APPEAL NO. 990961

Following a contested case hearing (CCH) held on January 19, 1999, with the record closing on January 29, 1999, 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/cross-appellant (claimant) did not sustain a compensable injury to his abdomen (inguinal hernia) in addition to the compensable lumbar injury on _____; that claimant's L5-S1 injury is not a result of the compensable injury sustained on or about _____; that the maximum medical improvement date cannot be determined at this time; that the appellant/cross-respondent (carrier) did not waive the right to contest the compensability of the claimed L5-S1 injury by not contesting within 60 days of being notified of the claimed injury; that claimant did have disability from May 19 to September 17, 1998, resulting from the injury sustained on or about _____; that (employer), did tender a bona fide offer of employment to claimant on or about September 17, 1998; and that the Texas Workers' Compensation Commission (Commission) did not abuse its discretion in approving Dr. TS as an alternate treating doctor. The carrier has appealed the disability and change of treating doctor determinations, asserting that videotape evidence showed claimant can work and that he changed treating doctors because he was dissatisfied with his former treating doctor's releasing him for work. Claimant has appealed the extent of injury, carrier waiver, disability, and bona fide offer of employment issues on evidentiary insufficiency grounds. Both parties filed responses to the respective requests for review.

DECISION

Affirmed as reformed.

The hearing officer's decision and order contains a detailed summary of the evidence with which neither party takes issue. Accordingly, we will refer to only so much of the evidence as is necessary to reach our determinations.

Claimant, testifying through a Spanish language translator, stated that he sustained a low back injury in 1988 which was followed by fusion surgery at L5-S1 by Dr. V from which he fully recovered; that he again injured his back in 1990; that on _____, while working for the employer at a construction site in (city 1), he emptied a wheelbarrow full of concrete, "felt [his] back crack," and advised his supervisor the next day of his injury; and that he also had pain in the area of his left testicle. He further stated that he began treating with Dr. K on the following Tuesday and complained not only about his back injury but also about pain in the left testicle area but that Dr. K told him there was "no problem" concerning the pain complaint in the left testicle area. Claimant further testified that he returned to work after a few days; that he continued treating with Dr. K throughout 1997 and into 1998; that he was periodically taken off work by Dr. K and returned to work with restrictions; and that after being released by Dr. K for work on April 7, 1998, Dr. K took him off work on April 28, 1998, to see Dr. KS. He indicated that he did not see Dr. KS because he had been previously seen by Dr. KS upon Dr. K's referral; that he felt he was just being referred and

given pills and was not making progress under the care of Dr. K; that he was telling Dr. K he had a lot of pain but that Dr. K "was not changing or doing anything" but just sending him to Dr. KS; and that Dr. KS had said he "was not going to change his opinion" so he decided to change treating doctors to Dr. TS who was recommended by his attorney. The Employee's Request to Change Treating Doctors (TWCC-53), signed by claimant on April 30, 1998, and approved by the Commission on May 7, 1998, states the reason for change as follows: "I want to execute my 1st choice of treating doctor. [Dr. K] is the company doctor. Please grant this request."

Ms. P, the employer's risk management coordinator, testified that claimant had been employed by the employer since June 1993 and that she believes he passed a preemployment physical exam and was working at full duty on _____; that, on the latter date, claimant was working at one of the employer's many construction jobs sites in the city 1 area; and that the employer at first paid claimant's medical bills from the _____, injury because claimant was not losing time from work, but that when she saw the report of a May 8, 1997, MRI, an Employer's First Report of Injury or Illness (TWCC-1) was sent to the carrier on May 16, 1997.

The medical records reflect that claimant was seen by other doctors before commencing treatment with Dr. K. Dr. K's Initial Medical Report (TWCC-61) dated May 1, 1997, which diagnosed a lumbar sprain, states that a lumbar spine MRI indicates post-operative change of posterior laminectomy and fusion at the L5 and S1 level. The carrier's Payment of Compensation or Notice of Refused or Disputed Claim Interim (TWCC-21), dated July 16, 1997, and stamped received by the Commission on that date, states as follows: "This injury is confined to L4-5 only. Another level is not related to this injury due to not in course & scope of employment." At the hearing, claimant relied on the May 1997 MRI report as providing evidence of an injury to the L5-S1 level from the _____, work incident and also contended, as he does on appeal, that the verbiage in the TWCC-21 is insufficient to constitute a contest of the compensability of the claimed L5-S1 level injury. The carrier's adjuster, Ms. G, stated in answer to one of claimant's interrogatory questions that the carrier was unable to confirm when the MRI was received but that the report was not dictated until May 9, 1997.

