APPEAL NO. 991715

A contested case hearing was originally held on April 8, 1999, under the provisions of the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). At the request of the appellant (carrier), the hearing officer added the issue of "[d]id the Claimant [respondent] waive [his] right to contest the Commission's [Texas Workers' Compensation Commission] order denying a change of treating doctor under Rule 126.9(g) [Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 126.9(g)]?" In Texas Workers' Compensation Commission Appeal No. 990997, decided June 16, 1999, the Appeals Panel affirmed the determinations of the hearing officer that resolved the issues that were reported as unresolved at the benefit review conference (BRC); noted that the added issue had not been resolved; reversed; and remanded for the hearing officer to resolve the issue that had been added. The Appeals Panel stated that it appeared that since the issue was added at the hearing, it was not fully litigated and that the parties should be afforded the opportunity to present evidence and make arguments to assist the hearing officer in resolving the added issue. The hearing officer did not hold another hearing. She rendered another decision on July 22, 1999, in which she made the following findings of fact and conclusion of law:

FINDINGS OF FACT

2. The denial of Claimant's request to change treating doctors was received by Claimant's attorney on October 7, 1998.

3. The Claimant went to the Commission on October 15, 1998, and disputed the Commission's denial of his request.

CONCLUSION OF LAW

3. The Claimant did not waive his right to contest the Commission's order denying a change of treating doctor under Rule 126.9(g).

The carrier appealed those findings of fact and conclusion of law, urged that the hearing officer erred in determining that an oral dispute of the denial of the request to change treating doctors was sufficient, contended that the decision of the hearing officer is so against the great weight and preponderance of the evidence as to be manifestly unjust, and requested that the Appeals Panel reverse the decision of the hearing officer and render a decision in its favor. The claimant responded; set forth the text of a Commission Dispute Resolution Information System (DRIS) entry dated October 15, 1998; contended that the DRIS entry and an Employee's Request to Change Treating Doctors (TWCC-53) dated October 16, 1998, and received by the Commission on that day are sufficient to prove that the claimant timely disputed the denial of the request to change treating doctors dated October 5, 1998; that the hearing officer did not err in finding that on October 15, 1998, the claimant timely disputed the denial of the request to change treating doctors; and requested that the decision of the hearing officer be affirmed.

DECISION

We reverse the decision of the hearing officer that the claimant timely disputed the October 5, 1998, denial of the request to change treating doctors and render a decision that he did not timely dispute the denial of that request to change treating doctors.

Appeal No. 990997, *supra*, contains a summary of evidence and quotations from documents related to requests to change treating doctors made by the claimant. The evidence will again be set forth in this decision.

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:

> The treatment I am getting from [Dr. G] is not helping me any. I want to get back to 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 alternate choice. Please grant my request.

A Commission employee denied the request on October 5, 1998, 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." 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. A DRIS entry dated October 15, 1998, states:

> ENE. [ENE appears to be the first three letters of the first name of the person making the entry] IN REF. DENYED [SIC] 53 EXP. TO GO AHEAD TO REAPPLY EXP. [DR. G] WAS HIS INITIAL DR. CONSENTRA MED. CL. [CLINIC] NO DR. WAS REALY [SIC] ASSIGNED AND WAS TREATED ONLY TWICE. [CLINIC] WAS EMP. CHOICE.

The claimant did not testify about talking with a Commission employee on October 15, 1998. The claimant submitted another TWCC-53 dated October 13, 1998, 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 need appropriate medical attention. I want to use my alternate choice. Please grant my request.

Apparently, the October 13, 1998, date on the TWCC-53 is an error. On October 26, 1998, a Commission employee denied the request to change treating doctors and gave the reason "per Section 408.022(b)" with no further explanation. The claimant submitted another request to change treating doctors to Dr. Z on November 3, 1998; the request was denied on November 17, 1998; the claimant filed a Request for Benefit Review Conference (TWCC-45) dated November 20, 1998, disputing the denial of the request to change treating doctors; and a Commission disability determination officer denied the request for a BRC on December 1, 1998. The claimant submitted another TWCC-45 dated December 19, 1998, and on January 7, 1999, the Commission agreed to set a BRC. The decision and order of the hearing officer did not make findings of fact concerning the October 26, 1998, denial of the October 13, 1998, request or the November 17, 1998, denial of the November 3, 1998, request and stated that they are superfluous.

