APPEAL NO. 94061

On October 25 and December 7, 1993, a contested case hearing was held in (city), Texas, with (hearing officer) presiding as the hearing officer. The hearing was held under the provisions of the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. Section 401.001 *et seq*. (1989 Act). The issues at the hearing were: (1) disability; (2) average weekly wage (AWW); and (3) "who is claimant's [respondent's] treating doctor?" The hearing officer determined that the claimant has had disability from a work-related injury of (date of injury), from May 22, 1993, through December 7, 1993, the date the hearing was closed; that due to the claimant's illness during some of the 13-week period preceding her injury, a fair, just, and reasonable method of determining AWW should be used which resulted in an AWW of $381.54; and that the claimant's first choice of treating doctor was (Dr. G) whom the claimant has kept as her treating doctor. The hearing officer ordered the appellant (carrier) to pay medical and income benefits in accordance with his decision and the provisions of the 1989 Act. The carrier disagrees with the hearing officer's findings on disability, AWW, and the claimant's treating doctor. No response was filed by the claimant.

DECISION

The hearing officer's decision and order are affirmed.

In 1975 the claimant had a back injury and had a laminectomy performed by (Dr. S) and a fusion performed by (Dr. C) in that year. In July 1990, the claimant said she returned to Dr. C for one visit because of neck pain she experienced after working in her yard.

Prior to May 1993, the claimant had worked for the employer, (employer), for over two years. She testified that on (date of injury), she fell in a hallway at work and twisted the left side of her body. A coworker took her from work to the emergency room of a hospital where the emergency room doctor, (Dr. T), diagnosed a lumbar strain. The plan of treatment on the emergency room report contains some illegible words followed by Dr. C's name and the words "next wk." The claimant testified that she told Dr. T that Dr. C had performed her fusion in 1975 and that Dr. T told her he wanted her to see Dr. C so that Dr. C could look at the fusion he had previously done. The claimant said she then made an appointment to see Dr. C on May 24, 1993.

According to the claimant, when Dr. C examined her on May 24th, he first told her that nothing was wrong with her and that she could return to work that day, but he then contradicted himself and said that she would not be better for at least two weeks. She further testified that she was in pain when she saw Dr. C, that she did not think that Dr. C was concerned about her condition, that she did not agree with Dr. C's "diagnoses," and that she wanted somebody to find out what was wrong with her. The claimant said that Dr. C did not give her any written documents, such as a release to return to work slip. The claimant did not return to Dr. C.

In a letter to (EP), who is a senior case manager for the carrier, dated June 11, 1993, Dr. C stated that on May 24, 1993, he examined the claimant for neck and shoulder pain for

an injury that had occurred several days previously, that the examination was normal, but that the claimant complained of discomfort so he thought she would benefit from two weeks off work. Dr. C further stated that the claimant should have been able to return to work after two weeks. He also stated that x-rays revealed no fractures, that the fusion was still intact, and that he had not seen the claimant since May 24th. In an undated letter, which the claimant said she received on June 10, 1993, Dr. C confirmed that he had spoken with EP on June 8, 1993, and that he had released the claimant to regular work on June 7, 1993. There was no evidence that Dr. C had filed an Initial Medical Report (TWCC-61) for the visit of May 24th.

At the request of the employer, the claimant was examined by (Dr. TE) on May 25, 1993. Dr. TE diagnosed "lumbar pain" and noted that the claimant was unable to return to work. In reports of follow-up appointments of May 28th and June 4th Dr. TE again noted that the claimant was unable to return to work. The claimant did not see Dr. TE after the visit of June 4th.

The claimant testified that on May 24th or 25th she contacted a Texas Workers' Compensation Commission (Commission) employee named (JB) who she thought was an ombudsman and explained that she had seen Dr. T, the emergency room doctor, and, upon referral from Dr. T, had seen Dr. C one time. She said she asked JB if she had a right to see another doctor and that JB told her she did because the emergency room doctor and Dr. C, as a referral doctor from the emergency room doctor, would not be considered her doctors. She also said that JB told her that she did not have to wait for permission from the Commission to see another doctor. However, the claimant also said that JB sent her a Commission form to fill out (TWCC-53, Employee's Request to Change Treating Doctors) and send to the Commission in case there was "any question over it."

