

APPEAL NO. 980041

Following a contested case hearing held, on December 9, 1997, pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act), the hearing officer, resolved the disputed issues by determining that the respondent's (claimant) compensable back injury of _____, did not extend to her neck, that she has had disability from _____, through the date of the hearing, and that the Texas Workers' Compensation Commission (Commission) did not abuse its discretion in approving (Dr. A) as an alternative doctor. The respondent (self-insured) has appealed the disability and change of treating doctor determinations. The file does not contain a response from the claimant.

DECISION

Affirmed as reformed.

The parties stipulated that the self-insured accepted liability for a _____ (all dates are in 1997 unless otherwise stated), back injury to claimant.

Claimant testified that she injured her back and neck lifting a heavy trash bag at the self-insured's hospital; that she saw (Dr. B) in the employee's clinic that day and the next; that Dr. B ordered no tests; that Dr. B took her off work for a few hours on both days and returned her to work on June 12th with restrictions; that there was no light duty on June 12th or thereafter; that she had to continue her normal duties of cleaning 19 or 20 rooms per day as best she could but could not perform some of the tasks; that her supervisor did from time to time assign someone to help her; and that she saw (Dr. C) at the clinic and he gave her four or five days off work. Claimant said she continued to work, showing up and doing what she could even though she felt she could not do the work. She said she obtained the approval of the Commission to see Dr. A and first saw him on July 29th; that Dr. A ordered diagnostic tests which Dr. B and Dr. C had not done; and that he took her off work as of July 29th and has kept her off work ever since. Claimant also stated that her employment was eventually terminated because she filed a workers' compensation claim and not, as the self-insured maintained, because she did not follow absence notification policies. She maintained that she has not been able to work since July 29th and cannot work at this time.

Dr. B's return to work certification of _____ states that claimant was able to return to full duty on June 16th and was able to return to work on June 12th with lifting and pushing/pulling restrictions. Another of Dr. B's records dated _____ reflects these dates as June 13th and June 11th, respectively. A return to work certificate dated July 18th with an illegible signature which does not appear to be that of either Dr. B nor Dr. C states

that claimant is unable to work until July 20th and reflects lifting and pushing/pulling restrictions.

Concerning the change of treating doctor issue, claimant stated that Dr. B did not order any diagnostic tests and the fact that she was not improving under the care of either Dr. B or Dr. C was the reason she requested the Commission to approve her change in treating doctors to Dr. A. The self-insured maintained that claimant changed to Dr. A for the purpose of obtaining an off-work certificate. The carrier had the burden of proof on this issue. The self-insured introduced a Payment of Compensation or Notice of Refused or Disputed Claim (TWCC-21) form which stated that the carrier "disputed the TWCC-approved change of treating physician," contending that it was not necessary for claimant to travel from Galveston to Houston for treatment of a back sprain, that claimant had been released to return to work by three doctors, and that claimant sought a change in doctors "for the purpose of obtaining an 'off work' slip."

Dr. A's Initial Medical Report (TWCC-61) for the July 29th visit reflected a diagnosis of sprain/strain in all three spinal regions. A cervical spine MRI obtained by Dr. A on August 2nd revealed bulging discs and spondylosis at the C3-4 through C6-7 levels. A lumbar spine MRI obtained by Dr. A on August 18th revealed mild protrusion/herniation at the L4-5 and L5-S1 levels. Dr. A wrote on October 27th that he initially saw claimant on July 29th and that "she has not been able to work since 07-29-97 to present." Several of Dr. A's records of claimant's visits before October 27th refer to her being unable to work at those times.

In both her opening and closing statements, claimant asserted that she was claiming disability from July 29th through the date of the hearing. Dr. A's records reflect that he first saw claimant on July 29th and that she has been unable to work since that date. Claimant testified that she has not been able to work since that date. The evidence thus supports claimant's assertion at the hearing that her disability began on July 29th. However, the hearing officer both found and concluded that claimant's disability began on _____. As noted as above, claimant testified to Dr. B's taking her off work for several hours after seeing him on the date of her injury and again after seeing him on June 11th, and she also stated that Dr. C had her off work for four or five days. These dates were not clearly developed. However, she also testified to having worked full time and not being given restricted duty until seeing Dr. A on July 29th and being taken off work by him. It may be that claimant decided not to attempt to claim disability prior to July 29th because she was paid for whatever hours or days she was off pursuant to the orders of Dr. B, Dr. C or some other doctor. In any event, we view the evidence and claimant's own assertions at the hearing that her disability began on July 29th as requiring that we reform Finding of Fact No.10 and Conclusion of Law No. 5 and the decision to conform to the disability commencement date of July 29th, as asserted by claimant, which is supported by the evidence. We are satisfied that the evidence is sufficient to support the determination that claimant had disability from July 29th through the date of the hearing and that such

determination is not so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

We also note several problems with dates referred to in the hearing officer's statement of the evidence and in various findings of fact. For instance, in Finding of Fact No. 6, the hearing officer stated that claimant last saw Dr. C on July 16th when the records reflect that the date should be June 16th; that in Finding of Fact No. 9, claimant went to Dr. A on June 29th when the records reflect that the date should be July 29th; and that in Finding of Fact No. 8, Dr. A kept claimant off work from June 29th when that date should be July 29th.

Finally, with regard to the change of treating doctor issue, the hearing officer found that there was no showing that the Commission abused its discretion in approving claimant's change to Dr. A. The Appeals Panel reviews a challenge to the Commission's approval of a change in treating doctor for abuse of discretion and in determining whether there was an abuse of discretion we look to see if the hearing officer acted without reference to any guiding rules or principles. Morrow v. H.E.B., Inc., 714 S.W.2d 297 (Tex. 1986). We are satisfied the hearing officer acted within the purview of Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 126.9(d) (Rule 126.9(d)) and Section 408.022(c). The Appeals Panel has previously recognized the contention of failure to improve as a basis for an employee's request to change treating doctors. See Texas Workers' Compensation Commission Appeal No. 950252, decided April 5, 1995. We find no abuse of discretion in approving the change.

The decision and order of the hearing officer are affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Christopher L. Rhodes
Appeals Judge