APPEAL NO. 001188

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 April 19, 2000. The agreed upon issues were:

1. Did the Commission [Texas Workers' Compensation Commission] properly appoint a designated doctor in accordance with Rule 130.6 [Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.6]?

2. Did Claimant [appellant] have disability resulting from the injury sustained on _____ from January 1, 1999 to January 19, 2000?

In response to those issues, the hearing officer determined that the Commission had abused its discretion in approving the change of treating doctor to Dr. P because it did not follow the requirements of Section 408.022 and Rule 126.9; that the Commission did not properly appoint a designated doctor in accordance with Rule 130.6; and that the claimant had disability resulting from the injury sustained on _____, beginning April 26, 1999, and continuing through November 30, 1999.

The claimant appealed, contending that the hearing officer's findings regarding the change of treating doctor prior to the appointment of the designated doctor was not supported by the evidence and the change of treating doctor had not been disputed by the respondent (carrier) as provided for under Rule 126.9(g). The claimant further contended that even if the change of treating doctor had been disputed (and was an issue before the hearing officer), the evidence, the claimant's testimony, and the claimant's Employee's Request to Change Treating Doctors (TWCC-53) gave a proper reason for the change of treating doctor. The claimant contends that the hearing officer's determination that the Commission had not properly appointed a designated doctor was based on the hearing officer's findings regarding the change of treating doctors which (1) "was not before the hearing officer" and (2) there was no evidence or explanation "how or in what way the commission abused their discretion in approving [a] change of doctor." Regarding the disability issue, the claimant contends that the hearing officer's decision is against the great weight and preponderance of the evidence. The claimant requests that we reverse the hearing officer's decision and render a decision in his favor. The carrier responds that the hearing officer is the sole judge of the weight and credibility of the evidence and that her decision should be affirmed.

DECISION

Reversed and rendered in part and reversed and remanded in part.

Much of the CCH dealt with matters not related to the agreed upon issues. The parties stipulated that the claimant sustained a compensable injury on _____. Although the stipulated compensable injury is not defined, the medical evidence and

testimony appear to indicate that the claimant injured his neck and right shoulder pulling on a wrench. The claimant had been employed for 20 years as a mechanic by the employer. The claimant sought medical care from Dr. M, his family doctor, on December 17, 1998, and was eventually referred to Dr. Mc. In a report dated March 2, 1999, Dr. Mc notes neck and right shoulder complaints and orders diagnostic testing, including an MRI. A cervical MRI performed on March 16, 1999, showed moderate disc protrusions at C3-4 and other very small or minimal protrusions. Another MRI apparently showed "a full thickness tear" in the right shoulder, a right rotator cuff tear, and right carpal tunnel syndrome (CTS). The claimant had surgery to repair the right rotator cuff, an "'AC' joint resection," cubital tunnel release with ulnar nerve transposition of the right elbow and a CTS release of the right wrist on April 26, 1999. Various progress notes by Dr. Mc show continued complaints. Dr. T, the carrier's required medical examination doctor, in a report dated October 27, 1999, noted the claimant's surgery; stated that the claimant "is not presently working and his job is no longer available"; and certified maximum medical improvement (MMI) on October 27, 1999, with a 10% impairment rating (IR) based on various right upper extremity problems. The claimant received this report in early November and subsequently disputed the IR and retained an attorney. In a TWCC-53 dated November 16, 1999, the claimant requested a change of treating doctor from Dr. Mc to Dr. P, giving as a reason "Because it [his injury] is not getting any better. I would like to try chiropractic treatment to see if it will improve my condition." The TWCC-53 was in the claimant's handwriting and the claimant testified at the CCH that he changed treating doctors because he was "not satisfied" with Dr. Mc "because [the claimant] had not improved." The request was approved by the Commission on December 7, 1999, noting "This is employee's alternate choice." In an Employee's Notice of Injury or Occupational Disease and Claim for Compensation (TWCC-41), also dated November 16, 1999, the claimant filed his claim. On questioning by the hearing officer, the claimant said that the forms were filled out in the attorney's office and that Dr. P had been recommended by someone in the attorney's office. There was no evidence or testimony that the change in treating doctor was to get a new report. The claimant apparently continued to see Dr. Mc until November 30, 1999. Dr. P, in a series of progress notes beginning December 13, 1999, took the claimant off work and documented chiropractic manipulations. Subsequently, Dr. D, was appointed as the designated doctor. In a report dated February 20, 2000, Dr. D noted the claimant's history, assessed (incorrectly) that the claimant is at "statutory MMI" and assessed a 15% IR (MMI and IR are not at issue in this case).

On the first issue, the hearing officer made a number of findings that the Commission abused its discretion in approving the change of doctor to Dr. P because the provisions of Section 408.022 and Rule 126.9 were not followed. In her discussion, the hearing officer explained that "it was clear Claimant filed the request to obtain a new medical report." The hearing officer also made a finding that the claimant's request to change treating doctors was to get a different MMI and IR. That finding is totally unsupported by the testimony and documentary evidence and constitutes sheer speculation on the part of the hearing officer. Rule 126.9 basically refers to Section 408.022, which lists criteria to be used in selecting a new treating doctor. Section 408.022(c) provides that the criteria may include:

(1) whether treatment by the current doctor is medically inappropriate;

(2) the professional reputation of the doctor;

(3) whether the employee is receiving appropriate medical care to reach [MMI]; and

(4) whether a conflict exists between the employee and the doctor to the extent that the doctor-patient relationship is jeopardized or impaired.

