

APPEAL NO. 991041

Following a contested case hearing held on April 23, 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 concluding that the Texas Workers' Compensation Commission (Commission) did not abuse its discretion in approving Dr. MK as the respondent's (claimant) alternate treating doctor and that the appellant (carrier) waived its right to dispute the Commission's order to change claimant's treating doctor by failing to dispute the order within 10 days of receiving it. The carrier has appealed these conclusions and several factual findings on the basis of insufficiency of the evidence. The carrier asserts that claimant was "doctor shopping" and should have been required to return to one of the doctors he had previously seen and that the carrier should not be penalized for the postal system's delay in delivering its dispute of the Commission's order. The file does not contain a response from claimant.

DECISION

Affirmed.

The parties stipulated that on _____, claimant sustained a compensable injury; that her treating doctor was Dr. SK; and that claimant submitted an Employee's Request to Change Treating Doctors (TWCC-53) to the Commission to change her treating doctor to Dr. MK which the Commission approved on November 9, 1998.

Claimant testified that she was injured on _____, when she stepped up on an embankment and fell to her knees while trying to protect the lap top computer she was carrying; that she was treated in an emergency room by a doctor who told her to follow up with her family doctor; that she next was seen by her family doctor, Dr. MA, who said he could not treat her and referred her to both Dr. SK, a chiropractor, and Dr. W, an orthopedic specialist; that she began receiving chiropractic treatment immediately from Dr. SK but did not get to see Dr. W until sometime in May 1998; that she was treated by both Dr. SK and Dr. W for some time and was also sent to another city for nerve block injections from Dr. R; that sometime in October 1998, Dr. SK told her he could do nothing further for her; and that she then requested Commission approval to change treating doctors to Dr. MK, a neurologist.

Claimant further stated that she was initially diagnosed and treated for abrasions and contusions of her right knee; that the knee became infected; that she was later diagnosed with reflex sympathetic dystrophy (RSD) and a subcutaneous neuroma; and that these latter conditions required treatment by a neurologist. She stated that she had been interested in commencing treatment with Dr. MK early on but that the carrier did not want her to see him. Dr. MK's records reflect that he has diagnosed right RSD, myofascial pain syndrome in primarily the lumbar region and, to a lesser extent, in the cervicothoracic region, and right knee pain.

In evidence is a TWCC-53 reflecting that on September 30, 1998, the Commission approved claimant's request to change treating doctors from Dr. W to Dr. SK. There is no disputed issue concerning that Commission order. Claimant was unable to clearly answer questions concerning why this form was executed at the time since she had been provided with treatment by Dr. SK since soon after her injury. Dr. SK wrote claimant on October 29, 1998, stating that due to the nature of her injuries, neither he nor the chiropractic clinic could be of further service; that she is released and he is no longer her primary care physician; and that she may feel free to go to another doctor of her choice.

Also in evidence is a TWCC-53, signed by claimant on November 2, 1998, reflecting that on November 9, 1998, the Commission approved claimant's request to change treating doctors from Dr. SK to Dr. MK. This document states as claimant's reason for requesting the change that Dr. SK recommends she change to a physician who can treat subcutaneous neuroma with very severe hypoesthetic condition, as well as pain management and medication. This document reflects at the bottom that on November 9, 1998, the Commission checked both the block for "request approved" and the block for "exception" which was followed by the statement "[Dr. SK] unable to treat any longer. See [Section] 408.022(E)(4)(c)." This document also bears the carrier's date stamp reflecting receipt by the carrier on November 19, 1998.

