APPEAL NO. 990997

This appeal is brought 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 April 8, 1999. The appellant/cross-respondent (claimant) and the respondent/cross-appellant (carrier) stipulated that on _____, the claimant sustained a compensable injury in the form of an inguinal hernia. The issues reported as unresolved at the benefit review conference were: (1) did the Texas Workers' Compensation Commission (Commission) abuse its discretion in denying Dr. Z as the alternate doctor, (2) is the claimant's lumbar and cervical injury a result of the compensable injury sustained on _____, and (3) did the claimant have disability from September 25, 1998, to the present. At the request of the carrier, the hearing officer added the issue of "did the claimant waive its right to contest the Commission's order denying a change of treating doctor under Rule 126.9(g) (Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 126.9(g))." The hearing officer made the following findings of fact and conclusions of law:

FINDINGS OF FACT

2. [Dr. G] was the Claimant's initial choice for a treating doctor.

3. [Dr. Z] was the Claimant's alternate choice for treating doctor.

4. The Claimant's reason for requesting an alternate choice was his belief that [Dr. G] was not properly treating him for his injury.

5. On _____ the Claimant did not sustain an injury to the cervical and lumbar regions of his spine.

6. [Dr. G] released the Claimant to return to limited duty work on September 8, 1998.

7. [Dr. Z] took the Claimant off-work on September 25, 1998, due to the myospasms at the bilateral lumbar paraspinals.

CONCLUSIONS OF LAW

3. The Commission did abuse its discretion in denying [Dr. Z] as the alternate doctor.

4. The Claimant's lumbar and cervical injury is not a result of the compensable injury sustained on or about _____.

5. The Claimant did not have disability from 9-25-98 through the date of the [CCH] resulting from the injury sustained on _____.

The claimant appealed the determinations that his injuries to his lumbar and cervical spine are not part of the compensable injury and that he did not have disability from September 25, 1998, through the date of the hearing; urged that those determinations are so against the great weight of the evidence as to be manifestly unjust; and requested that the Appeals Panel reverse those determinations and render a decision in his favor on those issues. The carrier responded, urged that the evidence is sufficient to support those appealed determinations, and requested that they be affirmed.

The carrier appealed the determination that the Commission abused its discretion in denying the request that Dr. Z become the claimant's treating doctor. The carrier stated that the claimant filed three Employee's Request to Change Treating Doctors (TWCC-53) in which he requested that Dr. Z become his treating doctor and that the claimant did not dispute the first order denying the request to change treating doctors within 10 days after receiving that order denying the request as required by Rule 126.9(g). The carrier argued that the first order denying the request to change to Dr. Z became final in the absence of a change of circumstances. The carrier also urged that there was no real evidence of a conflict in the doctor-patient relationship and that the Commission did not abuse its discretion in denying the request to have Dr. Z become the treating doctor. The claimant responded, urging that the hearing officer's determination that the Commission abused its discretion in not approving the request that Dr. Z become the claimant's treating doctor.

DECISION

We affirm in part and reverse and remand in part.

The claimant testified that on _____, it had been raining; that he was carrying pipes; that he slipped and fell; that he was taken to a clinic used by the employer; that he was diagnosed as having a hernia; that his lower back also hurt; that he told the doctor that his lower back hurt; and that the doctor told him that they would have to check the hernia first. He said that at first he did not want to have surgery; that he decided to have the surgery to repair the hernia and had the surgery on August 3, 1998; that he did not tell the surgeon that his back was hurting because the surgeon was only to treat his hernia; and that he did not want to continue to go to the doctors at the clinic because they did not pay any attention to him. He said that the doctors at the clinic did not treat him for 60 days and that Dr. G became his treating doctor. A TWCC-53 in the record indicates that the Commission approved a request for Dr. G to become the claimant's treating doctor on July 23, 1998. The claimant stated that Dr. G released him to return to light duty; that he was told to work as a flagman; that there was too much standing in that job; that he told Dr. G that he could not do the work; that Dr. G told him that the surgeon said that he could return to work at light duty four weeks after the surgery, and that Dr. G would not change that; that a friend recommended that he see Dr. Z; that is why he requested that Dr. Z become his treating doctor; and that Dr. Z took him off work and told him that his neck and low back injuries were related to his compensable injury. The records of the clinic, the surgeon who repaired the hernia, and Dr. G do not mention cervical or lumbar pain. The reports of Dr. Z do mention lumbar and cervical pain. In a report dated October 29, 1998, Dr. Z stated he

diagnosed "cervicocranial syndrome & lumbar segmental dysfunction and myospasm due to altered gait."

