

APPEAL NO. 990596

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on February 9, 1999. The issue was whether the Texas Workers' Compensation Commission (Commission) abused its discretion by approving a change of doctor for the appellant, who is the claimant.

The hearing officer found that procedures had not been followed to ascertain from the claimant's treating doctor at the time if there was dissatisfaction or inability to continue the doctor-patient relationship. Because the change was approved without going through these procedures, and because the hearing officer further found that the claimant's purpose in making the change was to obtain another impairment rating (IR) and date of maximum medical improvement (MMI), the hearing officer found that the Commission abused its discretion in allowing the change, which was reversed. The claimant's original treating doctor was reinstated.

The claimant has appealed. She argues that she did not request the change to seek a new IR but to obtain better treatment for her back injury. She argues that her current doctor is able to prescribe medication to help her. She says her first doctor did not give her proper medical care, and that the Commission has already approved the change and should not be permitted to reverse it. The disputed treating doctor, Dr. S, has also filed a statement in appeal of the decision, but he is neither a party nor a representative and his letter cannot therefore be taken as an appeal. The respondent (carrier) responds that the decision is sufficiently supported and argues that evidence from the record that it contends lends this support.

DECISION

We affirm the decision of the hearing officer based upon her holding that the claimant changed treating doctors to secure another IR.

The claimant was employed by (employer); on _____, she slipped and fell in a sitting position onto her rear end. She said she injured her left foot and her back began to hurt that night. The claimant maintained that she could not speak, write, or understand English.

The claimant began treatment with Dr. B, D.C. thereafter in January 1998. She stated that she saw Dr. B five days a week at first, then only three days a week, then once a week. She said he rendered therapy only. However, she agreed, he referred her to Dr. C, a medical doctor who prescribed pain medication for her. The claimant said her therapy made her feel good for two hours and then the effect would go away. The claimant said that Dr. B spoke Spanish.

Dr. B's medical records in evidence show that he diagnosed a lumbar strain/sprain and disc syndrome with radiculopathy. He took the claimant off work. He referred her to a neurosurgeon, Dr. C, in March 1998. Dr. B treated her with hot packs, electrical stimulation, massage, and manual traction. The frequency and nature of his treatments is documented. As her treatment progressed, the claimant subjectively rated her pain for Dr. B on a "10" scale, and which indicated gradual decrease in pain. It appears that Dr. C may have felt that a limited surgical procedure could be considered if conservative treatment was not successful.

On February 20, 1998, the claimant had a lumbar MRI which found a mild bulge at one level, and moderate or mild arthrosis at two spinal levels. The MRI reported no narrowing or stenosis. Dr. B's recitation of his treatment history (contained in an IR he performed in October 1998) also mentions referral to a clinic for facet injections.

Dr. F examined the claimant for the carrier on July 13, 1998. He assessed a zero percent IR and an MMI date back to February 1998. Dr. F noted that there was initially no assertion of a fall. He stated his belief that the claimant, at most, had a soft tissue injury which had resolved. Dr. B disagreed with this IR. A designated doctor, who was also a chiropractor, was appointed in response to the dispute. The designated doctor, Dr. CT, examined the claimant in mid-September 1998, invalidated the claimant's range of motion testing due to what he believed were voluntary restrictions, and stated that the MRI contained no findings consistent with a recent spinal trauma. He certified MMI on February 18, 1998, with a zero percent IR.

Dr. B performed his own IR on October 12, 1998, upon his strong disagreement with Dr. F and Dr. CT. He assigned an IR of 19%, with an MMI date of September 1, 1998.

The claimant said that she was riding a bus and, in conversation with another passenger, was given Dr. S's name. An initial medical report (not signed) is in the record from (Orthopedic practice). The address is the same as Dr. S's office, although this was not otherwise made clear. This report is dated October 30, 1998, and states that the claimant had "a severe injury" to her back when she tripped and fell at work. The report noted that the claimant had returned to work, and that she had severe pain. The impression from x-rays was lateral recess stenosis. Recommendations were made for myelogram and EMG testing.

The claimant said that, although Dr. S did not speak Spanish, his office staff was fluent in Spanish. She was assisted in filling out her Employee's Request to Change Treating Doctors (TWCC-53) by someone at Dr. S's office, which supplied the form. Nevertheless, she maintained that there was some communication difficulty underlying the request of the form asking for the change, in part, because she had been given a zero percent IR and that the 19% IR Dr. B gave in response was not clear and strong in its medical backup. She also stated in the TWCC-53 that she felt she had not been treated appropriately. The change was approved three days after receipt.

A Dispute Resolution Information System note indicated that the carrier disputed this approval, and that good cause was found upon administrative review to set a benefit review conference based upon the failure of the official approving the change to contact Dr. B. However, there was no evidence presented to show any policy or procedure that was thus violated by this failure.

The claimant maintained that Dr. S has given her pain medication, referred her for injections, and told her she will likely need surgery. He has not prescribed therapy. The EMG recommended by Dr. S was done on November 3, 1998, and reported as normal.

The Commission enacted administrative rules to put into place a process for the approval of a change of treating doctor, and for the review of that approval to ensure that standards authorizing a change consistent with Section 408.022(c), (d), and (e) were complied with. Although the claimant complains about the hearing officer overruling what had already been approved by another branch of the Commission, Section 408.024 authorizes relieving a carrier of liability for medical bills incurred where the doctor has not been selected in compliance with the 1989 Act. Tex. W. C. Comm'n, 28 TEX. ADMIN. CODE § 126.9(h) (Rule 126.9(h)) also empowers the hearing officer to relieve the carrier "after the fact" for noncompliance. Changing doctors to obtain a new IR or new medical report is prohibited under Section 408.022(d).

Although the hearing officer finds that the Commission official approving the change was required to contact Dr. B before approval, there is nothing in the record, nor was official notice taken, proving any applicable policy that was thus violated. Consequently, there is insufficient basis for the determination that some procedural deficiency would cause the approval to be set aside. However, the determination of the reason the claimant sought a change is a fact determination for the hearing officer. In this case, the TWCC-53 indicates on its face that the IR previously assigned, and the purportedly weak rebuttal IR

by Dr. B, is a motive for the change. In assessing whether the claimant sought better treatment, the hearing officer was entitled to consider the nature of the claimant's injury, the objective tests indicating the lack of a herniation or stenosis, and the opinions of Dr. B, Dr. CT, and even Dr. F, as well as the report of Dr. S. She could find that the reasons stated on the TWCC-53 were not compromised by the asserted failure of communication. We do not agree that the decision of the hearing officer is against the great weight and preponderance of the evidence, and affirm her decision and order.

Susan M. Kelley
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Alan C. Ernst
Appeals Judge