

APPEAL NO. 000193

This appeal arises 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 November 29, 1999. The hearing officer determined that the Texas Workers' Compensation Commission (Commission) did not abuse its discretion in approving a change of treating doctors from Dr. S, D.C., to Dr. P, D.C. The appellant (carrier) appeals this determination, contending that there was an abuse of discretion. The respondent (claimant) replies that the decision is correct, supported by sufficient evidence, and should be affirmed. Another issue of entitlement to reimbursement of travel expenses for travel to other doctors was resolved by agreement of the parties.

DECISION

Affirmed.

Section 408.022(c) provides a nonexclusive list of criteria for approving a change of treating doctors. A change to secure a new impairment rating (IR) or medical report is prohibited. Section 408.022(c). See *also* Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 126.9 (Rule 126.9). A determination to approve or disapprove a change of treating doctors is reviewed under an abuse of discretion standard. Texas Workers' Compensation Commission Appeal No. 970686, decided June 4, 1997. An abuse of discretion review is based on the facts as they exist at the time the request is acted upon. Texas Workers' Compensation Commission Appeal No. 981841, decided September 25, 1998. We have also held that the distance to the new treating doctor's office may be a consideration in approving the request. Texas Workers' Compensation Commission Appeal No. 961336, decided August 26, 1996.

The claimant was not present at the CCH and appeared through his attorney. Because he did not appear, the only evidence of his reasons for requesting a change of treating doctors was that contained in the Employee's Request to Change Treating Doctors (TWCC-53) he submitted. The reason for the request stated:

I have been treating with [Dr. S] for some time. I do not feel that I have been allowed to receive the care that I need to return to work. I have tried to discuss this. I need a doctor that can provide me the appropriate care that I need to get better to return to work.

The Commission approved this request on September 20, 1999.

The carrier had the burden of proving an abuse of discretion in the approval. See Texas Workers' Compensation Commission Appeal No. 93433, decided July 7, 1993; Texas Workers' Compensation Commission Appeal No. 941721, decided February 7, 1995 (Unpublished). It introduced into evidence reports of various doctors who had seen the

claimant to support its position that the claimant was given medically appropriate care and was, in fact, significantly improving. For example, Dr. T reviewed the claimant's records, apparently at the request of the carrier, and wrote on August 31, 1999, that the claimant "has improved 40% according to the medical records." Dr. F examined the claimant and in a report of September 10, 1999, noted normal muscle strength and a normal sensory examination and MRI of the lumbar spine. His diagnosis was mechanical lower back pain. Dr. PE also examined the claimant and concluded he reached maximum medical improvement with a zero percent IR. At an August 13, 1999, examination by Dr. N, the claimant was advised to continue physical therapy from Dr. S "as this seems to be helping him quite a bit." He was given further pain medications.

The carrier also argued that the Commission abused its discretion in approving this change because the new treating doctor's office was further from the claimant's home than his former doctor's office. The carrier introduced into evidence a mileage calculation that the distance was 52.3 miles. However, it did not dispute that this mileage was the distance not between the claimant's home address and Dr. P's office, but between the claimant's postal box number and Dr. P's office. The claimant's own mileage calculation between his home address and Dr. P's office was not admitted because it was not timely exchanged. Because the claimant was not present to testify, he could not offer this evidence from his own knowledge.

The hearing officer found the claimant's position as reflected in the TWCC-53 credible and considered the change to be premised on an attempt to obtain better medical treatment and an assertion that he was failing to improve under Dr. S's treatment. We have held that such reasons may be a proper basis for approving a change in medical treatment. Appeal No. 961336, *supra*. While there was evidence that other doctors believed the claimant was improving, this is to some degree a subjective judgement and may depend on perceptions of whether the recovery was fast enough. The hearing officer also considered the cost of travel to be only one factor and not the controlling factor in this case. In Texas Workers' Compensation Commission Appeal No. 961888, decided November 8, 1996, we noted that the existence of medical treatment closer to home does not necessarily control because "medical service providers are not fungible." In this case, the hearing officer rejected the carrier's evidence on distance because it failed to show the distance from the claimant's residence. We agree that the residence, not the post office address, was the correct point from which to calculate distance. There was no other evidence of distance.¹

There is an abuse of discretion when a decision maker reaches a decision without reference to guiding rules and principles. Morrow v. H.E.B., Inc., 714 S.W.2d 297 (Tex. 1986). From our review of the record in this case, we conclude that there was no abuse of discretion in the approval of the change in treating doctors to Dr. P.

For the foregoing reasons, we affirm the decision and order of the hearing officer.

¹We do not consider representations of counsel to be evidence.

Alan C. Ernst
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

CONCUR IN RESULT:

Robert W. Potts
Appeals Judge