APPEAL NO. 93966

Pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act) (formerly V.A.C.S., Article 8308-1.01 *et seq*.), a contested case hearing was held in (city), Texas, on September 16, 1993, (hearing officer) presiding as hearing officer. He determined that the respondent's (claimant) pre-existing avascular necrosis condition was aggravated by her fall at work on (date of injury), that she timely disputed a certification of maximum medical improvement (MMI) and impairment rating (IR) within 90 days of receiving notice, that she timely filed her claim, that he had no jurisdiction to decide whether she changed treating doctors, and that the issues of MMI and IR were not ripe for adjudication. Appellant (carrier) appeals finding fault with several of the hearing officer's findings of fact and conclusions of law and urges the decision is so against the great weight and preponderance of the evidence as to be manifestly unjust. The claimant responds that the decision is supported by sufficient evidence and asks that it be affirmed.

DECISION

Finding the evidence sufficient to support the essential findings and conclusions of the hearing officer, the decision is affirmed.

The review of this case was exceedingly hampered in that there was no testimony, the case was submitted solely on documentation, and unexplained lapses of time and gaps in the sequence of events only added to the difficulty. We note that a hearing officer has independent authority to develop facts. Section 410.163(b). In any event, the evidence supports that the claimant slipped and fell at work on (date of injury). The medical documentation is in conflict; however, she apparently sustained an injury to her left hip (and perhaps back although there was a notation in one report indicating that she sustained an earlier back injury in January 1991). Nonetheless, she apparently went to a doctor, (Dr. F), suggested by the employer and there is evidence in the record that the parties agreed (at or before a benefit review conference (BRC)) that this doctor was not the claimant's choice of treating doctor. Dr. F. diagnosed left hip pain and saw the claimant some three weeks after the initial visit on (date of injury). The remainder of Dr. F's report indicates that the claimant did not return and that she did not appear for some scheduled tests. At that time, March 9, 1991, Dr. F apparently decided to "finalize" the claimant's "chart and bill" and rendered a certification of MMI effective March 9, 1991 with a 0% IR. His report was addressed to the carrier's adjusting service with no indication that copies were sent to anyone else. Although counsel commented on the issue of receipt and dispute of Dr. F's report during their closing argument and made some non-evidentiary assertions, there is no other evidence in the record on the matter of receipt and only the BRC report addresses the dispute of Dr. F's report.

During the months following the incident of (date of injury), the claimant saw a number of doctors (not always clear from the record in what capacity, i.e. treating doctor, referral doctor, carrier requested doctor, or some other doctor); however, it appears undisputed that she suffered a serious hip condition (aseptic or avascular necrosis) and that she subsequently underwent hip replacement surgery in November 1991 and perhaps a

second surgery, "left total hip arthroplasty revision in" March 1993. A report dated March 11, 1993, from a (Dr. N), who became claimant's treating doctor, states that the claimant was scheduled for such surgery on March 30, 1993. Dr. N stated that the claimant was unable to return to work, with an "Impression" of "left hip failed bipolar endoprosthesis." While there is abundant medical evidence from the various doctors and medical tests to show that the claimant had a serious hip condition, there is conflicting medical evidence concerning its genesis. The carrier introduced medical evidence in a report dated October 21, 1991, from a doctor, (Dr. A) who they requested, that showed that the claimant was involved in an automobile accident in 1988 and had sustained some injury to her hip as well as other areas of her body. Dr. A, who examined the claimant and reviewed her extensive medical records, found no evidence of any loosening of the claimant's hip prosthesis and opined that the claimant "had a very obvious pre-existing problem (avascular necrosis) which goes back to at least 1988" and that she "may have had some aggravation" on (date of injury), that he described as relatively trivial. A letter dated January 15, 1993, from Dr. A states that he does not feel that the fall resulted in any injury. A report that a (Dr. W) rendered on the claimant indicates he saw the claimant in July 1991, and that he felt it "highly probable that the fall in (month, year), was a causal relationship of her continued hip pain and avascular necrosis."

The Findings of Fact and Conclusion of Law with which the carrier takes exception are:

FINDINGS OF FACT

5.Claimant aggravated her prior avascular necrosis condition in her left hip on (date of injury) when she fell at work.

7. Claimant did not receive notice of [Dr. F]'s certification (under finding six) until the Benefit Review Conference on July 22, 1993 when she disputed that certification.

8. The events regarding changing doctors that are the subject of that issue arose before July 1, 1993.

9.A designated doctor was not appointed to resolve the disputes regarding maximum medical improvement and impairment rating.

CONCLUSIONS OF LAW

2. Claimant's preexisting avascular necrosis condition was not the sole cause of that condition, but that condition was aggravated by her fall at work on (date of injury).

3. Claimant timely and within 90 days of receiving notice, disputed [Dr. F]'s certification of maximum medical improvement and impairment rating.

4.I do not have jurisdiction to decide whether claimant changed treating doctors.

5. Due to the absence of a report from a designated doctor the issues of maximum medical improvement and impairment rating are not ripe for adjudication.

While the medical evidence may be in conflict concerning whether the claimant's pre-existing avascular necrosis condition was the sole cause of her current hip condition or injury, this does not mean that there is insufficient evidence to support the hearing officer's finding and conclusion on this issue. When evidence is in conflict, it is the function and responsibility of the fact finding hearing officer to resolve such matters and determine the facts in the case. Section 410.165(a) and 410.168(a); Garza v. Commercial Insurance Co. of Newark, N. J., 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ); Texas Workers' Compensation Commission Appeal No. 93854, decided November 9, 1993. This is equally true of conflicts in medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286,290 (Tex. App.-Houston [14th Dist] 1984, no writ). An appellate body normally does not substitute its own judgment for that of the fact finder even if evidence would support a different result. National Union Fire Insurance Co. of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied). Only were we to find, which we do not, that the findings and conclusions were so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust would there be a sound basis to disturb the decision. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986); Texas Workers' Compensation Commission Appeal No. 92232, decided July 20, 1992. The report of Dr. A, although generally describing the aggravation caused by the (month date) incident as trivial, together with the opinion expressed by Dr. W that it was "highly probable" that the fall in (month) was causally related to the claimant's current condition, is sufficient evidence from which the hearing officer could determine that the claimants pre-existing condition or injury was not the sole cause of her current condition or injury.

