APPEAL NO. 93705

This appeal arises under the Texas Workers' Compensation Act of 1989 (1989 Act), TEX. LAB. CODE ANN. § 401.001 *et seq*. On July 14 and 15, 1993, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. He determined that respondent (claimant) was injured in the course and scope of employment, has disability, has not reached maximum medical improvement (MMI), and does not have a compensable psychological injury. Appellant (carrier) asserts that the decision is against the great weight and preponderance of the evidence. Claimant responds, at length, t hat the evidence sufficiently supports the decision.

DECISION

We affirm.

At the hearing the parties agreed that the issues were whether claimant's injury of (date of injury), included the cervical and lumbar area of the spine in addition to the thoracic, whether claimant suffered disability after (date), whether a bona fide offer of light duty was made to claimant, whether claimant has reached MMI, whether claimant sustained compensable psychological trauma, and who is her treating doctor.

Section 410.204(a) of the 1989 Act states that the Appeals Panel "shall issue a decision that determines each issue on which review was requested."

Carrier asserts that the great weight of the evidence is against the finding of fact that claimant's injury includes the cervical and lumbar spine, arguing that medical evidence is insufficient to support the finding and that pain is not compensable. It adds that the evidence is insufficient to support the finding of disability, pointing to determinations of MMI and releases to return to work. Carrier also stated that the claimant was made a bona fide offer based on the assessment of (Dr. Y), the designated doctor; Dr. Y also is said to have properly certified MMI as of August 25, 1992, making the hearing officer's finding that MMI had not been reached against the great weight and preponderance of the evidence. Finally, carrier disputes that the claimant is entitled to select a doctor of her choice, stating that she "willfully chose to discontinue her care" and failed to follow doctor's advice.

The Appeals Panel determines:

That the findings of fact and conclusions of law in dispute are sufficiently supported by the evidence.

Claimant hurt her back on (date of injury), while working in a hospital as a respiratory therapist. She reported low back and thoracic area back pain that day in the emergency room; she was referred to (Dr. P). Dr. P's records indicate that he saw claimant on January 7, 1992, and found a sprain or strain of the lumbar, thoracic, and neck areas. He took her off work for a period of time. Medical records of Dr. S show that claimant visited him on January 22, 1992, with marked spasms; he referred her to (Dr. Pl), who also took her off work for a period and ordered an MRI. Dr. A(Dr. A) record of February 5, 1992, indicates

that claimant came to him from Dr. Pl; Dr. A took her off work for a period. In February, 1992, Dr. A noted an "upper back strain" and "lumbar sprain;" he refers to her loss of range of motion and decreased strength. On April 4, 1992, (Dr. T), on referral from Dr. A, states that claimant's history and examination are consistent with fibromyalgia. On May 5, 1992, Dr. A wrote to the carrier indicating that he was overwhelmed by this patient. He says that she did not want to return to work; she failed to follow advice; he said she could go back to work after one week. He also stated that she should consult another doctor because he has "run out of knowledge and treatment." His last line was that claimant needed psychiatric help. Dr. A then provided a TWCC-69 (claimant said he did not provide it to her) indicating that MMI was reached on (date), with zero percent impairment. Dr. A stated in item 13 therein that claimant "was dismissed from my care on April 29, 1992, to return to her duties. . . ."

(Dr. H), an orthopedic surgeon, stated on June 10, 1992, that she needed an EMG to review her cervical paraspinal musculature and could possibly need a CT scan of the cervical spine. In June, 1992, Dr. Y was designated to provide an opinion as to disability, return to work, MMI, and impairment rating. By TWCC-69, accompanied by a narrative dated July 10, 1992, Dr. Y stated that claimant had not reached MMI and recommended that she have an MRI of the cervical area plus nerve conduction/EMG studies "of each arm;" he also called for a neurosurgical consult. He then said that claimant could do some light duty with no weight over 10 or 15 pounds (which of the two weights was not stated) and no repetitive bending.

On August 12, 1992, claimant wrote to her employer that she was unable to return to work, stating that she had no treating doctor except for seeing an emergency room doctor who told her to rest. She added in testimony at the hearing that she wanted to work, the offer made by her employing hospital to return to work with lifting limitations set for by Dr. Y was good, but the work was a regular eight hour shift which she physically could not do because of her back; "I could not hold my back up for more than four hours at a time. . . ." On August 13, 1992, a cervical spine MRI showed that claimant had "posterior disc herniation at the C5-6 intervertebral disc space." It also stated that the disc encroached on the thecal sac. The radiologist at that time stated that claimant could not work. On August 24, 1992, claimant was said by the Texas Back Institute to have lumbar, thoracic, and cervical syndrome, adding that her pain is aggravated by "almost any activity."

