

## APPEAL NO. 990328

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on January 14, 1999. The hearing officer determined that the appellant/cross-respondent (claimant) had disability from June 6, 1998, through June 8, 1998; July 21, 1998, through July 28, 1998; September 3, 1998, through September 17, 1998; ½ days from September 18, 1998, through December 8, 1998; and from December 9, 1998, through the date of the CCH. She also determined that the claimant's employer made a bona fide offer of employment to claimant and that the Texas Workers' Compensation Commission (Commission) abused its discretion in approving Dr. FR as an alternate treating doctor. Claimant appeals the determination that there was a bona fide offer, but asks only for clarification regarding the bona fide offer. Claimant also appeals the determination that the Commission abused its discretion in approving the change of treating doctor. Respondent/cross-appellant (carrier) replies that the Appeals Panel should affirm the hearing officer's determinations regarding the request for a change of treating doctor and bona fide offer. In a cross-appeal, carrier contends that the hearing officer erred in determining that claimant had disability "for any point in time after July 28, 1998." Claimant responds that the disability determination should be affirmed.

### DECISION

We affirm in part and reverse and remand in part.

Claimant contends the hearing officer erred in determining that the Commission abused its discretion in approving Dr. FR as the claimant's new treating doctor. The request was approved in July 1998. On her Employee's Request to Change Treating Doctors (TWCC-53), claimant stated, among other things, that she needed "a doctor who understands this system, who can help [her] obtain the appropriate care and help [her] get well." A review of Commission rules concerning medical reports indicates that certain medical reports are required to be sent to the carrier, the claimant or the claimant's representative. There is not a requirement that the reports be sent to the Commission. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.1(h) (Rule 130.1(h)) requires that a doctor who completes a Report of Medical Evaluation (TWCC-69) send a copy to the Commission, the carrier, and the claimant.

Claimant testified that Dr. FUL stated that she did not require any therapy and that she was not happy with him because he did not give her proper treatment. She said Dr. FUL released her to return to work full duty. She said she requested a change of treating doctor to Dr. FR because she was in pain and wanted treatment. There is evidence that after Dr. FUL released claimant to full duty, in October 1998, carrier's independent medical examination doctor, Dr. T, indicated that claimant was not at maximum medical improvement (MMI) and said she will require further therapy. There is nothing in the record to indicate that any of the medical records from Dr. FUL were received by the Commission before September 1998. The Commission employee who approved the request to change

treating doctors did not testify at the hearing and the record does not contain a statement from her.

Section 408.022, SELECTION OF DOCTOR, provides, in part:

- (2) If an employee is dissatisfied with the initial choice of a doctor from the commission's list, the employee may notify the commission and request authority to select an alternate doctor. The notification must be in writing stating the reasons for the change, except notification may be by telephone when a medical necessity exists for immediate change.
- (3) 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:
  - (1) whether treatment by the current doctor is medically inappropriate;
  - (2) the professional reputation of the doctor;
  - (3) whether the employee is receiving appropriate medical care to reach [MMI]; and
  - (4) whether a conflict exists between the employee and the doctor to the extent that the doctor-patient relationship is jeopardized or impaired.
- (4) A change of doctor may not be made to secure a new impairment rating (IR) or medical report.

Rule 126.9 concerns choice of treating doctor and in subsection (e) provides:

Reasons for approving a change in treating doctor include but are not limited to:

- (1) the reasons listed in Texas Civil Statutes, Article 8308-4.63(d) [now Section 408.022]; and
- (2) the selected doctor chooses not to be responsible for coordinating injured employee's health care as described in §133.3 of this title (relating to Responsibilities of Treating Doctor).

In Texas Workers' Compensation Commission Appeal No. 941281, decided November 4, 1994, the Appeals Panel stated that the issue of whether the Commission improperly approved or disapproved a request to change treating doctors was to be reviewed under an abuse-of-discretion standard and that the standard was whether the decision maker acted without reference to any guiding rules or principles. In Texas Workers' Compensation Commission Appeal No. 950252, decided April 5, 1995, the claimant stated in the TWCC-53 that she wanted to change doctors because she wanted appropriate treatment and to get well. The hearing officer determined that claimant was not credible in her reasons for asking for a change in treating doctor. The hearing officer stated in the decision and order that the medical treatment from Dr. FUL was medically appropriate and that the Commission should not have approved the change of treating doctor request.

From the decision and order, it appears that the hearing officer considered information that was not available to the Commission employee when the request to change treating doctors was approved by the Commission. We reverse Finding of Fact No. 8 that the Commission should not have approved the request for a change of treating doctor and Conclusion of Law No. 5 that there was an abuse of discretion regarding the approval of such request. We remand for the hearing officer to consider information available to the Commission employee on July 30, 1998, when she approved the request to change treating doctors and to make a finding or findings of fact and a conclusion of law to resolve the disputed issue of whether the Commission abused its discretion.

We next address the hearing officer's determination regarding bona fide offer. Claimant contends that "for clarification purposes" the Appeals Panel should "modify the [hearing officer's] decision to read that the employer provided a bona fide offer of employment and should be relieved of [the] duty to pay temporary income benefits (TIBS) during the time that [Dr. FR] had claimant on light-duty work" between August 14, 1998, and September 2, 1998. In the decision and order, the hearing officer stated:

[Dr. FR] took claimant off work on July 31, 1998, until August 13, 1998, when she was again released to limited duty. In reviewing [Dr. FUL's] medical reports and the initial report from [Dr. FR], there seems to be no change in claimant's condition and no real treatment needed which supports this period of disability. In September 1998, injections were requested . . . and approved. Claimant was taken off work from September 3, 1998, through September 17, 1998, while the injections were being given.

From the decision and order, it appears that the hearing officer considered the issue of bona fide offer and whether carrier owed TIBS for the period from August 14, 1998, to September 2, 1998. Because we are remanding regarding the change of treating doctor issue, we also remand for clarification regarding bona fide offer and what periods the hearing officer finds that TIBS are not owed.

In its cross-appeal, carrier contends the hearing officer erred in determining that claimant had disability after July 28, 1998. Carrier asserts that claimant had disability pursuant to medical records from the treating doctor, Dr. FUL, until July 28, 1998. Carrier asserts that although there are medical records from Dr. FR that support the hearing officer's disability determination, because the hearing officer determined that there should not have been a change of treating doctor to Dr. FR, his records cannot support the hearing officer's disability determination. We first note that we have remanded the issue regarding the change of treating doctor to the hearing officer for reconsideration. In any case, however, we would note that the hearing officer may still consider Dr. FR's medical reports regarding disability, whether or not he is claimant's treating doctor. Texas Workers' Compensation Commission Appeal No. 92257, decided August 4, 1992. We perceive no error in the hearing officer's disability determination regarding the period after July 28, 1998. Having reviewed carrier's assertions on appeal, we conclude that the disability determination not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust.

We affirm that part of the hearing officer's decision that states that claimant had disability for the stated periods after July 28, 1998. We reverse that part of the decision and order that states that the Commission abused its discretion in approving Dr. FR as the claimant's new treating doctor and remand for the hearing officer to make a finding or findings of fact and conclusion of law consistent with this decision. We also remand for findings of fact regarding bona fide offer. Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Texas Workers' Compensation Commission's Division of Hearings, pursuant to Section 410.202. See Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

---

Judy Stephens  
Appeals Judge

CONCUR:

---

Thomas A. Knapp  
Appeals Judge

---

Alan C. Ernst  
Appeals Judge