APPEAL NO. 002545

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On October 11, 2000, a contested case hearing (CCH) was held. With regard to the issues before him, the hearing officer determined that the appellant's (claimant) "current low back condition, if any," is the result of her compensable injury of _____ (all dates are 2000 unless otherwise noted), that the claimant was not at maximum medical improvement (MMI) as certified by the designated doctor, and that the claimant had disability from April 20 through June 7. The extent-of-injury and MMI issues have not been appealed and have become final pursuant to Section 410.169.

The claimant appeals the disability issue asserting that an MRI showing a herniated disc was newly discovered evidence because the respondent (carrier) had refused to authorize the MRI and that when the claimant went for the MRI she "was turned away because the Adjuster was not authorizing it." The circumstances surrounding the authorization of the MRI became important because the hearing officer commented, "Claimant has no objective evidence of disability from June 8 through the date of the [CCH]." The claimant requests that we reverse the hearing officer's decision and render a decision that the claimant had disability through the date of the CCH. The appeals file does not contain a response from the carrier.

DECISION

Reversed and remanded.

The parties stipulated that the claimant sustained a compensable injury to her lower back on _____. The claimant was about "two or three months" pregnant at the time of her injury. The claimant initially began treatment with Dr. R, who continued the claimant on light or modified duty (approved by the claimant's OB/GYN doctor) until April 10 when Dr. R certified that the claimant reached MMI with a zero percent impairment rating. The claimant subsequently changed treating doctors, approved by the Texas Workers' Compensation Commission (Commission) on April 12, to Dr. M, a chiropractor, who took the claimant off work on April 20. It is undisputed that the claimant refused an epidural steroid injection because of her pregnancy although her OB/GYN doctor had given clearance for that procedure.

A nerve conduction study was performed on June 9 and was found to be "unremarkable." That report also recommended an "MRI, which is safe during pregnancy." Why the MRI was not performed is in dispute. The claimant testified that the carrier refused to "approve" the MRI. The claimant testified that Dr. M told her she should have an MRI "but then his secretary told me that the insurance company didn't approve." The carrier argued that it did not need to approve an initial set of x-rays (and MRI), and there is no explanation at that point in time why the claimant would not have had an MRI. The claimant gave birth to her baby on July 22. The hearing officer commented:

> To date, Claimant has not taken the MRI or any X-rays or undergone any objective tests to determine the severity of her claimed injury.
>
> * * * *
>
> The negative results of the nerve conduction test indicate that Claimant has no objective evidence of disability from June 8, 2000 through the date of this hearing.

The hearing officer found disability from April 20, when Dr. M took the claimant off work to June 7, the day prior to the unremarkable nerve conduction studies.

Attached to the claimant's appeal is an appointment form dated August 10 requesting a lumbar MRI with Dr. M as the referring physician. Across the face of the form is written: "DENIED under dispute till 9-28-00 Adj [Ms. J]." Also attached to the appeal is a lumbar MRI report dated October 28 (the CCH was October 11) which states:

> 1. L4-5 MILD CENTRAL SPINAL CANAL STENOSIS SECONDARY TO MILD DEGENERATIVE DISC DISEASE, CENTRAL DISC HERNIATION, AND DEGENERATIVE GRADE I SPONDYLOLISTHESIS (RETROLISTHESIS).
>
> 2. L5-S1 MILD BILATERAL FACET DEGENERATIVE ARTHROPATHY WITHOUT SIGNIFICANT STENOSIS.

There is conflicting evidence whether the claimant refused an MRI prior to the birth of her child and/or in August and the circumstances of the "DENIED" MRI appointment form which lists an adjuster's name. The claimant's attorney, in the appeal, states:

> Claimant testified under both direct and cross examination that her current treating doctor, [Dr. M] had requested the MRI of her lumbar spine but that the Carrier was denying the authorization and so she did not have it done. The Carrier Representative [at the CCH] then asked the Claimant if she knew that under the Workers' Compensation Rules, the first MRI of the spine does not have to be preauthorized by the Carrier to which the Claimant replied that she did not know that, but, that she was sent for the MRI but was turned away because the Adjuster was not authorizing it. [Our review of the testimony does not exactly reflect that conversation as represented.]
>
> Attached to this Request for Appeal is a copy of the referral for the MRI of the lumbar spine by OPEN MRI of West Texas dated August 10, 2000, that was denied by the Adjuster. I spoke with the Adjuster, [Ms. J], on October 25, 2000, and she did confirm that she had denied the MRI pending the outcome of this [CCH]. I informed her of the Carrier Representatives comments at the CCH on Workers' Compensation Rules on medical benefits

and that since the compensability of the lower back injury had been accepted that the first MRI did not have to be preauthorized. She did not know this and so agreed to allow the MRI as soon as possible.

We remand this case back to the hearing officer to take such specific evidence necessary to determine if the claimant had refused an MRI and, if not, whether the MRI performed on October 28 provided such objective evidence of disability to change his decision. If the claimant had not refused the MRI and if the representations made in the appeal are correct, we hold that the October 28 MRI is such newly discovered evidence not reasonably available at the CCH due to the carrier's improper denial of the MRI and that the MRI should be considered by the hearing officer.

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:

Gary L. Kilgore
Appeals Judge

Judy L. Stephens
Appeals Judge