The claimant asserts that his reasons for changing doctors, stated both at the CCH and on the TWCC-53, were included in (1) and (3) above. The claimant further contends, on appeal, this was not an issue before the hearing officer and that the carrier had not disputed the change of treating doctor under provisions of Rule 126.9(g).

We agree with the claimant's contentions. The change of treating doctor was not an issue before the hearing officer; the carrier had not disputed the change of treating doctor (and certainly not within the time frame of Rule 126.9(g)); and, as previously noted, there was no mention of obtaining a new report. The hearing officer, in questioning the claimant, was able to get the claimant to admit that he had discussed Dr. T's report with the attorney (only later did the claimant's attorney assert an attorney-client privilege) and that someone in the attorney's office had recommended Dr. P. That falls far short of leading to the conclusion that the claimant was seeking to change treating doctors in order to obtain a new medical report or to get a different MMI and IR. While the Commission's reason for approving the change of treating doctor may have been flawed with no foundation in the statute or rules, nonetheless, the change of treating doctor was supported by the evidence.

The issue, as originally presented, was whether the designated doctor should be an M.D., D.O., or D.C. Rule 130.6(b)(4) provides that a designated doctor should "to the extent possible, be in the same discipline and licensed by the same board of examiners as the employee's doctor of choice." Dr. M was an M.D. and referred the claimant to Dr. Mc, a D.O., orthopedic surgeon, and in December 1999, the Commission approved Dr. P, a D.C., as the treating doctor. At the time, Dr. D was appointed as the designated doctor; Dr. P was the treating doctor, although Dr. Mc had performed the surgery and timewise had given most of the treatment. The hearing officer made several findings regarding the change of treating doctors and then found:

FINDINGS OF FACT

15. Claimant's request to change treating doctors was made to secure a new medical report specifically a different date of [MMI] and [IR].

* * * *

17. In response to Claimant's dispute of [Dr. T's] report, the Commission appointed [Dr. D], a chiropractor, as designated doctor because Claimant's new treating doctor, [Dr. P] was a chiropractor.

18. The Commission did not investigate Claimant's request to change treating doctors and subsequent dispute of [Dr. T's] report before assigning [Dr. D] as the designated doctor.

CONCLUSION OF LAW

3. The Commission did not properly appoint a designated doctor in accordance with Rule 130.6.

We hold that the hearing officer's determinations on this issue are unsupported by the evidence, based on speculation, and are so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986). Accordingly, we reverse the hearing officer's findings regarding the change of treating doctor as not being an issue before the hearing officer and not being supported by the evidence and render a new decision that the Commission had properly appointed a designated doctor in accordance with Rule 130.6.

On the issue of disability, the evidence (although portions were disputed) was that the claimant was notified by his union that his job (and others) was being eliminated and that the claimant could accept a severance package and take early retirement or be "fired" (laid off) some time prior to his injury. The claimant, subsequently, sustained his injury on December 17 or 18, 1998; continued to work until December 25, 1998, when he signed his severance package; and "voluntarily retired." The hearing officer commented:

> Claimant's evidence was sufficient to prove that he had disability from the date of surgery on April 26, 1999 to November 30, 1999 the last day he was examined by [Dr. Mc]. The records of [Dr. P] are not persuasive and [Dr. D's] report is based upon incorrect information. Claimant was working at his regular job until he was forced to retire. Claimant was angry at having to retire and it is clear he would have continued working but for the forced retirement. He did not attempt to find work afterwards and there is insufficient evidence of disability until after surgery on April 26, 1999.

The hearing officer was free to believe that the reason for the claimant's disability (inability to obtain and retain employment at the preinjury wage due to the compensable injury (Section 401.011(16)) was his "retirement" and the start date of the disability was April 26, 1999. However, we find problems in the end date, being the last day the claimant saw Dr. Mc. In a report dated November 30, 1999, Dr. Mc stated:

> [The claimant] presents today still complaining of pain in his right shoulder with weakness. . . . The only PT [physical therapy] he had really had on it is basically ROM [range of motion]. . . . He's also still complaining of some weakness and discomfort with abduction and stating his discomfort is mainly in the area of his deltoid.
>
> * * * *
>
> After review of his hx and his PT I feel this is still limited somewhat secondary to the weakness of his right shoulder.
>
> * * * *
>
> I also feel he very certainly could benefit from seeing a different therapist to see if he could work on scapular stabilization as well as strengthening. Then, if he's a failure to this with continued discomfort, I would possibly suggest an ultrasound of his rotator cuff and a follow up with [Dr. Mc].

This does not in anyway suggest an end date to disability but rather provides positive evidence of continued disability. Even if the hearing officer does not believe Dr. P and Dr. D, Dr. Mc's last report does not provide evidence of an end to disability. Accordingly, we reverse the hearing officer's decision that disability ended on November 30, 1999, as being against the great weight and preponderance of the evidence and remand the case for the hearing officer to make determinations on disability that are supported by the evidence. The hearing officer may solicit additional oral or written argument but the decision should be based on the evidence already in the record.

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.

Thomas A. Knapp
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Tommy W. Lueders
Appeals Judge