The claimant further testified that after talking to JB she went to (Dr. G) on May 26, 1993, and that Dr. G has been treating her ever since May 26th. Dr. G reported that he examined the claimant on May 26th, diagnosed a cervical strain and a lumbar strain, recommended physical therapy three to five times a week, and took the claimant off work. The claimant has been undergoing the recommended therapy. The claimant has been examined by Dr. G at least five more times since May 26th and Dr. G has continued to report that the claimant is unable to work and that she has continued to have pain in her lumbar region which radiates into her right leg. In a report dated August 16, 1993, Dr. G anticipated that the claimant could return to regular work on November 1, 1993, but as of the date the hearing was closed, December 7, 1993, no release to return to work had been provided by Dr. G. The claimant testified that she is still treating with Dr. G and that he has told her that she still cannot return to work. She said she still has back and leg pain. Dr. G filed a TWCC-61 for the initial visit and has filed a Specific and Subsequent Medical Report (TWCC-64) for each subsequent visit. The claimant said she has not worked anywhere since her accident of (date of injury).

The claimant said that on June 4, 1993, Dr. C called her and she told him that she was not "using" him because he had made contradictory statements to her about her

medical condition.

The claimant testified that she did complete and send to the Commission the TWCC-53 JB sent to her. In evidence was a TWCC-53 signed by the claimant and dated June 14, 1993. In the space on this document where the employee is to write the name of the initial treating doctor, the claimant wrote, "[Dr. T] - Emergency [hospital] - [Dr. T] sent me to [Dr. C] for lumbar ck. and I went to [Dr. G] as my choice." Then in the space to write the address of the initial treating doctor, the claimant wrote Dr. G's name and Dr. G's address. The next direction on the form states "Request to Change To:" and has two spaces for writing in the "alternate treating doctor's name" and address. The claimant left these two spaces blank. In the next space which asks for the reason for the request to change doctors, the claimant wrote:

> [Dr. G] was my choice of doctors. [Carrier] has taken the stand that [Dr. C] was my choice. [Dr. T] from [hospital] sent me to see [Dr. C]. See attached [nothing is attached].
>
> I confirmed seeing [Dr. G] on 5-25-93 with [JB] and again on 6-10-93 when I talked to (L) [illegible] and [JB] because of the dispute by [carrier].

At the bottom of the TWCC-53 is a Commission order denying the claimant's request for the reason that the claimant did not indicate a doctor to change to. The order is dated June 29, 1993, and is signed by (LS), a Commission disability determination officer (DDO).

The claimant testified that when she received the order dated June 29th, she called the DDO who signed the order and explained to her that she did not complete the "alternate doctor" spaces on the TWCC-53 because Dr. G "is not an alternate doctor, he is my doctor of choice." Also in evidence is another copy of the above mentioned TWCC-53, except that the Commission Order at the bottom of the document approves the request and gives as a reason for approval "[f]urther review of situation reveal [sic] that the order should be approved." The order is signed by the same DDO who had originally denied the request and is dated July 2, 1993. It appears that the first order was simply whited over and the new order made on the same TWCC-53.

EP, the carrier's case manager, testified that on May 24, 1993, the claimant told him that she and Dr. T decided that she should see Dr. C and that she wanted Dr. C to be her doctor because "[Dr. C] knew her body and she was going to see him because she had treated with him before." EP said he then "advised" the claimant that Dr. C would "be your doctor" and the claimant said "yes." He further stated that "we verified her to go see [Dr. C] that day." EP also testified that on May 28th the claimant told him that Dr. C had told her on May 24th that she could return to work and that she said that Dr. C was not "her doctor." EP said he advised the claimant that the Commission would have to approve a change of treating doctor. EP said that on June 10th the claimant told him that Dr. G, and not Dr. C, was her doctor. The claimant acknowledged that she talked with EP, but denied telling him that Dr. C was going to be her doctor or that she wanted to change doctors to Dr.

