APPEAL NO. 002799

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On November 14, 2000, a hearing was held. The hearing officer decided that the respondent (claimant) had sustained a compensable injury on _____; that the claimant had disability resulting from the compensable injury from August 24, 2000, through the date of the hearing; that the appellant (carrier) had tendered a bona fide offer of employment, but that the offer was no longer in effect as of August 24, 2000; and that the claimant's change of treating doctors from Dr. A to Dr. N was properly approved by the Texas Workers' Compensation Commission (Commission) and that the claimant was entitled to Dr. N as his choice of treating doctor. The carrier appealed, asserting that the claimant did not sustain a compensable injury; that the claimant did not have disability from August 24, 2000, through the date of the hearing because he had been released to light duty and had accepted a light-duty position; that the claimant did not have disability because the claimant is deemed to have earnings in an amount as set forth in the bona fide offer of employment; that the claimant did not have disability because he failed to inform his employer about changes in his restrictions; and that the Commission's approval of the claimant's change in treating doctors did not comply with the 1989 Act and Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 126.9 (Rule 126.9) and, therefore, the claimant was not entitled to Dr. N as his treating doctor; and that Dr. N's opinion on the claimant's ability to work should be disregarded. There is no response in the appeal file from the claimant.

DECISION

Affirmed as reformed.

The hearing officer did not err in finding that the claimant had sustained a compensable injury on _____. There is evidence in the record that the claimant and several coworkers were attempting to move a pallet filled with merchandise, that the claimant's coworkers released the pallet, that the claimant was pushing the pallet with his shoulder, that at least one of the claimant's coworkers heard a popping sound from the claimant's general direction when the weight of the pallet was released, that the claimant made an immediate exclamation of pain and reported the injury to a supervisor within minutes, and that the claimant was ultimately diagnosed with a torn rotator cuff. The hearing officer's determination that the claimant sustained a compensable injury on _____, is adequately supported in the record.

The hearing officer made a finding of fact that the claimant's employer had not made a bona fide offer of employment sufficient to satisfy the requirements of Rule 129.6 after August 24, 2000, and then made a conclusion of law that the claimant's employer had not made a bona fide offer of employment to the claimant which would entitle the carrier to adjust the post-injury weekly earnings after August 24, 2000. The record reflects that the claimant's employer offered the claimant modified-duty employment in writing on August 8, 2000. The employment offered to the claimant was listed as "light clerical" and

"light maintenance." It is undisputed that the claimant's then treating doctor, Dr. A, saw the claimant on August 9, 2000, and modified the claimant's work activities to include only sedentary office work. Dr. A reduced that recommendation to writing in a work-status report of the same date, stating that the claimant would be off work until after surgery "unless office/clerical work only." Since, by its terms, the employer's offer of light-duty employment included both light-duty clerical and light-duty maintenance work, it no longer complied with the claimant's restrictions as of August 9, 2000, and was no longer of any force or effect. In light of the uncontroverted evidence, we reform Finding of Fact No. 3 to read:

> 3. The claimant's employer tendered a bona fide offer of employment, effective August 8, 2000, which ceased to comply with the claimant's restrictions on August 9, 2000.

We also reform the hearing officer's Conclusion of Law No. 4 to read as follows:

> 4. The claimant's employer tendered a bona fide offer of employment to the claimant entitling the carrier to adjust the claimant's post injury weekly earnings for the period beginning on August 8, 2000, and ending on August 9, 2000.

The hearing officer did not err in determining that the claimant's subsequent choice of treating doctors from Dr. A to Dr. N was proper pursuant to the requirements of Section 408.022(e). The standard for reviewing orders granting a change of treating doctors is an abuse of discretion. Texas Workers' Compensation Commission Appeal No. 960891, decided May 30, 1996. The determination of whether there was an abuse of discretion must be based on information available to the Commission employee approving the request. Texas Workers' Compensation Commission Appeal No. 990328, decided April 5, 1999. There have been a number of Appeals Panel decisions approving a change of doctor because of dissatisfaction with the current treatment or because of the expectation of better treatment with another doctor. *See* Texas Workers' Compensation Commission Appeal No. 970686, decided June 4, 1997, and Texas Workers' Compensation Commission Appeal No. 961888, decided November 8, 1996. In his request to change treating doctors, the claimant stated that he was not satisfied with Dr. A's treatment (a recommendation for surgery without prior conservative measures). In light of our foregoing decisions, we cannot say that the Commission acted without reference to any guiding principles in approving the claimant's request to change treating doctors or that the hearing officer erred in determining that the Commission had not abused its discretion. *See* Morrow v. H.E.B., Inc., 714 S.W.2d 297 (Tex. 1986).

The carrier asserts that the claimant's request to change treating doctors was for the purpose of obtaining a new medical report, a motivation which would negate the propriety of the approval of the request. *See* Section 408.022(d). The hearing officer did not err in rejecting this argument because there was evidence before the hearing officer that Dr. A had already taken the claimant off work, until after surgery could be performed,

before the claimant requested the change to Dr. N. Dr. N also took the claimant off work, despite the fact that Dr. N intended to exhaust more conservative measures before performing surgery, but the medical records before the hearing officer indicated that Dr. N also believed that surgery might be necessary to treat the claimant's injury. Under this set of facts, the hearing officer's determination that the claimant did not seek to change treating doctors in order to obtain a new medical report is not so against the great weight of the evidence as to be clearly wrong or manifestly unjust. We will not substitute our judgment for that of the hearing officer. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

The hearing officer did not err in determining that the claimant had disability from August 24, 2000, through the date of the hearing. Even had the hearing officer determined that the Commission had erred in approving Dr. N as the treating doctor, Dr. N's work status recommendation could have been considered by the hearing officer in determining whether the claimant's inability to obtain and retain employment at wages equivalent to his preinjury wage was a result of the compensable injury. *See* Texas Workers' Compensation Commission Appeal No. 981811, decided September 21, 1998 (Unpublished).

There being no reversible error in the record and the hearing officer's determinations being supported by the evidence, we affirm the decision and order of the hearing officer as reformed.

Kenneth A. Huchton
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

CONCUR IN THE RESULT:

Philip F. O'Neill
Appeals Judge