APPEAL NO. 950144

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On December 19, 1994, a contested case hearing (CCH) was held in (city), Texas, with (hearing officer) presiding. The sole issue as restated and agreed upon by the parties was:

Whether Claimant may select (JH) [sic] as his alternate treating doctor.

The hearing officer determined that the appellant's (claimant) request to change treating doctors was based, in part, on a desire to obtain a new impairment rating (IR) and therefore, claimant may not select (Dr. H) as his new treating doctor.

Claimant contends that the hearing officer misapplied the facts, the law, and the argument presented at the hearing, and requests that we reverse the hearing officer's decision and render a decision in his favor. Respondent (carrier) responds that the decision is supported by the evidence and requests that we affirm the decision.

DECISION

The decision and order of the hearing officer are affirmed.

Some background may be appropriate in this case. Claimant has had three injuries working for the employer (employer) in 1993. In a (date of injury 1) fall claimant injured his right knee and subsequently had surgery by (Dr. J), on that knee. In an (date of injury 2) fall on a staircase claimant injured his left knee. (The third injury was (date of injury 3) and is not at issue in this case.) An employer representative, (Mr. D), took claimant to Dr. J for treatment that day. It was that injury that was subject to the benefit disputes resolution process and was the subject of a split decision in Texas Workers' Compensation Commission Appeal No. 94326, decided May 2, 1994. Although the hearing officer in that case found, and the Appeals Panel affirmed, that "claimant sustained no injury . . . and that the claimant's injury of (date of injury 2), was the result of claimant's willful intent to injure himself," the Appeals Panel reversed the hearing officer's decision regarding compensability by determining that the carrier failed to timely dispute that injury and it "became a compensable injury as a matter of law." That decision was appealed to the District Court of (city) County on June 10, 1994, and the claimant filed a cross-action claiming disability and alleging to be "totally and permanently disabled."

As of June 1994, Dr. J had assessed a zero percent whole body IR for the (date of injury 1), right knee injury and had found no injury to claimant's left knee, allegedly injured in the August fall. Claimant on June 29, 1994, filed an Employee's Request to Change Treating Doctors (TWCC-53) from Dr. J to Dr. H in (city). The reasons given on the TWCC-53 for the change were:

Need to get out of small town for doctor[.] [Dr. J] would not check other problems from falls[.] All he wanted to check was knee, plus [Dr. J] wrote down zero percentage for disability on knee[.] Their [sic] is know [sic] way for 0 percentage, on knee surgery. And other problems [Dr. J] is not at best interest[.]

A disability determination officer (DDO) approved claimant's request for a change of treating doctors on July 6, 1994. Carrier apparently requested a benefit review conference (BRC) where the disputed issue was "[d]id the Commission abuse its discretion in approving Dr. Handle [sic] as an alternate doctor?" That dispute was not resolved at the BRC and the CCH was scheduled in accordance with Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 126.9(g) (Rule 126.9(g)).

Dr. J, in a report dated October 31, 1994, stated that claimant's "complaint's were strictly related to left knee soreness" (for the injury of (date of injury 2) which is at issue here). Dr. J further stated that claimant ". . . did not relate to me problems other than the knee problem we were treating." Dr. J's comments are supported by Mr. D, the supervisor who took claimant to the doctor on (date of injury 2) and who stayed with claimant throughout the examination. Dr. J in the report concluded "I did not refer him to another doctor regarding back problems in that we do take care of back problems and do back surgery, etc."

Claimant testified, at the CCH, that he was initially treated by Dr. J, that he had seen a local chiropractor and another local medical doctor but he did not want further treatment from them because he believed "everything was sewed up" (apparently indicating they had all conspired to find nothing wrong with him). Claimant testified "my actual reason is for changing because I'm still having trouble with my knee." (Claimant seems to indicate he is talking about his right knee.) At other times in his testimony claimant indicates that he wants to see Dr. H because he needs treatment for his head, shoulders and back. Then claimant states that Dr. H "wants to get somebody for my knee, a special doctor for my knee because he's not a knee doctor. He's a back doctor." Claimant also indicated that he believed that the doctors in the (city)/(city) area were unduly influenced by the employer and for that reason he wanted an out of town doctor. Claimant admitted that he had not considered any doctors in the (city) area, around 70 miles from where claimant lived, which had a population which carrier said to be about 100,000. Claimant admitted on cross-examination that he selected Dr. H "through one of the local personal injury attorneys." Since being approved by the Texas Workers' Compensation Commission (Commission) as a treating doctor on July 6, 1994, Dr. H has only seen claimant twice, being on July 19, 1994, where Dr. H diagnosed claimant as having "1. Right knee instability 2. Lumbar radiculopathy 3. Cervical spondylosis" and on November 17, 1994, where Dr. H suggested claimant have additional tests and needs to see a knee specialist "because I think his right knee needs to be re-done." (The right knee was injured on (date of injury 1.))