On August 25, 1992, Dr. Y, in response to the carrier, provided a narrative to the Texas Workers' Compensation Commission (Commission) in which he reviewed the MRI performed earlier in August. After evaluating that test, Dr. Y said:

> From a neurological standpoint she has reached maximal medical improvement and the restrictions outlined in my report of 7/10/92 remains (sic).
>
> Furthermore, I still recommend that she have a neurosurgical consultation along with a nerve conduction/EMG study, which I shall leave to your discretion or the insurance company's choice.

On August 25, 1992, at the Texas Back Institute, claimant had a normal EMG and nerve

conduction study "of the right upper extremity." Claimant requested another treating physician. Among the numerous pieces of correspondence admitted in evidence, the carrier on October 2, 1992, stated that it would not approve the doctor claimant requested, would not accept a referral by Dr. S, and referred claimant to the contested case hearing to "address this issue of your treating physician."

On December 31, 1992, an MRI of the lumbar spine showed a "small 3-4 mm right paracentral disc protrusion present, which slightly displaces the right S1 nerve root posteriorly." On January 28, 1993, (Dr. J) of the (PRH) said that claimant was recently discharged and was unable to work. Carrier's Exhibit G is a TWCC-69 signed by Dr. Y on July 14, 1993, which states that claimant reached MMI on August 25, 1992, with four percent impairment (the same date as that of Dr. Y's narrative described above). On that TWCC-69, signed on July 14, 1993, Dr. Y refers to the narrative report of "8-25-92" in three places rather than provide any explanation for his determination of MMI and percentage of rating. We point out that the copy of the August 25, 1992, narrative attached to the TWCC-69 signed on July 14, 1993, contains exactly the same limitations in it as to a "neurological standpoint" and the need for further consults and testing. Claimant testified that she did not see Dr. Y in 1993.

Carrier first attacks the finding relating to the extent of injury as not being supported by medical evidence. In Texas Workers' Compensation Commission Appeal No. 93694, decided September 23, 1993, the Appeals Panel re-affirmed that the question of causation is one for the hearing officer to decide. In addition, Texas Workers' Compensation Commission Appeal No. 93315, decided May 24, 1993, referred to Parker v. Employers Mut. Liability Ins. Co. of Wis., 440 S.W.2d 43 (Tex. 1969), as calling for medical evidence as to causation in some cases, but cited T.E.I.A. v. Thompson, 610 S.W.2d 208 (Tex. Civ. App.-Houston [1st Dist] 1980, writ ref'd n.r.e.) as stating that the requirement in Parker "is a narrow one" and did not apply it to that case since it did not involve "disease or cancer." In addition, in this case, the report of Dr. P in January 1992 refers to lumbar, cervical, and thoracic sprain or strain; later the Texas Back Institute found lumbar, cervical and thoracic syndrome. MRIs also found disc irregularities in the cervical and lumbar regions. Texas Workers' Compensation Commission Appeal No. 92030, decided March 12, 1992, indicated that the claimant's testimony alone could be sufficient for a finding of injury. The evidence sufficiently supports the hearing officer's finding that the claimant's injury was to the lumbar, thoracic, and cervical areas of the back.

While claimant was returned to work on some occasions, she was repeatedly told not to return to work by the doctors she saw after (date). In addition, claimant testified that she could not work, indicating that she would like to have taken the offer to return to work that was made to her, but that she physically could not do it. Texas Workers' Compensation Commission Appeal No. 92167, decided June 11, 1992, points out that a finding of disability may be made on the testimony of the claimant alone. In addition, while pain does not qualify as a compensable injury, pain may be a basis for inability to return to work. *See* Texas Workers' Compensation Commission Appeal No. 91024, decided October 23, 1991. The hearing officer could give more weight to the repeated medical restrictions as to work

than to those that returned her to work, especially in view of the claimant's testimony and the opposing medical evidence as to a return to work provided at relatively the same time, such as Dr. A's return to work in May 1992 and Dr. S's advice not to work. The hearing officer is sole judge of the weight and credibility of the evidence. *See* Section 410.165 of the 1989 Act. He could choose to give little weight to Dr. A's statement that the claimant did not want to return to work and believe the claimant instead. The evidence was sufficient to support the finding that claimant has disability since (date).

