APPEAL NO. 022235
FILED OCTOBER 15, 2002

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 August 12, 2002. The hearing officer determined that the respondent (claimant) has disability from January 28, 2002, through the date of the CCH from his compensable _____, injury and that the claimant is entitled to change treating doctors. The appellant (carrier) contends that the hearing officer's determinations are against the great weight and preponderance of the evidence. There is no response from the claimant contained in our file.

DECISION

Affirmed.

DISABILITY

It was undisputed that the claimant sustained a compensable injury to his left shoulder on _____. The hearing officer found that "the Claimant has been unable to obtain and retain employment at wages equivalent to his wage before _____. . . ." The carrier appeals that determination, contending that the claimant has refused to have surgery and therefore the claimant is at maximum medical improvement (MMI) and has no disability. The carrier's appeal assumes that if the claimant reached MMI, he could not have disability; however, the Appeals Panel held early on that MMI and disability are distinct issues, not equivalent to each other. *See* Texas Workers' Compensation Commission Appeal No. 91060, decided December 12, 1991. Further, in regard to the disability determination, the hearing officer notes, "[t]he claimant is reluctant to have the surgery without a second opinion, but the second opinion has apparently not been approved by the carrier." The claimant offered evidence that he still has work restrictions from the injury; that he was laid-off from his job because his employer did not have light duty for him; and that he has not worked since January 28, 2002, because of his injury.

The evidence sufficiently supports the hearing officer's determination that the claimant had disability beginning on January 28, 2002, and continuing through the date of the CCH. Section 401.011(16) defines disability as the inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage. It is the hearing officer, as the sole judge of the weight and credibility of the evidence (Section 410.165(a)), who resolves the conflicts and inconsistencies in the evidence (Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ)), and determines what facts have been established from the conflicting evidence. St. Paul Fire & Marine Insurance Company v. Escalera, 385 S.W.2d 477 (Tex. Civ. App.-San Antonio 1964, writ ref'd n.r.e.). The Appeals Panel will not disturb the challenged factual findings of a hearing

officer unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust and we do not find them so in this case. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

CHANGE OF TREATING DOCTOR

On September 14, 2001, the claimant submitted an Employee's Request to Change Treating Doctors (TWCC-53), which was denied initially because the claimant had mistakenly listed a referral doctor as his treating doctor. A Texas Workers' Compensation Commission employee approved the corrected TWCC-53 on January 18, 2002. On February 1, 2002, the referral doctor issued a report that certified that the claimant had reached MMI and assigned an impairment rating of 0%. The carrier contends that the claimant wanted to change doctors to secure a new medical report. The hearing officer determined that because the "claimant's request to change doctors preceded [the referral doctor's] February 1, 2002, report, the request was not motivated by that report" and that the claimant's request to change his treating doctor was reasonable and appropriate.

Section 408.022(c) provides a list of criteria for approving a change of treating doctors. A change to secure a new medical report is prohibited. Section 408.022(d). *See* also Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 126.9 (Rule 126.9). 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 and principles. Morrow v. H.E.B., Inc., 714 S.W.2d 297 (Tex. 1986). The carrier had the burden of proving an abuse of discretion in the approval. *See* Texas Workers' Compensation Commission Appeal No. 93433, decided July 7, 1993; and Texas Workers' Compensation Commission Appeal No. 941721, decided February 7, 1995 (Unpublished). The hearing officer was satisfied that the evidence showed the claimant had requested the change in treating doctor prior to the referral doctor issuing his certification of MMI and she concluded it was not done to secure a new medical report. The hearing officer did not abuse her discretion.

We affirm the decision and order of the hearing officer.

The true corporate name of the insurance carrier is **CONNECTICUT INDEMNITY COMPANY** and the name and address of its registered agent for service of process is

CORPORATION SERVICE COMPANY
800 BRAZOS, COMMODORE 1, SUITE 750
AUSTIN, TEXAS 78701.

_____
Michael B. McShane
Appeals Judge

CONCUR:

_____
Judy L. S. Barnes
Appeals Judge

_____
Susan M. Kelley
Appeals Judge