The principal thrust of claimant's argument, first raised at the CCH, regarding why he wanted to see Dr. H in (city), was that he could stop at churches and at the homes of church members on the way in order to rest. One church member apparently lives close to (city) and the others live close to or in (city). We note that the majority opinion in Appeal No. 94326, *supra*, commented that "much of the rest of the claimant's testimony is somewhat confused and difficult to follow." His testimony at the hearing on December 19, 1994, is also somewhat confused and difficult to follow.

The hearing officer in her discussion considers Section 408.022, indicates that she reads claimant's reason for changing treating doctors to be at least in part, "to obtain a new [IR] or medical report." The hearing officer discusses the various reasons claimant has given to change treating doctors, the relative mileage between (city) and (city), (city), (city) and (city), recognizes that the 1989 Act does not require an injured worker to choose the closest health care provider or set limits on the distance an injured worker may travel to obtain appropriate health care and concluded that "claimant's request to change treating doctors was based, in part, upon claimant's desire to obtain a new impairment rating." The hearing officer determined claimant may not select Dr. H as a treating doctor but has a "statutory right to choose another treating doctor." Claimant disagreed with the hearing officer and appealed, alleging Dr. J was only treating his knee and "that was not the extent of my (date of injury 2) injury." Claimant in his appeal lists additional reasons not advanced at the CCH for going to (city) for treatment but we will not consider those reasons as they were not part of the record. (*See* Section 410.203(a)(1)).

Under the 1989 Act, a change of treating doctor is controlled by Section 408.022 and Rule 126.9. Both require that to change treating doctors an injured worker must provide the Commission with the reasons the claimant desires to change doctors. Section 408.022(b); Rule 126.9(d). The standards which the Commission shall use in determining whether to grant a request for a change of treating doctors are found in Section 408.022(c) and Rule 126.9(e).

Section 408.022 provides as follows:

(c)The commission shall prescribe criteria to be used by the commission in granting the employee authority to select an alternate doctor. The criteria may include:

(1)whether treatment by the current doctor is medically inappropriate;

(2)the professional reputation of the doctor;

(3)whether the employee is receiving appropriate medical care to reach maximum medical improvement; and

(4)whether a conflict exists between the employee and the doctor to the extent that the doctor-patient relationship is jeopardized or impaired.

(d)A change of doctor may not be made to secure a new impairment rating or medical report.

Rule 126.9(e) provides as follows:

Reasons for approving a change in treating doctor include but are not limited to:

(1)the reasons listed in Texas Civil Statutes, Article 8308-4.63(d) [now codified as Section 408.022(c)]; and

(2)the selected doctor chooses not to be responsible for coordinating injured employee's health care as described in § 133.3 of this title (relating to Responsibilities of Treating Doctor).

We have previously held that the standard to be applied in determining whether the Commission improperly approved a request to change doctors is an abuse of discretion standard. Texas Workers' Compensation Commission Appeal No. 94857, decided August 17, 1994; Texas Workers' Compensation Commission Appeal No. 941281, decided November 4, 1994; Texas Workers' Compensation Commission Appeal No. 93834, decided October 22, 1993; and Texas Workers' Compensation Commission Appeal No. 941475, decided December 16, 1994. The hearing officer indicated that she believed that the DDO had abused her discretion in approving claimant's request to change treating doctors and determined that claimant's request to change treating doctors was, in principal part, in order to secure a new IR and medical reports in contravention of Section 408.022(d). In determining whether there is an abuse of discretion by the hearing officer, we look to see if the hearing officer acted without reference to any guiding rules or principles in making her determinations. Morrow v. H.E.B., 714 S.W.2d 297 (Tex. 1986); Appeal No. 94857, *supra*. We find the hearing officer's determination that the request to change treating doctors was, at least in part, to obtain a new IR to be supported by the evidence. We note that claimant has seen Dr. H only twice in a six month period and his treatment plan was to have claimant undergo additional EMG and MRI testing of the spine "to identify a specific pain generator." Dr. H proposes to refer claimant to another doctor for additional evaluation of his (date of injury 1), injury. We fail to see where Dr. H has done any treatment and we note that claimant had not sought other treatment for any of his injuries after January 1994 from any doctor before seeking the change of treating doctors in June 1994.

The hearing officer in this case considered the evidence and testimony, considered claimant's testimony about his reasons for requesting a change of treating doctor, considered claimant's TWCC-53 and the surrounding circumstances. The hearing officer is the sole judge of the weight and credibility to be given to the evidence. Section 410.165(a). The hearing officer read claimant's TWCC-53 and clearly interpreted that language to indicate in large part that the claimant was seeking a different IR than assessed by Dr. J. In viewing all the facts and circumstances involved, we are unable to say, as a matter of law, that the hearing officer acted without reference to guiding rules or principles. Clearly the hearing officer carefully considered the applicable Commission rules and the 1989 Act in determining that the request to change doctors to Dr. H was for purposes of securing new medical reports and impairment ratings for both his (date of injury 1) and the (date of injury 2), injuries.

Upon review of the record submitted, we find no reversible error and we will not disturb the hearing officer's determinations unless they are so against the great weight and preponderance of the evidence as to be manifestly unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). We do not so find and consequently the decision and order of the hearing officer are affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Tommy W. Lueders
Appeals Judge