A bona fide offer to return to work was never made upon the basis of a report of a treating doctor or of the claimant herself. The offer to return to work resulted from advice as to restrictions on work made by the designated doctor, Dr. Y. As a result, no bona fide offer to return to work was made. *See* Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 129.5 (Rule 129.5)). *Also see* Texas Workers' Compensation Commission Appeal No. 91023, decided October 16, 1991. That opinion also pointed out that the hearing officer could consider the claimant's own testimony of his or her physical ability to return to work when a treating doctor had triggered the bona fide offer provision by providing criteria for limited work. The evidence sufficiently supports the hearing officer's findings and conclusions that no bona fide offer was made.

The Appeals Panel reversed and remanded a finding of MMI in Texas Workers' Compensation Commission Appeal No. 92452, decided October 5, 1992, when the doctor's opinion as to MMI did not make it clear whether that doctor considered a psychological injury in finding that MMI had been reached. In addition, in Texas Workers' Compensation Commission Appeal No. 93493, decided July 30, 1993, the Appeals Panel affirmed a hearing officer's determination that the great weight of other medical evidence was contrary to the designated doctor's opinion based on the designated doctor's failure to consider a second EMG performed of a wider area of the body than considered in the first EMG. In the case before us on appeal, it does not appear that the EMG was considered by Dr. Y, and the EMG eventually done at the Texas Back Institute only considered claimant's right "upper extremity" as opposed to Dr. Y's recommendation of an EMG for each arm. While the designated doctor can change his opinion, the hearing officer is not obligated to give weight to any change not explained; in this instance, Dr. Y never indicated that an EMG of only one extremity would be sufficient. Dr. Y also called for a neurosurgical consult; this recommendation was never changed by Dr. Y; in fact the narrative that contained it was referred to in Dr. Y's TWCC-69 that purported to find MMI. Finally, Dr. Y made it clear that his TWCC-69 as to MMI was no more than equivalent to a consult from him as a neurologist. He stated "from a neurological standpoint she has reached maximal. . . ." The Appeals Panel has pointed out that a designated doctor does not have to be a specialist, but that his role is one of "weighing and considering the totality of medical evidence in a given case." *See* Texas Workers' Compensation Commission Appeal No. 93062, decided March 1, 1993. Dr. Y's statement makes it unclear whether he considered claimant's problems in regard to MMI from any perspective other than his specialty, neurology. Dr. Y's indication of a need for more testing and consultations did, however, provide some evidence that he would evaluate all the pertinent medical evidence necessary to MMI, but according to the record he never received all the reports or consults he asked for. Texas Workers'

Compensation Commission Appeal No. 93007, decided February 18, 1993, indicates that the designated doctor can call for added tests and consults. The hearing officer was also permitted to weigh the designated doctor's finding, in 1993, that claimant reached MMI in 1992 based on the designated doctor's own report of that period, without any explanation as to why he could reach that conclusion in 1993 when he did not in 1992. The evidence sufficiently supports the hearing officer's determination that the claimant has not reached MMI. The hearing officer's conclusion of law that the designated doctor's finding of MMI was not unconditional is sufficiently supported by this evidence.

Finally, the hearing officer found that the claimant was entitled to choose a treating doctor. Both under Article 8308-4.64 and Section 408.022, both of the 1989 Act, no limitation on a claimant's ability to change a treating doctor results from a present treating doctor "becoming unavailable or unable" to treat the claimant. This provision applies both to changes occurring before and after January 1, 1993. The hearing officer's finding that claimant's treating doctor, Dr. A, discharged her was based on Dr. A's own statements of his inability to further treat her coupled with his statement that she should consult another doctor. The effort of the Commission to have the claimant see Dr. S again after Dr. A rejected her was not found to have been a choice of a treating doctor by the hearing officer. The evidence sufficiently supports the determination of the hearing officer that claimant is entitled to select a treating doctor based on Dr. A's unavailability.

While carrier attacks claimant's urological problem as being unproven, it does not attack the finding of fact that says, "claimant has been unable to obtain adequate medical care to determine if her bladder problem is related to her back injury or is the result of treatment for her back injury because of carrier's refusal to approve a treating doctor." In addition, claimant did not appeal this finding. This finding does not foreclose the question of whether the bladder problem results from the compensable injury.

The other issue at the hearing involving mental trauma was decided in the negative by the hearing officer and there was no appeal of that issue.

The decision and order of the hearing officer are sufficiently supported by the evidence, the findings of fact, and conclusions of law and are affirmed.

Joe Sebesta
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Lynda H. Nesenholtz
Appeals Judge