Ms. P further stated that the employer sent claimant a written offer of light duty dated September 17, 1998; that the employer got the "green card" back but claimant did not respond; that the employer intended to accommodate any light-duty restrictions of any treating doctor necessary to have claimant back working and still would; and that the employer did not send the offer of light-duty letter for the purpose of setting claimant up for the cessation of his income benefits. The September 17, 1998, letter, signed by Ms. P, states that Dr. TS had given claimant a light-duty release effective September 8, 1998; that light-duty work is available for claimant; that the doctor believes claimant should be on light duty at least until his next appointment and that the employer assures him that light duty will be available during that time; that the employer is aware of the doctor's restrictions and will abide by them; that the light-duty position offered includes the tasks of using employee files to record certain stated data; that the tasks conform to Dr. TS's requirements; that claimant

will receive his preinjury pay; and that the light-duty job is available at the employer's regional office in (city 2), Texas. Ms. P indicated that city 2 is about a 15-minute drive from city 1 and claimant indicated it was about a 30-minute drive from his residence.

Both Ms. P and Mr. M testified that in an August 17, 1998, letter, the employer offered claimant a light-duty position as a flagman at a construction site and that Dr. TS wrote that claimant could perform the job but that his medications may cause drowsiness which could be safety problem so they then made the September 17th offer of an office position. Dr. TS wrote on September 8, 1998, that claimant may work at the light-duty job as a flagman from a physical standpoint but that some of the medications he is taking may cause drowsiness and impair his state of alertness.

Mr. M, the employer's vice president for operations, testified that he assisted Ms. P in the drafting of the September 17, 1998, written offer of light duty. He also said that claimant responded to that letter by calling him and stating, "contact my attorney." Claimant testified to the same effect. Mr. M stated that there was no expiration date on the offer of employment, that he had several times talked to claimant about returning to work, even at claimant's house, and that even on the date of the hearing the employer remained willing to give claimant light duty which would comply with whatever a treating doctor wanted. Mr. M also testified that the matter of a hernia injury did not come up until at least a year after the _____, injury.

The September 29, 1997, report of Dr. JS, who examined claimant for the carrier, stated the impression as a "chronic low back"; previous spondylosis and spondylolisthesis, status post Gill procedure with good fusion at the L5-S1 level; and abnormal EMG suggestive of a right L4-5 radiculopathy not corroborated with clinical examination or structural studies. Dr. JS also stated that all the neurosurgeons who have examined claimant recently have commented on the excellent fusion and outcome of the previous fusion at the L5-S1 level. Dr. JS's February 3, 1998, report states that all imaging studies demonstrate good fusion at the L5-S1 level. Dr. JS also commented that "it is possible that [claimant] could work in a light-duty status on a full-time basis although in the presence of his subjective belief that he is disabled and in need of surgery, it is unlikely he will pursue this matter." In his January 6, 1999, report, Dr. JS stated that, with regard to a hernia condition, he was not able to determine that claimant presently has an inguinal hernia but that he does have an umbilical hernia not caused by the work injury.

Dr. KS's June 20, 1997, note states that a recent lumbar myelogram and CT scan show scar formation at L5-S1 and a bulging disc at L4-5; his September 9, 1997, letter to the carrier states that he did not know if claimant has a hernia; his January 19, 1998, note states that the recent lumbar MRI shows some disc bulges at L-5. Responding to the carrier's requests for his opinions, Dr. KS wrote on July 7, 1997, that, while the disc herniation-bulging disc at L4-5 is most probably related to the _____, injury, the epidural fibrosis at L5-S1 is related to the 1988 surgery.

The January 14, 1998, report of a December 6, 1997, MRI states that with regard to L5-S1 there were the post-operative changes previously described (referring to a May 5, 1997, MRI), some posterior bulging of the thecal sac in the laminectomy defect not appreciably changed, and no other abnormality identified.

