APPEAL NO. 93701

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. 401.001, *et seq.* (1989 Act). On July 6, 1993, a contested case hearing was held in (city) Texas, with (hearing officer) presiding. The issues to be determined were announced and agreed upon as being: what is the average weekly wage; what is the claimant's impairment rating; and, who is claimant's treating doctor? The hearing officer determined that claimant's average weekly wage (AWW) to be $273.26, that claimant had an impairment rating of 12% as assigned by the designated doctor, and that claimant's treating doctor is (Dr. S), M.D.

Appellant, carrier herein, requests the Texas Workers' Compensation Commission (Commission) review its policy of not forwarding ". . . copies of the Appeals Panel Decisions (sic--probably means hearing officer decisions) to the attorney representing the carrier and requests that we reverse the hearing officer's finding of fact and conclusion of law determining that claimant's treating doctor is Dr. S. Respondent and cross-appellant, claimant herein, timely files an "appeal" requesting clarification of the hearing officer's decision regarding "the date . . . impairment income benefits (IIBS) began." Carrier filed a response to claimant's cross-appeal.

DECISION

The decision of the hearing officer is affirmed.

Claimant testified through a translator, who had been duly sworn by the hearing officer. Initially we note that on occasion, after questions from the hearing officer, the translator and claimant (and perhaps the ombudsman) would engage in extended dialogue between or among themselves. The translator would then say "[t]his is very confusing." It is not clear whether the claimant was saying the question was confusing or the translator was saying the answer was confusing. In any event, it is clear that the translator was summarizing, and in some cases explaining, claimant's testimony. In some instances claimant's translated answers were totally unresponsive to the question asked. In at least one instance either the translator or the ombudsman engaged in speculation about what claimant meant by a particular answer.

Neither party appealed the hearing officer's determination of the AWW or the claimant's impairment rating, therefore, those determinations are not considered in this decision. Regarding the appealed determination of who is the claimant's treating doctor, we note there was scant testimonial evidence on this point and the principal evidence was carrier's Exhibit B, which contained three Employee's Request to Change Treating Doctors (an outdated, no longer used predecessor to the interim TWCC-50 was used).

Claimant testified that he had been employed by (employer), employer herein, for some eight years and that he considered Dr. S his treating doctor. His further testimony was that after the accident, on (date of injury), his employer "asked me to go see [Dr. H]."

Claimant stated he received treatment from Dr. H (a chiropractor) for a period of time ("two weeks" or several weeks). At some time claimant was apparently told he had to see another doctor who could prescribe medicine. He apparently saw a Dr. R and/or Dr. C, got his prescription and returned to Dr. H. When claimant did not get better, claimant stated that the employer canceled claimant's appointments with Dr. H. From June to September (year) claimant stated he went back to work and his injury (back and shoulder) got worse. Claimant testified that in (year) he went to the hospital emergency room to find someone to treat him. Claimant states that this is when he began treatment with Dr. S. There is no other testimonial evidence regarding the circumstances of filing the requests to change treating doctors.

Carrier's Exhibit B contains a request to change treating doctors dated 1-27-93. Obviously the form was completed by someone other than claimant because it was claimant's testimony that he cannot read nor write English. The form is a "Request to change to: SB [address]" with the "Reasons for Request to Change Doctors: Second oponion (sic) [Dr. S] advised clmt to get a second opinion if he was unhappy with his treatment." The request was approved and the Disability Determination Officer (DDO), (Ms. W), commented: "In talking with the claimant and [Dr. S's] office, I'm getting conflicting info. Due to a conflict between claimant and doctor, change is approved."

There is no evidence of what happened between January 27, and March 19, 1993, when claimant (with someone's assistance) filed another request to change treating doctors for the stated reason "I wish to continue seeing doctor (Dr. S). Mr . C said I only had to see (Dr. B) once but that I did not need to change doctors." The DDO, CL, denied the request stating "[r]easons stated do not comply with section 4.64. You may request a Benefit Review Conference."

Subsequently by another request to change treating doctors, dated 3/23/93, claimant gave as the reason for change: "SB este Doctor es para la segunda opinion solamente no para cambiar De Doctor." The DDO, LJ, approved the request and commented: "In talking with [claimant]. The ‘change’ to (B) was not for a 2nd treating doctor; but for a second opinion only! Therefore I am approving this change back to [Dr. S]."

The hearing officer determined, in pertinent part:

FINDINGS OF FACT

11. On January 27, 1993, Claimant requested to change from [Dr. S], the initial treating doctor, to [Dr. B] because of the Claimant's perceived need for a second opinion concerning his treatment. The Commission mistakenly approved this request which should have been a referral for second opinion instead of a change of treating doctors.