G.

(LS), the employer's human resources supervisor, testified that on May 24, 1993, the claimant told her that Dr. C was her doctor and that she was going to see him that afternoon. Based on that information, LS wrote on the Employer's First Report of Injury that Dr. C was the claimant's doctor. LS also said that she talked to the claimant later the same day and that the claimant was upset that Dr. C had said she could return to work because the claimant didn't think she was ready to return to work. However, LS also said that the claimant stated that she felt good and did not see a problem with returning to work that night. The claimant said that she only told LS that she had an appointment with Dr. C on May 24th.

Also in evidence was an Employer's Wage Statement showing wages paid to the claimant for the 13-week period immediately preceding the injury of (date of injury). Attached to the wage statement is a written explanation prepared by the employer. Basically, in weeks 2 and 12 the claimant received no wages because she was out sick (the employer allows five paid sick days a year which had already been used), and in weeks 7 and 11 the claimant received only about one-half of her weekly wage because of being out sick. The claimant said that she was not paid for the sick days she took during the 13-week period preceding the injury and the employer's written explanation confirmed her testimony. The claimant said that sick days taken during the 13-week period were because of neck problems.

DISABILITY

The carrier contends that the hearing officer erred in finding that the claimant's inability to obtain and retain employment from May 22, 1993, through the date the hearing was closed on December 7, 1993, was because of the injury she sustained while working for the employer on (date of injury). The carrier further contends that the hearing officer erred in concluding that the claimant had disability from May 22, 1993, through December 7, 1993.

"Disability" means the inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage. Section 401.011(16). In this case, there was conflicting evidence on the issue of disability. On the one hand Dr. C reported that the claimant was capable of returning to work on June 7, 1993. On the other hand Dr. TL stated that the claimant was not able to return to work when he last saw the claimant on June 4, 1993, and Dr. G has continuously reported that the claimant has been unable to return to work since he first saw the claimant on May 26, 1993. In addition, the claimant testified to the back and leg pain she is still experiencing.

The hearing officer judges the weight and credibility to be given to the evidence. Section 410.165(a). Where there are conflicts and contradictions in the evidence, it is the duty of the finder of fact, in this case the hearing officer, to consider the conflicts and contradictions and determine what facts have been established. St. Paul Fire & Marine Insurance Company v. Escalera, 385 S.W.2d 477 (Tex. Civ. App.-San Antonio 1964, writ

ref'd n.r.e.). The hearing officer also judges the weight to be given to conflicting expert medical opinions. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ.). The issue of disability may be determined based upon all relevant evidence, including lay testimony and the opinions of doctors. *See* Texas Workers' Compensation Commission Appeal No. 92209, decided July 13, 1992. The hearing officer is not restricted to considering only the opinion of the treating doctor in determining an issue of disability. *See* Texas Workers' Compensation Commission Appeal No. 92257, decided August 3, 1992.

The decision of the hearing officer should be set aside only if the evidence supporting the hearing officer's determination is so weak or against the overwhelming weight of the evidence as to be clearly wrong or manifestly unjust. Atlantic Mutual Insurance Company v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.). The hearing officer's decision should not be set aside merely because different inferences may be drawn upon review, even when the record contains evidence that would lend itself to different inferences. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). Having reviewed the record, we conclude that the hearing officer's finding and conclusion in favor of the claimant on the issue of disability are supported by sufficient evidence and are not against the great weight and preponderance of the evidence.

