

APPEAL NO. 010967
FILED JUNE 13, 2001

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 12, 2001, with the record closing on April 13, 2001. With regard to the two issues before her, the hearing officer determined that the respondent's (claimant) compensable right shoulder rotator cuff injury extends to a "severe degenerative disorder and internal derangement" and that the Texas Workers' Compensation Commission (Commission) did not abuse its discretion in approving the claimant's request to change treating doctors to Dr. K.

The appellant (carrier) appeals both issues, attacking Dr. K's qualifications and testimony regarding the extent of injury, and asserting that the claimant sought to change treating doctors from Dr. RK, an orthopedic surgeon, to Dr. K, a chiropractor, on referral by the claimant's attorney, to obtain another impairment rating (IR). The file does not contain a response from the claimant.

DECISION

Affirmed.

The claimant is 53 years old and was employed as a millwright. On _____ (all dates are 2000 unless otherwise noted), the claimant tripped and fell at work, injuring his right shoulder. The carrier has accepted liability for a partial right shoulder rotator cuff tear. The claimant was treated by Dr. RK, who performed surgery on June 22. The claimant testified that he continued to have pain in his right shoulder and only received physical therapy in the form of a passive CPM chair, and home exercises. On a Report of Medical Evaluation (TWCC-69) and narrative dated August 21 (two months after surgery), Dr. RK certified the claimant at maximum medical improvement (MMI) with a 7% IR. The narrative stated:

At this time I do not expect the patient to make any significant change as he does have degenerative changes and this will not get better with time in fact it will get worse with time. Over time is [sic] it is expected that the patient in the future may need a total shoulder replacement.

The claimant testified to the effect that he believed that Dr. RK had released him from care. Consequently, the claimant sought assistance from his union and eventually was referred to Dr. K. On an Employee's Request to Change Treating Doctors (TWCC-53) form dated September 10, the claimant sought to change treating doctors from Dr. RK to Dr. K, giving as his reason:

I have been treating with [Dr. RK] since my injury and do not believe I have received appropriate medical care. [Dr. RK] has not given me any physical

therapy after surgery and I am still in pain. I've tried to discuss this. I need a new doctor who can give me appropriate care.

The claimant's request was approved by the Commission on September 27. Dr. K began treating the claimant with ultrasound and ice packs, which, according to the claimant, gave him temporary relief. Dr. K then referred the claimant to Dr. M, an orthopedic specialist, who, in several reports, stated that he thinks most of the claimant's "symptoms today actually are coming from his AC joint" and that the claimant has "an unrecognized AC joint injury that has remained symptomatic." In another report dated February 26, 2001, Dr. M writes that the claimant's injury "is not the glenohumeral joint, this is the AC joint" (Dr. RK had performed surgery on the glenohumeral joint.) Dr. K testified that the injury to the claimant's AC joint was caused by the compensable injury. Dr. G, the designated doctor, in a report of December 13, said that the claimant was not at MMI and that the claimant "has had a multi-causal, poor outcome following his right shoulder injury of last _____." Dr. G went on to write that "[b]efore a distal clavicectomy is performed, I would make sure that the AC joint is the major pain producing structure."

The hearing officer found that the claimant's "degenerative condition/disorder" and the internal derangement of the claimant's right shoulder "was caused and/or aggravated by" the compensable fall. The medical evidence was certainly in conflict, even in regard to what the actual injury was. The hearing officer's determinations on this issue are supported by sufficient evidence.

On the issue of the change of treating doctor, the hearing officer found that Dr. RK "was not responsive to Claimant's post-operative complaints" and that the "credible evidence establishes that the Claimant genuinely sought the change of doctors to obtain relief of his ongoing symptoms."

Section 408.022 sets out the criteria for selecting and changing a treating doctor, which are to guide the parties and the Commission. Section 408.022(d) expressly states that a change may not be made to secure either a new IR or a new medical report. See *also* Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 126.9(h)(2) (Rule 126.9(h)(2)). 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. There is an abuse of discretion when a decision maker reaches a decision without reference to guiding rules or principles. Morrow v. H.E.B., Inc., 714 S.W.2d 297 (Tex. 1986). 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. 000193, decided March 13, 2000. Generally, this determination is made with regard to what information needed would have been in the Commission's files at the time of the requested change. Texas Workers' Compensation Commission Appeal No. 950252, decided April 5, 1995. The determination of what the reasons were for the change of treating doctors was a factual matter for the hearing officer to determine. Texas Workers' Compensation Commission Appeal No. 992921, decided February 9, 2000.

We do not find the hearing officer's decision either wrong as a matter of law or against the great weight and preponderance of the evidence. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

Accordingly, the hearing officer's decision and order are affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Robert E. Lang
Appeals Panel
Manager/Judge

Michael B. McShane
Appeals Judge