The carrier cited Texas Workers' Compensation Commission Appeal No. 971957, decided November 3, 1997, contending that it applies to both carriers and claimants. In Appeal No. 971957, the carrier received the approved request to change treating doctors on June 2, 1997; Commission records indicate that the carrier's adjuster talked with "a Commission field office" on June 11, 1997, and indicated that he was sending a request for a BRC to contest the change of treating doctors; that the Commission received a TWCC-45 contesting the change of treating doctors on June 16, 1997; and that a BRC was scheduled. The Appeals Panel cited Rule 126.9(g) that 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 Provision, [BRC], Benefit Contested Case Hearing, and Review by the Appeals Panel).

The Appeals Panel wrote:

> The carrier asserts that there is no 10-day rule or other time requirement to dispute a change of treating doctor contained in Rule 126.9(g), nor is there any requirement that it be in writing. While it is true that Rule 126.9(g) does not specifically state a writing is required, the rule does specifically provide a 10-day time frame and states that "[T]hat dispute will be handled through the dispute resolution process . . . ." Clearly, the dispute resolution process as set forth in Section 410.021 and Rule 141.1 provides that a BRC is the initial vehicle to mediate and possibly resolve issues and that a request for a BRC shall be made on a form TWCC-45. Rule 102.7 mandates that a request to be considered timely must be received on or before the last permissible day of filing. That requirement was not met here. As was held in Texas Workers' Compensation Commission Appeal No. 951264, decided September 8, 1995, a case concerning the timely filing of a request for a BRC in a supplemental income benefits case, the request had to be received by the Commission

> within 10 days and not just mailed within 10 days. *See also* Texas Workers' Compensation Commission Appeal No. 962466, decided January 8, 1997. From our review of the record, we do not find a factual or legal basis to set aside or otherwise disturb the holding of the hearing officer that the carrier waived the right to contest the change of treating doctor by not contesting the change within 10 days.

Rule 130.108(a) provides that a claimant or a carrier may request a BRC to contest a determination or entitlement or amount of supplemental income benefits. In Appeal No. 971957, *supra*, the Appeals Panel did not specifically address whether the carrier's adjuster's indicating that he was sending a request for a BRC to contest the approval of the change of treating doctors was a dispute of the approval of the request to change treating doctors or was merely a statement of an intent to dispute such approval.

Turning to the case before us, Rule 126.9(g) states that a claimant or a carrier may dispute the order regarding a change to an alternate treating doctor within 10 days after receiving the order and in another sentence states that the dispute will be handled through the dispute resolution process described in Chapters 140 through 143. It appears that the better practice is to dispute an order regarding a change to an alternate treating doctor by having the Commission receive a TWCC-45 stating that the order is being disputed within 10 days after receiving the order. However, the provisions of Rule 126.9(g) may be read to indicate that after a dispute has been timely made, the dispute will be handled through the benefit dispute resolution process. We do not hold that a dispute of a Commission order regarding a change to an alternate doctor may never be made orally.

We now address the sufficiency of the evidence to support the finding of fact that "[t]he Claimant went to the Commission on October 15, 1998, and disputed the Commission's denial of his request." As indicated earlier in this decision, the claimant did not testify about what he may have told a Commission employee on October 15, 1998. In Appeal No. 990997, *supra*, that Appeals Panel noted that the remanded issue had not been fully litigated at the hearing and stated that the parties should be afforded the opportunity to present evidence and make arguments to assist the hearing officer in resolving the issue she added but did not resolve. In her Decision and Order, the hearing officer stated that no further hearing was necessary and none was held. Review of the record of the April 8, 1999, hearing reveals that the only evidence of what the claimant told a Commission employee on October 15, 1998, is contained in a DRIS entry with that date. No form of "dispute" or "contest" appears in that entry. The entry indicates that claimant was there in reference to a denied TWCC-53, and that he was advised to reapply to change treating doctors and was told how to word the request to indicate that it was the first request to change treating doctors since the doctor he saw at the clinic was not his first choice of treating doctors. He did so and did not file a TWCC-45 disputing the October 5, 1998, denial. The evidence indicates that on October 15, 1998, the claimant was asking what to do rather than disputing the denial of the request to change treating doctors. The part of the finding of fact that on October 15, 1998, the claimant disputed the Commission's denial of his request to change treating doctors is so against the great weight and preponderance

of the evidence as to be clearly wrong and unjust and is reversed. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951); Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); and Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986).

We reverse the decision of the hearing officer that the claimant timely disputed the October 5, 1998, denial of the request to change treating doctors and render a decision that he waived the right to dispute that denial of that request to change treating doctors.

Tommy W. Lueders
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Robert W. Potts
Appeals Judge