AVERAGE WEEKLY WAGE

The usual way to compute AWW is to divide the sum of the wages paid in the 13 weeks immediately preceding the date of the injury by 13. Section 408.041(a). The evidence showed that the claimant was working for the employer for the 13 weeks immediately preceding the injury, only she was off work due to sickness during some of those weeks. The usual wage the employer paid to a similar employee for similar services is used where the employee worked for the employer less than the 13 weeks immediately preceding the injury. Section 408.041(b). The carrier concedes that 408.041(b) does not apply to the facts of this case. Section 408.041(c) provides as follows:

> If Subsection (a) or (b) cannot reasonably be applied because the employee's employment has been irregular or because the employee has lost time from work during the 13-week period immediately preceding the injury because of illness, weather, or another cause beyond the control of the employee, the commission may determine the employee's average weekly wage by any method that the commission considers fair, just, and reasonable to all parties and consistent with the methods established under this section.

In this case, the evidence showed that the claimant missed 14 days of work in the 13-week period immediately preceding her injury because of problems with her neck (she did not attribute the neck problem to any prior injury as asserted by the carrier). The employer recorded the missed days as sick days and the claimant was not paid for those days. We note that Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 128.1(b)(1) (Rule

128.1(b)(1)) includes in AWW amounts paid to the employee by the employer for time off such as holidays, vacation, and sick leave.

The carrier disagrees with the hearing officer's finding that the methods under Subsections (a) and (b) of Section 408.041 (formerly Article 8308-4.10) cannot be applied reasonably due to the claimant's loss of time from work due to illness, and his finding that the fair, just, and reasonable method to determine the claimant's AWW is the sum of the wages paid in weeks 1, 3, 4, 5, 6, 8, 9, 10, and 13 of the 13 weeks immediately preceding the injury divided by 9 (this method leaves out weeks 2 and 12 when the claimant was out sick without pay all week, and weeks 7 and 11 when the claimant was out sick without pay about half of the week). This method resulted in an AWW of $381.54. We observe that the wage shown on the wage statement for a full 40-hour week is about $400.00. The carrier contends that not all the weeks the claimant was sick should have been disregarded and that the claimant's AWW under the fair, just, and reasonable method should be $292.69.

Having reviewed the record, we conclude that the hearing officer did not err in using the fair, just, and reasonable method of calculating AWW because of the claimant's loss of time from work due to sickness, and that his method of calculating AWW was, under the particular facts of this case, fair, just, and reasonable to all parties and in accordance with the methods established under Section 408.041. *See* Texas Workers' Compensation Commission Appeal No. 92292, decided August 17, 1992.

TREATING DOCTOR

One of the issues at the hearing was: "Who is claimant's treating doctor." "Treating doctor" means the doctor who is primarily responsible for the employee's health care for an injury. Section 401.011(42). Under Section 408.022, an employee is entitled to the employee's initial choice of doctor from the Commission's approved list of doctors and if the employee is dissatisfied with the initial choice of a doctor, the employee may notify the Commission and request authority to select an alternate doctor. Section 408.022(c) provides that the Commission shall prescribe criteria to be used by the Commission in granting the employee authority to select an alternate doctor and sets forth criteria that may be included by the Commission. Section 408.022(d) provides that a change of doctor may not be made to secure a new impairment rating or medical report. Subsection 408.022(e) sets forth situations that do not constitute a selection of an alternate doctor.

Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 126.7(c) (Rule 126.7(c)) (repealed effective July 1, 1993) provided that, except as provided in subsections (d), (e), and (f) of that section, the first doctor, as defined in the Act, Section 1.03(17) (TEX. LAB. CODE § 401.011(17)), who provides health care to an injured employee shall be known as the injured employee's initial choice of treating doctor. Subsections (d), (e), and (f) of Rule 126.7 provided that a doctor providing emergency care is not the initial choice of treating doctor unless the injured employee returns to this doctor for additional treatment other than follow-up care related to the emergency treatment; that the receipt of health care from a doctor salaried by the employer does not constitute the injured employee's initial choice of a treating

doctor; and that the receipt of health care from a doctor selected by the employer or carrier does not, by itself, constitute the injured employee's initial choice of a treating doctor, unless the doctor continues to treat the employee for a period of 60 days. Subsection (f) also provided that the employee should choose a treating doctor and notify the Commission of that choice as soon as possible.