Regarding the hearing officer's finding that the claimant did not receive notice of Dr. F's certification of MMI and IR until July 22, 1993, when she disputed it, the only evidence in the record on this matter that we find is the Benefit Review Officer's Report and Dr. F's report which itself gives no indication that a copy was ever sent to the claimant, or to the Commission for that matter. Indeed, the contrary inference is permissible, which we conclude the hearing officer must have arrived at, from the single addressee on the report, that of the carrier's adjusting representative. The report itself suggests that Dr. F had finalized his association with the claimant and that the claimant had not return to him for any care or follow-up testing. Our reading of the Benefit Review Officer's report and recommendation on this issue leads us to conclude that a reasonable inference could be made that the impairment rating was made known to claimant and was disputed by her at the BRC. Unfortunately, this issue was not properly handled at the BRC level since the Benefit Review Officer concluded that the claimant "does not have to dispute an impairment rating when the carrier already agreed that this doctor was not the treating doctor." While

this is a misstatement of the requirements of TWCC Rule 130.5, Tex. W. C. Comm'n, 28 TEX. ADMIN. CODE § 130.5, it does not detract from the reasonable inference that the impairment rating of Dr. F was not agreed to by the claimant once she was aware of the rating. (We also note that an agreement that was in evidence indicates the carrier as late as September 16, 1991, agreed to continue paying temporary income benefits which would surely indicate the carrier was not asserting or relying on Dr. F's certification.) The claimant is not limited to only disputing the rating of his or her treating doctor. TWCC Rule 130.6(a). *See also* Texas Workers' Compensation Commission Appeal No. 92394, September 17, 1992. Further, the 90-day period does not begin to run until the requirements of TWCC Rule 130.3 and 130.5 have been met and it does not begin to run until the injured employee is notified or has knowledge of the impairment rating. Texas Workers' Compensation Commission Appeal No. 92542, decided November 30, 1992; Texas Workers' Compensation Commission Appeal No. 93729, decided October 5, 1993. *See also* Texas Workers' Compensation Commission Appeal No. 93666, decided September 15, 1993; Texas Workers' Compensation Commission Appeal No. 92670, decided February 1, 1993. Under the circumstances, we cannot conclude that the hearing officer's finding that the claimant did not receive notice of Dr. F's certification until the BRC and that the impairment was disputed at the BRC is so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Appeal No. 92232, *supra*.

The hearing officer's finding that the events regarding changing doctors occurred before July 1, 1993, is supported by sufficient evidence. However, it does not necessarily follow, as stated in his conclusion, that he lacked jurisdiction in the matter of change of treating doctor although there may have be little he could accomplish. In Texas Workers' Compensation Commission Appeal No. 93433, decided July 7, 1993, we stated that there is no provision in the rules and statues that provide for the reviewability through the hearings process set forth under Article 6 of the 1989 Act of the Commission's approval of a change of treating doctors. (A rule change effective July 1, 1993 does provide a carrier the opportunity to dispute this matter). Regardless, the issue on the matter of a change in treating doctors or selection of an alternate doctor in this case appeared to be controlled by Section 408.022(e)(5) which provides that it is not a selection of an alternate doctor when a change of doctors is required because of a change of residence by the employee. The evidence and circumstances clearly indicate that the claimant filed a notice with the Commission showing a change of residence. The claimant was advised the request was not necessary under the circumstances and that she could start treating with Dr. N. There is no evidence in the record which contradicts the claimant's statement on her form that she had changed residence to (city), (state). In any event, on one of the forms the claimant filed with the Commission, the change was apparently approved by a Disability Determination Officer. We find no merit to this assertion of error.

The evidence, or lack of evidence, clearly supports that portion of the hearing officer's finding that a designated doctor had not been appointed in this case. And, under the particular circumstances present in this case, that part of the finding and conclusion which indicates that in the absence of a designated doctor "to resolve disputes regarding" MMI and IR, the issue is not ripe for adjudication may have practical application. Clearly, the

matter of MMI and IR have not been resolved even at this late date. However, the hearing officer was not equipped to resolve these matters at the hearing once he determined, which we uphold, that the claimant did not have notice of Dr. F's certification and effectively disputed it at the BRC when she became aware of it. At this point in time, further action is necessary within the dispute resolution process to determine MMI and an IR. Given the passage of time, it is very possible that statutory MMI has occurred although we do not have any evidence to show when and if income benefits began to accrue. Section 401.011(30) provides that MMI means the earlier of:

(a)the earliest date after which, based on reasonable medical probability, further material recover from or lasting improvement to an injury can no longer reasonably be anticipated; or

(b)the expiration of 104 weeks from the date on which income benefits begin to accrue.

It may be that a designated doctor will have to be involved in the ultimate resolution of this case, either through agreement by the parties or by designation of the Commission. *See* Subchapter G, Impairment Income Benefits; TWCC Rule 130.6. However, at the time of the hearing and under the somewhat unusual circumstances, the hearing officer was not able to resolve MMI or IR given his other determinations. We do not find a sound basis to reverse him on this matter.

For the reasons set out above, the decision of the hearing officer is affirmed.

Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Philip F. O'Neill
Appeals Judge