APPEAL NO. 000128

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On December 29, 1999, a contested case hearing (CCH) was held. With regard to the only issue before her, the hearing officer determined that, since respondent's (claimant) prior treating doctor "withdrew from Claimant's care," the Texas Workers' Compensation Commission (Commission) did not abuse its discretion in approving claimant's request to select Dr. W as his new treating doctor.

Appellant (carrier) appeals, reciting the chronology of the several doctors and requests to change treating doctors involved in this case, asserts that the record does not reflect that Dr. Q "refused, was unavailable or unable to provide medical care" and that claimant was changing doctors to secure another impairment rating (IR). Carrier contends that the hearing officer abused her discretion in finding that the Commission did not abuse its discretion in approving the change of treating doctors to Dr. W. Carrier requests that we reverse the hearing officer's decision and render a decision in its favor. Claimant responds, urging affirmance.

DECISION

Affirmed.

Claimant was employed as a truck driver. It is undisputed that on _____, while trying to tighten a load on a flat-bed truck, the mechanism handle recoiled, striking claimant in the chest and that claimant sustained a non-displaced sternal fracture as a result of that injury. Claimant testified that he first began treating with Dr. K but no records from Dr. K are in evidence. The circumstances are not clear, but claimant subsequently began treating with Dr. F, variously described as an orthopedic or chest, rib specialist. Dr. F began treating claimant conservatively in January 1999. In a note dated February 18, 1999, Dr. F suggested that if the pain persisted, "then perhaps surgical intervention with wiring of the sternum may be indicated" but that claimant should approach the surgery "with a great deal of caution." In a note dated March 22, 1999, Dr. F discusses surgery and that claimant might have pain even after surgery. The last line states: "He will call our office when he is ready to have [surgery]." Two days later, on March 24th, claimant filed an Employee's Request to Change Treating Doctors (TWCC-53) to change treating doctors from Dr. F to Dr. S, another medical doctor, because "Doctor [F] want to do surgery[,] need second opinion." Claimant's request was denied by the Commission.

What, if any, treatment claimant received and/or by whom claimant was seen between March and June 29, 1999, is not clear. However, on June 29th, claimant filed a second TWCC-53 requesting a change of treating doctor to Dr. W, a chiropractor, and a doctor recommended by some friends. (The reason given is not legible.) A Dispute Resolution Information System (DRIS) note, dated June 30, 1999, stated:

> REASON: HS/BN TRTG W/CO DR & HIS REFRLS . . . DOESNT FEEL HAS RCVD APPROPRIATE MED CARE . . . HAS TRIED DISCUS'D W/DR W/O SUCCESS . . . WANT DR THAT UNDERSTANDS SYSTEM & CAN HELP HIM GET APPROPRIATE CARE T/HELP HIM GET WELL. . . . (I DONOT FEEL A CHG T/A CHIRO IS APPROPRIATE FOR A CRACKD STERNUM INJ) . . . CALLD CLMT . . . LCB W/MALE ASNWRG . . .

The Commission, in denying claimant's request, explained the concern of having a chiropractor treat a "cracked sternum." In a third TWCC-53, dated July 2, 1999, claimant requested a change of treating doctors from Dr. F to Dr. Q, a medical doctor, and apparently an orthopedic specialist, giving as his reason essentially the same reason as the immediately prior request. This request was approved.

Dr. Q apparently began seeing claimant around July 20, 1999; however, reports dated July 20 and 22 and September 2, 1999, from Dr. Q are in longhand and are largely illegible. Also in evidence is a note dated September 15, 1999, which states: "No longer my patient. Referred to [Dr. W] for further evaluation and treatment." Claimant testified that Dr. Q no longer wanted to treat him and withdrew. Claimant filed another TWCC-53, dated September 22, 1999, requesting a change of treating doctors from Dr. Q to Dr. W, with the reason: "I have been treating with [Dr. Q], who no longer wants to be my treating doctor." Claimant's request was approved by the Commission with the notation that Dr. Q "has withdrawn from trmt."

The hearing officer, in the discussion portion of her decision, commented:

> Although the record of the CCH certainly indicates that Claimant has changed or attempted to change his treating doctor on several occasions, and although it further appears that a chiropractor would constitute a less than prudent choice for a treating doctor when, as in this case, the compensable injury constitutes a fracture, the fact remains that Section 408.022(e)(4)(C) indicates that it is not considered the selection of an alternate doctor when the prior doctor becomes unavailable to provide medical care to the employee. Since it appears that [Dr. Q], Claimant's prior treating doctor, withdrew from Claimant's treatment, thereby becoming unavailable to provide medical care to Claimant, Claimant's choice of [Dr. W] as a new treating doctor did not constitute the selection of an alternate doctor under the cited portion of the Act, and therefore was not subject to approval or disapproval by the Commission at the time relevant to the case at bar.

Carrier argues that nowhere in the medical records did it indicate that Dr. Q was refusing to be claimant's treating physician. We disagree and refer to Dr. Q's September 15, 1999, note quoted above. Claimant's Exhibit No. 5. Carrier also argues that claimant's attempts to change treating doctors fell within the purview of the prohibition in Section 408.022(d) that a change of doctor may not be made to secure a new IR or medical report. Although

Dr. Q released claimant to limited duty with restrictions, none of the doctors appear to have certified MMI with an IR. Nor is there any evidence that the changes were requested to obtain a new medical report.

Section 408.022(e)(4)(C) provides in (e) that "the following is not a selection of an alternate doctor: . . . (4) the selection of a doctor because the original doctor: . . . (C) becomes unavailable or unable to provide medical care to the employee . . . ." The hearing officer found that Dr. Q withdrew from claimant's care, thereby becoming unavailable to provide claimant's medical care. That finding is supported not only by claimant's testimony but also by Dr. Q's September 15, 1999, note. The Appeals Panel applies an abuse of discretion standard in reviewing cases regarding requests to change treating doctors. Texas Workers' Compensation Commission Appeal No. 951943, decided January 2, 1996. In determining whether the hearing officer has abused his or her 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 reviewing the Commission's actions in approving a request to change treating doctors, the hearing officer also looks to see whether the Commission has abused its discretion.

Further, the hearing officer is the sole judge of the weight and credibility to be given to the evidence. Section 410.165(a). Here, the hearing officer was clearly bothered by the fact that "a chiropractor would constitute a less prudent choice for treating doctor when . . . the compensable injury constitutes a fracture" but referred to the provisions of Section 408.022(e)(4)(C) in finding that the Commission had not abused its discretion. We cannot say, under these circumstances, that the hearing officer acted without reference to any guiding rules or principles.

Accordingly, we affirm the hearing officer's decision and order.

Thomas A. Knapp
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Dorian E. Ramirez
Appeals Judge