least examine the claimant and document the complaints. Article 8308-4.64 provides exceptions which do "not constitute the selection of an alternate doctor for the purposes of Sections 4.62 and 4.63 of this Act." Article 8308-4.64(4) provides an exception for "a selection made because the original physician dies, retires, or becomes otherwise unavailable or unable to provide medical care to the employee . . ." (Emphasis supplied). Clearly the hearing officer was referring to this section of the Act, without actually citing the subsection, in his Conclusion of Law No. 4 as evidenced by the terminology used by the hearing officer which the carrier found "non-sensical." (Dr. W), by refusing to see claimant or provide any further medical services made himself "otherwise unavailable or unable to provide medical care" to claimant. Article 3808-4.64(4) is applicable and we find no error in the hearing officer's findings and conclusion on this point.

Carrier in its closing argument at the CCH refers to Texas Workers' Compensation Commission Appeal No. 91045, decided November 21, 1991 as authority for the proposition that the hearing officer is "entitled to go ahead and render a decision" without having to use a designated doctor. A pertinent portion of Appeal No. 91045 *supra* states:

However, we conclude the more consistent, reasonable, and supportable approach,

> where as here, there is a question as to the continuance of disability, is to require some showing of the employee's injury. Montford, supra. An unconditional medical release to return to full duty does not, in and of itself, end disability. See Article 8308-4.16(e). If an employee cannot obtain and retain employment because of a compensable injury, disability continues.

We completely affirm that decision and its applicability to this case. Although (Dr. W) gave claimant an unconditional release to return to full duty, both the claimant's testimony and objective medical evidence submitted by (Dr. M), the designated doctor, would indicate otherwise. Certainly claimant emphatically testified he was unable to work and (Dr. M) found "Degenerative disc disease of the lumbar spine, L4/L5 and L5/S1."

The hearing officer has great latitude to resolve conflicts, including medical testimony. Texas Employers' Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th District] 1984, no writ). The findings will be upheld unless it is determined that they are so against the great weight and preponderance of the evidence as to be manifestly wrong of unjust. *See* In Re Kings Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). We will not substitute our judgement for the hearing officer, as trier of fact, when the challenged findings are not against the great weight and preponderance of the evidence.

The hearing officer's decision is affirmed.

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Thomas A. Knapp
Appeals Judge

CONCUR:

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Joe Sebesta
Appeals Judge

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Robert W. Potts
Appeals Judge