Also in evidence is the carrier's Request for Benefit Review Conference (TWCC-45), dated November 24, 1998, which bears the Commission's date stamp reflecting receipt by the Commission on December 2, 1998. This document requests an expedited benefit review conference (BRC), stating that it disputes "the latest change in treating doctor" approved by the Commission because it is excessive and unreasonable in that claimant has already been seen by approximately eight doctors. The Commission's letter of December 8, 1998, to the parties states that pursuant to Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 126.9(g) (Rule 126.9(g)), a BRC will not be scheduled since the dispute of the Commission's order was not received within 10 days. Also in evidence is the carrier's letter of January 8, 1999, which enclosed another TWCC-45. This letter states that the carrier disagrees with the Commission's determination that its previous TWCC-45 was not timely and requests that a BRC be set to address this issue. The letter further states that the carrier received claimant's TWCC-53 on November 19, 1998, that it filed its dispute by mail on November 20, 1998, and that it did not anticipate that the mail system between (City 1) and (City 2) would take longer than five days. The letter also states that the Commission's "general rule regarding the presumed date of receipt for mail (five days from the date it is sent) should apply in this case."

Section 408.022(b) provides, in part, that 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. Section 408.022(c) provides that the Commission shall prescribe the criteria to be used in granting the employee authority to select an alternate doctor and that the criteria may include: (1) whether treatment by the current treating doctor is medically appropriate, (2) the professional reputation of the doctor, (3) whether the employee is receiving appropriate medical care to reach maximum medical improvement, and (4) whether a conflict exists between the employee and the

doctor to the extent that the doctor-patient relationship is jeopardized or impaired. Section 408.022(d) provides that a change of doctor may not be made to secure a new impairment rating or medical report. Section 408.022(e) provides, in part, that a referral made by a doctor chosen by the employee is not a selection of an alternate doctor if the referral is medically reasonable and necessary and also that the selection of a doctor because the original doctor becomes unavailable or unable to provide medical care to the employee is not a selection of an alternate doctor. There were no disputed issues concerning the status of Dr. MA or Dr. W and, as noted, the parties stipulated that claimant's treating doctor was Dr. SK. Rule 126.9(e) provides that reasons for approving a change in treating doctor include but are not limited to the reasons listed in Section 408.022 and also that the selected doctor chooses not to be responsible for coordinating the injured employee's health care.

The Appeals Panel has consistently applied an abuse of discretion standard in reviewing requests to change treating doctors. Texas Workers' Compensation Commission Appeal No. 951943, decided January 2, 1996. In determining whether there has been an abuse of discretion, the Appeals Panel looks to see whether the hearing officer acted without reference to any guiding rules or principles. Appeal No. 951943; Morrow v. H.E.B., Inc., 714 S.W.2d 297 (Tex. 1986). In Texas Workers' Compensation Commission Appeal No. 941475, decided December 16, 1994, the Appeals Panel affirmed the hearing officer's determination that the Commission did not abuse its discretion in approving a change of treating doctor for the reasons that the treating doctor was unavailable and that the employee was not improving under his care. We are satisfied that the three appealed findings and the conclusion relating to the change of treating doctor issue are not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly 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).

Concerning the waiver issue, Rule 126.9(f) provides that the Commission shall issue an order approving or denying a change of doctor request and Rule 126.9(g) provides that 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. The hearing officer found that on November 19, 1998, the carrier received a copy of the Commission order of November 9, 1998, approving claimant's TWCC-53; that on November 24, 1998, the carrier prepared a TWCC-45 to dispute that order; and that on December 2, 1998, the Commission received the carrier's TWCC-45. These findings are not appealed. The carrier does appeal the conclusion that it waived its right to dispute the Commission's order to change claimant's treating doctor by failing to dispute the order within 10 days of receiving it, arguing, as it did below, that it is unfair to penalize the carrier for postal service delay in delivering its TWCC-45 and that Rule 102.5(h), which deems receipt of a document five days after it is mailed, should be applied. We find no merit in either contention. The Appeals Panel has long observed that the postal service is the agent of the party selecting it as the vehicle of delivery and that any delay occasioned by its negligence is attributable to the sender. See Texas Workers' Compensation Commission Appeal No. 931172, decided January 18, 1994. As for the application of Rule 102.5(h), that rule applies to documents sent by the Commission, not by parties. See e.g. Texas Workers'

Compensation Commission Appeal No. 941345, decided November 21, 1994. Further, Rule 102.7 provides, in part, that documents required to be filed by a specified time will be considered timely only if received by the Commission on the last permissible day of filing.

The decision and order of the hearing officer are affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Alan C. Ernst
Appeals Judge