Dr. K's note of April 28, 1998, states that claimant is unable to work pending his follow-up with Dr. KS. Dr. K's Specific and Subsequent Medical Report (TWCC-64) of April 28, 1998, states that claimant chose not to see Dr. KS but to change doctors and hired an attorney. In his September 5, 1998, answers to deposition questions Dr. K stated that he felt that claimant had an L5-S1 disc injury and not one at L4-5; that he was concerned that the MRI findings at L5-S1 could possibly represent a dislodged fragment and that is why he arranged on several occasions for claimant to see Dr. KS; and that, concerning claimant's change of treating doctor, he felt claimant became frustrated after he was found on video to be much more active than he was stating.

Dr. G reported on July 8, 1998, that based on claimant's history of "lifting a barrel of cement" at work on _____, it is medically most probable that the injury is the direct cause of a disc fragment found at L5-S1 and that today's testing shows a herniated disc at L5-S1.

Dr. D wrote on November 6, 1998, that claimant needs an inguinal hernia repair before returning to work, that he experiences low back pain, and that he is not able to return to work.

Dr. MS wrote on December 29, 1998, that he is treating claimant and that claimant is to be taken off work and will not be able to work at the present time due to the injuries he sustained at work, which Dr. MS diagnosed as a herniated nucleus pulposus at L5-S1, lumbar radiculitis, and a reducible umbilical hernia.

The hearing officer is the sole judge of the weight and credibility of the evidence (Section 410.165(a)) and, as the trier of fact, resolves the conflicts and inconsistencies in the evidence including the medical evidence (Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ)). The Appeals Panel, an appellate reviewing tribunal, will not disturb the challenged factual findings of a hearing officer unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust and we do not find them so in this case. 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).

While there was some conflict in the medical evidence, the hearing officer could conclude that the evidence did not establish that claimant's solid fusion at the L5-S1 level was damaged or that he received any injury to that lumbar spine level on _____. The hearing officer could also consider the paucity of evidence that claimant had an inguinal hernia and the near total absence of evidence that he sustained an inguinal hernia from the _____, event.

Claimant had the burden to prove when the carrier received a written notice which fairly informed the carrier of facts showing the compensability of the claimed work-related injury at the L5-S1 level on _____. Texas Workers' Compensation Commission Appeal No. 962512, decided January 27, 1997. *And see* Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 124.1(a)(3) (Rule 124.1(a)(3). The hearing officer found that the carrier did not receive such written notice before May 18, 1997, and that its TWCC-21 of July 16, 1997, was a sufficient and timely contest of the compensability of the claimed L5-S1 injury. *See* Rule 124.6(a)(9) and Texas Workers' Compensation Commission Appeal No. 971846, decided October 27, 1997. Again, we are satisfied that the challenged findings pertaining to the hearing officer's determination find sufficient support in the evidence.

As for the change of treating doctor issue, the hearing officer could conclude from claimant's testimony that he felt he was not improving under the care of Dr. K and Dr. KS and that he needed to change to another doctor to progress and improve. *See* Section 408.022 and Rule 126.9. The Appeals Panel has indicated that this is a proper reason for the Commission to approve a request to change treating doctors. *See, e.g.,* Texas Workers' Compensation Commission Appeal No. 950252, decided April 5, 1995. We find the evidence sufficient to support the hearing officer's determination of this issue.

As for the bona fide offer of employment and disability issues, the hearing officer determined that claimant had disability from May 19, 1998, until September 17, 1998, when the carrier tendered to claimant an offer of employment in the employer's office which satisfied the bone fide offer of employment requirements of Rule 129.5(b) and that claimant did not have disability beyond that date. Again, we are satisfied that the hearing officer's determinations are not against the great weight of the evidence. We do, however, note that, while the hearing officer both found and concluded that claimant's disability ended on September 17, 1998, when he was tendered the bona fide offer of employment, in Finding of Fact No. 3 the hearing officer found that claimant was unable to obtain and retain employment at his preinjury wage from May 19 through September 22, 1998. We view the September 22nd date as a typographical error and reform the finding to read September 17, 1998.

The hearing officer's decision and order, as reformed, are affirmed.

_____
Philip F. O'Neill
Appeals Judge

CONCUR:

_____
Susan M. Kelley
Appeals Judge

_____
Thomas A. Knapp
Appeals Judge