

APPEAL NO. 012368  
FILED NOVEMBER 14, 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 September 13, 2001. With regard to the restated issues, the hearing officer determined that the respondent (claimant) did attend and submit to a required medical examination (RME) on April 5, 2001 (all dates are 2001 unless otherwise noted), and had good cause for failing to submit to the alleged RME referral on April 30. The hearing officer also determined that the claimant had disability from May 20 through the date of the CCH.

The appellant (self-insured) appealed on a number of grounds, including that the hearing officer refused to issue a subpoena for the attendance of Dr. S; that the hearing officer erred in his restatement of the attendance issue; and that the hearing officer's factual determinations on disability and whether the claimant was referred to Dr. A are against the great weight and preponderance of the evidence. The claimant responds to each of the points raised by the self-insured and urges affirmance.

DECISION

Affirmed.

The claimant was employed as an "institutional officer" by the self-insured's juvenile detention facility, and the parties stipulated that the claimant sustained a compensable (back) injury on \_\_\_\_\_. The claimant was scheduled to attend an RME by Dr. S on April 5. It is undisputed that the claimant did so and that Dr. S (who had seen the claimant previously) issued a report, essentially finding no objective symptoms, and a Work Status Report (TWCC-73) releasing the claimant to work without restrictions and telling the claimant that he was to return for care to his treating doctor. There is no mention of any referrals in this report. Although not entirely clear, Dr. S had been asked to give a maximum medical improvement (MMI) date and impairment rating (IR), but failed to do so because he apparently did not do IRs. Either before or after Dr. S's examination, the self-insured's adjuster contacted Dr. S, and perhaps Dr. A, and apparently authorized a referral to Dr. A for certification of MMI and an IR. Dr. S, on a deposition on written questions, agrees that he did not inform the claimant of any referral to Dr. A. Dr. A, in an unsigned letter (without even a signature block) dated April 17, advised the claimant that Dr. S had referred him to Dr. A for an IR and scheduled the appointment for April 30. The claimant contacted his attorney, who apparently advised the claimant that he did not have to attend that appointment with Dr. S. On a Request for Benefit Review Conference [BRC] (TWCC-45) dated May 4, the self-insured requested a BRC alleging that the "Meo doctor [Dr. S] has referred claimant for an [IR] and claimant has not complied." The Texas Workers' Compensation Commission (Commission), by letter dated May 18, denied the request because there was insufficient documentary information, and advised the self-insured that if it was paying temporary income benefits (TIBs) "you may submit a Notice of Intent to Suspend [TIBs] (TWCC-34) and attach a copy of the RME report." Although the self-

insured apparently completed the TWCC-34, it was never filed with the Commission and the self-insured eventually stopped TIBs, relying on Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 126.6(h) (Rule 126.6(h)), which provides that a carrier may suspend TIBs if an employee fails to attend an RME without good cause. The Appeals Panel has held that the term "attend" in Rule 126.6(h) includes and requires submission to an RME, which is consistent with the intent of Section 408.004(e). Texas Workers' Compensation Commission Appeal No. 010407, decided April 5, 2001.

In evidence is a letter dated June 22 from the self-insured's adjuster to Dr. S, which states that the self-insured believed Dr. S's examination to be incomplete, that Dr. S had referred the claimant to Dr. A for an IR, and that if that information is accurate to please sign the letter. The letter is initialed by what purports to be Dr. S's initials and is dated July 2. In computer notes, apparently prepared by the self-insured, dated June 1, the self-insured notes that Dr. S "stated he is not going to send anymore notes whatsoever on [claimant]." The self-insured subsequently sought to subpoena Dr. S's attendance at the CCH.

On the Rule 126.6(h) issue, the hearing officer comments:

Had [Dr. S] been unable to complete his examination and had he truly intended, at the time of the examination and not after receiving coaching or instruction from the adjuster, to refer the claimant for an impairment evaluation, one would expect the doctor to include such information in his report, his office notes or a brief letter. In this case, however, the materials offered by the self insured in support of its position include only the adjuster's letter of June 22, 2001, purportedly signed or initialed by [Dr. S], and the doctor's deposition on written questions which confirms that he never informed Claimant of any referral. The doctor's indication that he did inform the adjuster that he was referring the Claimant, when considered with all the evidence and Claimant's credible testimony, is not convincing. Claimant did have good cause for failing to attend the April 30, 2001 appointment because [Dr. A] was not the self insured's choice of doctor and self insured's argument that [Dr. S] made such referral for completion and as a part of the April 5 [RME] is not supported by the credible evidence.

The hearing officer weighed the credibility and inconsistencies in the evidence, and the hearing officer's determinations on this issue are not against the great weight and preponderance of the evidence. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

Regarding the self-insured's contention that the hearing officer erred in refusing to issue a subpoena for Dr. S to appear in person, we note that Rule 142.12(d), dealing with special provisions for hearing subpoenas, provides that the "Hearing Officer may deny a request for a hearing subpoena upon a determination that the testimony may be adequately obtained by deposition or written affidavit." In this case, Dr. S answered the question whether he had told the claimant about a referral to Dr. A in a deposition on

written questions. The hearing officer did not err in refusing to issue a subpoena for Dr. S to appear in person.

Regarding the disability issue, the hearing officer's determination is supported by the claimant's testimony, the treating chiropractor's reports and TWCC-73s, and even Dr. A's reports (the claimant was eventually examined by Dr. A), which indicate that the claimant would benefit from further testing and treatment.

The hearing officer's decision and order are affirmed.

The true corporate name of the insurance carrier is **(a self-insured governmental entity)** and the name and address of its registered agent for service of process is

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Thomas A. Knapp  
Appeals Judge

CONCUR:

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Elaine M. Chaney  
Appeals Judge

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Gary L. Kilgore  
Appeals Judge