The claimant went to the Commission field office handling the claim on July 20, 1998, and completed a TWCC-53 requesting that Dr. G become his treating doctor. The request was approved on July 23, 1998. On September 25, 1998, the claimant completed another TWCC-53, requesting that Dr. Z become his treating doctor. The reason given was "[t]he treatment I am getting from [Dr. G] is not helping me any. I want to get back for work as soon as possible. At this time I am in a lot of pain and I want the appropriate medical attention. I want to use my alternative choice. Please grant my request." A Commission employee denied the request and gave the following reason: ["p]er Sct. 408.022(b) claimant has had an alternate choice of doctor approved by TWCC [Commission] in the past." On October 13, 1998, the claimant submitted another request to change treating doctors to Dr. Z. In that TWCC-53 the claimant stated:

> [Dr. B] is with [clinic]. I was sent there by my employer. At this time the treatment I am receiving from [Dr. G] is not helping me any. I want to get back to work as soon as possible. I am in a lot of pain and I want the appropriate medical attention. I want to use my alternative choice. Please grant my request.

The Commission denied the request and simply cited Section 408.022(b). The claimant submitted another TWCC-53 that states:

> [Dr. B] is with [clinic] [Co. Doctor]. I was sent there by my employer. [Dr. HB] never saw me when I tried to see him. The only doctors that I have seen is the Co. Doctors and [Dr. G]. The treatment that [Dr. G] was giving me did not help me any. I am in a lot of pain and need appropriate medical attention. Please grant my alternate choice.

We first address the determination that the claimant's compensable injury does not include injuries to the claimant's cervical and lumbar spine. The testimony of the claimant alone may be sufficient to satisfy the burden of proof. Texas Workers' Compensation Commission Appeal No. 91013, decided September 13, 1991. The hearing officer is the trier of fact and is the sole judge of the relevance and materiality of the evidence and of the weight and credibility to be given to the evidence. Section 410.165(a). While a claimant's testimony alone may be sufficient to prove a claim, the testimony of a claimant is not conclusive but only raises a factual issue for the trier of fact. Texas Workers' Compensation Commission Appeal No. 91065, decided December 16, 1991. The trier of fact may believe all, part, or none of any witness's testimony because the finder of fact judges the credibility of each and every witness, the weight to assign to each witness's testimony, and resolves conflicts and inconsistencies in the testimony. Taylor v. Lewis, 553 S.W.2d 153 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.); Texas Workers' Compensation Commission Appeal No. 93426, decided July 5, 1993. This is equally true regarding medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286

(Tex. App.-Houston [14th Dist.] 1984, no writ). The claimant was not required to establish by medical evidence that his compensable injury included injuries to the cervical and lumbar spine. The hearing officer was required to consider all of the evidence, and acted properly in considering the medical evidence, including the lack of medical evidence mentioning injury to the claimant's cervical and lumbar spine soon after the fall, in making her determination concerning whether the cervical and lumbar spine are part of the compensable injury. However, care should be exercised in stating how the evidence was considered to avoid the appearance of applying an incorrect standard of requiring medical evidence to prove an injury in the course and scope of employment when such evidence is not required. An appeals level body is not a fact finder, and it does not normally pass upon the credibility of witnesses or substitute its own judgment for that of the trier of fact even if the evidence would support a different result. National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied). The hearing officer's determination that the claimant's compensable injury does not include injuries to the cervical and lumbar spine is not so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986). Since we find the evidence sufficient to support that determination of the hearing officer, we will not substitute our judgment for hers. Texas Workers' Compensation Commission Appeal No. 94044, decided February 17, 1994.

