

## APPEAL NO. 010626

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 March 6, 2001. With regard to the two issues, the hearing officer determined that the appellant/cross-respondent (claimant) "is not entitled to a change of treating doctor from [Dr. W] to [Dr. M]" and that the claimant did (or perhaps did not) have disability.

Both parties appeal the disability issue because the hearing officer has inconsistent findings on disability (and we note that the hearing officer failed to specify the period of disability). The claimant appeals the determination on change of treating doctor. The respondent/cross-appellant (self-insured) responds to the claimant's appeal, urging affirmance on the change of treating doctor issue. There is no response to the self-insured's appeal.

### DECISION

Reversed and remanded.

The claimant was employed as a merchandise processor by (employer). Although not reflected in the hearing officer's decision, the parties on the record stipulated, and it is not disputed, that the claimant sustained a compensable right hand/wrist injury on \_\_\_\_\_ (all dates are 2000 unless otherwise noted), when the claimant's hand/wrist was struck by a box on a pallet. The employer sent the claimant to (clinic), where she was diagnosed with a right wrist sprain and given five sessions of physical therapy on June 14, 15, 19, 20, and 21. When the claimant did not respond to treatment, she was referred to Dr. W, a hand surgeon or specialist. Dr. W saw the claimant on June 29 and in a note of that date stated:

[Claimant] has a scapholunate advanced collapse pattern on her wrist which was previously asymptomatic and may have remained so were it not for the injury she suffered on \_\_\_\_\_ [sic] of this year. She is probably going to require surgery to correct this problem. The options would be a proximal row carpectomy of the wrist or a fusion.

Dr. W ordered an MRI and in a report dated August 17 indicated that the claimant agreed to a "Kenalog 20 injection." The claimant said that she had the injection, that it did not help, and that she did not want surgery. Dr. W's Specific and Subsequent Medical Report (TWCC-64) of September 7 states that the "[i]njection was no help" and that he "[d]iscussed options & will do nothing for S-L." The claimant testified that the only option Dr. W offered was surgery. Nonetheless, Dr. W apparently sought authorization for surgery (that recommendation is not in evidence), which the carrier denied by letter dated September 18, the rationale being:

RATIONALE: THERE IS INADEQUATE DOCUMENTATION OF WHAT CONSERVATIVE TREATMENT THIS PATIENT HAS RECEIVED REGARDING THE INJURY OF \_\_\_\_\_ INVOLVING THE PATIENT'S RIGHT THUMB. BEFORE SURGICAL INTERVENTION IS UNDERTAKEN, AN APPROPRIATE COURSE OF OCCUPATIONAL THERAPY SHOULD BE PROVIDED.

Ironically, the claimant agreed with the self-insured and testified that she wanted further conservative care. Dr. W, by letter dated September 21, wrote the self-insured justifying his request for surgery and concluded by requesting "expeditious approval of this procedure so that we can get [claimant] back to work."

The claimant testified that the clinic had released her to return to work on light duty but that in reality she returned to her regular job. Our review of Dr. W's reports and the physical therapy notes do not indicate one way or the other whether the claimant was released to return to work, although Dr. W's September 21 letter to the self-insured sounds as if Dr. W was under the impression that the claimant was off work. The claimant requested a change of treating doctor from Dr. W to Dr. M, a chiropractor, on an Employee's Request to Change Treating Doctors (TWCC-53) dated September 18. The claimant gives her reason for the request as:

The doctor I'm treating with only sees me about 1 to 2 [times] a month. He only is suggesting surgery. He has not even tried any type of therapy. I would like to try therapy before even considering cutting on my hand.

The Texas Workers' Compensation Commission (Commission) approved the claimant's request on September 20. The claimant testified that she selected Dr. M because he was treating the claimant's daughter (who also, apparently, has a workers' compensation injury). The claimant saw Dr. M on September 26. Dr. M took the claimant off work on that date and began a process of ultrasound, paraffin baths, and therapeutic exercises. Dr. M also referred the claimant to Dr. FM, a medical doctor, for evaluation. In a report dated September 27, Dr. FM diagnosed right carpal tunnel syndrome and suggested that the claimant "[c]ontinue present care." The claimant testified that Dr. FM said that she may need surgery at some time. Dr. B, the self-insured's required medical examination doctor, in a report of October 12, said that since the claimant has declined surgery she is at maximum medical improvement (MMI) with a zero percent impairment rating. Dr. P, the designated doctor, in a report dated December 8, stated that the claimant is not at MMI and recommended "6 months to continue therapy from the date that she began conservative therapy with [Dr. M]."

The hearing officer, at the end of the CCH, engaged in a dialogue with the parties stating:

The reason is if I decide [claimant] doesn't have the right to change treating doctor, she is back with [Dr. W] and the decision is going to have to be made

as to whether surgery now or what else is going to be done. If I make the decision that she's entitled to the change, you know, then later on we're going to have the question of how long.

The hearing officer makes no reference to either Section 408.022 or Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 126.9 (Rule 126.9) either at the CCH or in his decision but appears to believe whether the Commission abused its discretion in approving Dr. M is purely a fact call to be made however he sees fit.

The hearing officer, in his Statement of the Evidence, comments that the claimant did not change treating doctors "for a proper reason" and "only changed doctors to be taken off of work." The hearing officer goes on to comment that "[s]ince, the Claimant changed doctors to be taken off of work, Claimant did have disability as a result of the compensable injury." In Finding of Fact No. 4, the hearing officer found that the claimant "was not unable to obtain or [sic] retain employment . . ." thereby indicating that the claimant did not have disability. In Conclusion of Law No. 4, the hearing officer concludes that the claimant "did have disability" and, in the Decision portion of his report, the hearing officer states that the claimant "did have disability." However, the hearing officer's order only orders medical benefits to be paid.

We reverse the hearing officer's decision on both issues and remand the case for the hearing officer to cite evidence, other than his speculation, regarding the claimant's change of treating doctor or how the Commission abused its discretion in approving the change of treating doctor, applying the 1989 Act and Rule 126.9. We also remand for the hearing officer to make consistent findings and conclusions whether the claimant did or did not have disability. No further hearing is necessary but the hearing officer, at his discretion, may request further written and/or oral argument on the remanded issues.

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.

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Thomas A. Knapp  
Appeals Judge

CONCUR:

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Elaine M. Chaney  
Appeals Judge

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Philip F. O'Neill  
Appeals Judge