APPEAL NO. 022503
FILED NOVEMBER 12, 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 September 4, 2002. With regard to the issues before her, the hearing officer determined that the appellant/cross-respondent (claimant) is entitled to change treating doctors from Dr. L to Dr. Z pursuant to Section 408.022, and that the claimant had disability beginning on August 1, 2002, and continuing through the date of the CCH.

The claimant appealed, contending that he "had disability after March 19, 2002," and that neither Dr. L nor Dr. Z had ever released him to return to work. The respondent/cross-appellant (carrier) appealed the hearing officer's determination on the change of treating doctor issue, contending that the Texas Workers' Compensation Commission (Commission) had abused its discretion by approving the change of treating doctor. The carrier referenced the disability issue, contending that "an injury cannot be created where no injury exists" and therefore, the claimant did not have any disability. The file does not contain a response from either the claimant or the carrier.

DECISION

Affirmed.

Much of this case is driven by a prior CCH in which this hearing officer determined that the carrier "has waived the right to contest compensability of the claimed injury by not timely contesting the injury in accordance with Section 409.021 and, therefore, the [claimant] sustained a compensable injury to his low back, including the resulting impotency, and neck, as a matter of law," and that the claimant had disability from February 27, 2001, and continuing through June 1, 2001. That decision was affirmed without comment in Texas Workers' Compensation Commission Appeal No. 021112, decided June 24, 2002.

The claimant sustained a compensable injury by operation of law through carrier waiver on _____. It is undisputed that the claimant had lumbar spinal surgery on February 27, 2001. In evidence is an off-work slip from Dr. L dated May 2, 2001, taking the claimant off work from "2-27-01 to 6-1-01." There are subsequent medical reports from Dr. L but those reports only reflect follow-up medical status and do not indicate anything about an ability to return to work. Also in evidence are a number of forms for creditors, several showing an estimated date the claimant can return to work as "6/01/01." Another such form indicates "continuous disability" to "8/16/01"; other forms show "unable to perform own occupation" through "2/18/02" or "undetermined." The claimant attempted to change treating doctors from Dr. L to Dr. Z on May 9, 2002, approved by the Commission on May 10, 2002. As noted by the hearing officer, Dr. Z, in a note dated May 23, 2002, stated that the claimant "is to currently remain off work till his follow up appointment [sic] in 3 weeks, June 13, 2002.

He can do no lifting, bending or climbing." In a subsequent report dated August 1, 2002, Dr. Z explains the claimant's condition in some detail and states that the claimant "is unable to return to do any type of work."

Regarding disability, there is evidence that the claimant was released to return to work on June 1, 2001, a fact affirmed in Appeal No. 021112, *supra*. Evidence of disability after that date is conflicting and while the claimant either drew or applied for short-term group disability, that is not necessarily binding on the hearing officer. There is abundant evidence that the claimant does have an injury, therefore the carrier's Continental Casualty Company v. Williamson, 971 S.W.2d 108 (Tex. App.-Tyler 1988, no pet. h.) argument that an injury cannot be created where no injury exists is without merit. Although there is evidence, including the claimant's testimony, that the claimant had disability from June 2, 2001, to August 1, 2002, the hearing officer could find that disability only commenced on August 1, 2002, based on Dr. Z's comprehensive report. The hearing officer's determination on that issue is affirmed.

The claimant testified that the reason he wanted to change treating doctors was because of poor communication with Dr. L and he was dissatisfied with the progress he was making. The hearing officer only states that a "determination to approve or disapprove a change of treating doctor is reviewed under an abuse of discretion standard" citing some Appeals Panel decisions. We have more recently addressed the standard to be used in reviewing a change of treating doctor in Texas Workers' Compensation Commission Appeal No. 020022, decided February 14, 2002 and Texas Workers' Compensation Commission Appeal No. 022245, decided, October 22, 2002. In Appeal No. 020022, *supra*, the Appeals Panel stated that while the Commission has previously considered changes of treating doctor in language encompassing "abuse of discretion," Advisory 2001-01, dated January 15, 2001, reflected a concern of the Commission that inconsistency was to be avoided in approving such changes and that the issue was "expressly broader than merely an abuse of discretion in approval of the Employee's Request to Change Treating Doctors (TWCC-53)." In Appeal No. 022245, *supra*, the issue was framed, as it was in this case, whether the claimant was "entitled to change treating doctors." The Appeals Panel cited Appeal No. 020022, *supra*, and held that the issue is "broader than whether a particular Commission employee who approved the change abused his or her discretion." The hearing officer was to evaluate whether a change should be allowed in accordance with the standards set forth in Section 408.022 and Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 126.9 (Rule 126.9) and the hearing officer is not limited to considering a change of treating doctor issue only in terms of whether the Commission abused its discretion. Texas Workers' Compensation Commission Appeal No. 020414, decided April 3, 2002. The hearing officer found that the change of treating doctors was based on the claimant's assertions that he was dissatisfied with his treatment by and communication with the doctor. We hold that the hearing officer properly applied the applicable law.

After review of the record before us and the complained-of determinations, we have concluded that there is sufficient legal and factual support for the hearing officer's decision. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

The hearing officer's decision and order are affirmed.

The true corporate name of the insurance carrier is **AMERICAN HOME ASSURANCE COMPANY** and the name and address of its registered agent for service of process is

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

_____
Thomas A. Knapp
Appeals Judge

CONCUR:

_____
Susan M. Kelley
Appeals Judge

_____
Veronica Lopez
Appeals Judge