12.On March 23, 1993, the Commission approved a change of treating doctors from [Dr. B] back to [Dr. S] in order to correct the previous order of January 27, 1993.

13.Claimant's treating doctor is [Dr. S].

CONCLUSIONS OF LAW

5.Claimant's treating doctor is [Dr. S].

Carrier appealed, contending that the March 23rd request for a change of treating doctors ". . . was clearly designed and fabricated to effect the change of treating doctors dispute . . . ." Carrier argues the January 27th request clearly states "that the change was due to a conflict between the claimant and the doctor (meaning Dr. S)." Carrier maintains that "Section 4.63 of the Texas Workers' Compensation Act only allows the employee to request authority to select an alternate doctor if the employee is dissatisfied with the INITIAL choice of doctor . . ." and does not provide for a second or third alternate doctor ". . . unless certain exceptions are present." Carrier alleges there is "no evidence that any of the exceptions outlined in Section 4.63(d) . . ." applied.

Section 408.022 (formerly Articles 8308-4.63 and 4.64) provides:

(c)The commission shall prescribe criteria to be used by the commission in granting the employee authority to select an alternate doctor. The criteria may include:

* * * * *

(4)whether a conflict exists between the employee and the doctor to the extent that the doctor-patient relationship is jeopardized or impaired.

(d)A change of doctor may not be made to secure a new impairment rating or medical report.

(e)For purposes of this section, the following is not a selection of an alternate doctor:

* * * * *

(3)the obtaining of a second or subsequent opinion only on the appropriateness of the diagnosis or treatment:

The implementing rule is Tex. W.C. Comm'n 28 TEX. ADMIN. CODE §126.7 (Rule 126.7). Rule 126.7, although repealed effective July 1, 1993, however will be used in this case in that requests were submitted and acted upon before July 1, 1993.

The crux of the question appears to be whether claimant's request of January 27th was a request to change treating doctors because of a conflict between claimant and Dr. S (as provided for in Sec. 408.022(c)(4) as alleged by carrier) or was merely a request for a second or subsequent opinion only on the appropriateness of diagnosis or treatment (as provided for in Sec. 408.022(e)(3) as found by the hearing officer). The hearing officer had all the available evidence regarding this matter before him and heard carrier's argument on this point. In the absence of any testimony or evidence, other than as cited, we conclude that the hearing officer, as the finder of fact and sole judge of the weight and credibility of the evidence (Section 410.165(a) formerly Article 8308.6.34(e)), is supported by sufficient evidence in determining claimant only intended to seek a second opinion. While we may agree that the January 27th request could be read either as a request for a change of treating doctor or only for a second opinion, there is sufficient evidence to support the hearing officer's determinations and those determinations are not so against the great weight and preponderance of the evidence as to be manifestly wrong or unjust. Cain v. Bain 709 S.W.2d 175 (Tex. 1986); In re King's Estate, 244 S.W.2d 660 (1951).

Regarding carrier's request that the Commission "review its policy of not forwarding copies of the Appeals Panel Decision (sic; hearing officer's decision) to the attorney representing the carrier . . ." we note that such a request is not within the jurisdiction of the dispute resolution process. We have, however, forwarded that request for a rule change to the appropriate division within the Commission.

Regarding claimant's inquiry (which we are treating as a timely filed cross-appeal) about the date his impairment benefits began, we note that an employee's entitlement to impairment income benefits (IIBS) begins the day after the employee reached MMI. *See* Section 408.121 (formerly Article 8308-4.26(c)). The BRC report in evidence as hearing officer Exhibit 1 reflects that the issue of MMI was resolved and that the parties agree that the date of MMI is 2/23/93. Therefore, in accordance with Section 408.121 impairment benefits begin the day after MMI was reached, which would be February 23, 1993, rather than after the (year) date of injury. As the carrier noted, the hearing officer's finding that MMI was reached on February 22, 1993 is merely a recitation of the agreement of the parties. Parenthetically we note that since the hearing officer found 12% whole body impairment, the claimant is entitled to impairment benefits computed at the rate of three weeks for each percentage point of impairment (Sec. 408.121 (a)(1)) for a total of 36

weeks--12 X 3 weeks = 36 weeks). We refer claimant to the ombudsman for further explaination of this point, if necessary.

Finding no reversible error and determining that the hearing officer's decision is not against the great weight and preponderance of the evidence, we affirm.

Thomas A. Knapp
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Lynda H. Nesenholtz
Appeals Judge