We next address the determination that the claimant did not have disability from September 25, 1998, to the date of the hearing. The claimant was released to return to work at limited duty on September 8, 1998. He was taken off work for his lumbar condition on September 15, 1998. We have affirmed the determination that the compensable injury does not include injuries to the cervical and lumbar spine. The determination that the claimant did not have disability from September 25, 1998, to the date of the hearing is not so against the great weight and preponderance of the evidence as to be clearly wrong or unjust and is affirmed.

Justly, we address the determination that the Commission abused its discretion in denying the claimant's request to change treating doctors. The hearing officer determined that the claimant's request was based upon his belief that he was not receiving proper treatment from Dr. G. The carrier appealed, and argued that there was no conflict in the doctor-patient relationship. That may be so, but that is not the basis on which the claimant sought the change of treating doctors. The Commission denied the request under the mistaken belief that the claimant was entitled to change treating doctors only once. In addition, Dr. G was the claimant's initial choice of treating doctor. *See* Rule 126.9(c) and Texas Workers' Compensation Commission Appeal No. 960455, decided April 17, 1996. The hearing officer was correct in determining that the Commission abused its discretion in denying the request to change treating doctors.

The hearing officer added the issues of "[d]id the claimant waive its right to contest the Commission's order denying a change of treating doctor under Rule 126.9(g)." She did not make specific findings of fact or conclusions of law to resolve that disputed issue. Rule

126.9 does not limit the number of requests by a claimant to change treating doctors. Rule 126.9(g) provides:

> With good cause, the injured employee or carrier may dispute the order regarding a change to an alternate treating doctor within 10 days after receiving the order. That dispute will be handled through the dispute resolution process described in Chapters 140 through 143 of this title (relating to Dispute Resolution/General Provisions, Benefit Review Conference, Benefit Contested Case Hearing, and Review by the Appeals Panel).

In Texas Workers' Compensation Commission Appeal No. 950764, decided June 28, 1995, the Appeals Panel affirmed a decision of the hearing officer that the carrier did not dispute the order granting the claimant's request to change treating doctors within the 10-day period prescribed for doing so in Rule 126.9(g) and that the doctor approved in that order had become the claimant's treating doctor. *Also see* Texas Workers' Compensation Commission Appeal No. 960697, decided May 15, 1996. In Texas Workers' Compensation Commission Appeal No. 971957, decided November 3, 1997, the Appeals Panel held that a dispute of an order concerning the change of treating doctors must be made by requesting a benefit review conference and that the request from a carrier must be in writing and on a Request for Benefit Review Conference (TWCC-45). Since a carrier becomes liable for the cost of reasonable and necessary health care provided by a treating doctor, a carrier's failure to timely file a TWCC-53 has legal consequences. We are not aware that a claimant's failure to appeal the denial of a request to change treating doctors precludes the claimant from filing another request to change to the previously requested treating doctor. In the case before us, the claimant filed a TWCC-45 signed by the attorney representing him and dated December 19, 1998. The TWCC-45 states that four TWCC-53s are attached. It appears that the TWCC-45 is untimely concerning the dispute of the denial of the requests to change treating doctors in the July, September, and October 1998 TWCC-53s. The order denying the last request by the claimant to change to Dr. Z was signed by a Commission employee on November 17, 1998. The order indicates that it was sent to several persons, including the claimant and the carrier. But the record does not indicate when the order was sent to or received by the claimant. The issue of waiver was added at the hearing. It appears that since the issue was added at the hearing, it was not fully litigated. The parties should be afforded the opportunity to present evidence and make arguments to assist the hearing officer in resolving the issue that she added.

We reverse the decision and order of the hearing officer and remand for her to make a finding or findings of fact and conclusion of law to resolve the issue that she added and to issue an appropriate decision and an appropriate order. 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 Commission's Division of Hearings, pursuant to Section 410.202. *See* Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

_____
Tommy W. Lueders
Appeals Judge

CONCUR:

_____
Joe Sebesta
Appeals Judge

_____
Robert W. Potts
Appeals Judge