Rule 126.9(a), effective July 1, 1993, provides that the injured employee is entitled to the employee's initial choice of treating doctor from the list of doctors approved by the Commission and that as of January 1, 1993, any change in treating doctor after the initial choice requires approval from the Commission. Subsection (c) of Rule 126.9 provides that the first doctor who provides health care to an injured employee shall be known as the injured employee's initial choice of treating doctor, subject to exceptions set forth in that subsection.

Section 401.011(19) provides, in part, that "health care" includes all reasonable and necessary medical aid, medical examinations, medical treatments, medical diagnoses, medical evaluations, and medical services.

The carrier argues on appeal, as it did at the hearing, that Dr. C was the claimant's initial choice of doctor and that the Commission's approval to change doctors to Dr. G was invalid because it did not meet any of the criteria for granting authority to select an alternate doctor. The carrier asserts that the only reason the claimant sought to change doctors was that she disagreed with Dr. C's "medical report" which released her to go back to work and she wanted to secure a new medical report. Thus, the carrier asserts that Dr. C continues to be the claimant's treating doctor. The claimant's position at the hearing was that she never chose Dr. C as her initial treating doctor; she only went to Dr. C because the emergency room doctor, Dr. T, recommended that she have Dr. C, who had performed the fusion operation in 1975, check the fusion. The claimant insisted that her initial choice of treating doctor was Dr. G and that Dr. G continues to be her treating doctor. She pointed out that in the TWCC-53 she sent to the Commission, she listed Dr. G as her initial choice of treating doctor and that she did not list any doctor as an alternate doctor to change to. Thus, she urged that the Commission Order which purports to approve a request to change treating doctors doesn't actually approve any change because no change was requested.

On appeal, the carrier contends that the hearing officer erred in finding that the claimant's first choice of treating doctors was Dr. G and that she has not changed doctors as of the date the hearing was closed. The carrier also contends that the hearing officer erred in concluding that the claimant's treating doctor is Dr. G as of the date the hearing was closed. In his discussion of the evidence, the hearing officer stated that, although the claimant prudently went through Commission procedures to change her treating doctor to Dr. G, it was not necessary in that Dr. G was the claimant's initial treating doctor. The hearing officer further stated that the claimant's only visit to Dr. C was because of a referral from the emergency room doctor.

Rule 126.7 was in effect at the time the claimant saw Dr. C on May 24, 1993. It

specifically provided in Subsection (d) that a doctor providing emergency care is not the initial choice of treating doctor unless the injured employee returns to this doctor for additional treatment other than follow-up care related to the emergency treatment. This same exception was carried forward in Rule 126.9(c) effective July 1, 1993. Although Rule 126.7(d) did not state that a referral doctor from a doctor providing emergency care is not the initial choice of doctor, under the circumstances presented in this case, it could reasonably be inferred by the hearing officer, who judges the weight and credibility of the evidence and resolves conflicts and contradictions in the evidence, that the emergency room doctor's referral of the claimant to Dr. C was for the purpose of checking to see if the fusion was intact and was simply a continuation of the emergency treatment. Dr. C had performed the fusion and would probably have been in the best position to quickly determine if changes had occurred since the surgery. The claimant saw Dr. C one time and Dr. C reported that the fusion was intact. The claimant, however, was still in pain and, immediately thereafter, began treatment with Dr. G and has continued under his care. The claimant also listed Dr. G as her initial choice of doctor on her TWCC-53. Having reviewed the record, we conclude that the hearing officer's finding that Dr. G was the claimant's first choice of treating doctors, and his conclusion that Dr. G was the claimant's treating doctor as of the date the hearing was closed, are sufficiently supported by the evidence and are not against the great weight and preponderance of the evidence.

The hearing officer's decision and order are affirmed.

Robert W. Potts
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Thomas A. Knapp
Appeals Judge