APPEAL NO. 020022
FILED FEBRUARY 14, 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 December 5, 2001. The hearing officer determined that the respondent's (claimant) request to change doctors had been for an appropriate purpose.

The appellant (carrier) appeals, arguing that the hearing officer was precluded from considering any evidence for a reason not included on the Employee's Request to Change Treating Doctors (TWCC-53). The carrier further argues that there was no evidence that the treating doctor was unwilling to continue as the treating doctor or that his treatment was inadequate. The claimant responds, seeking affirmance.

DECISION

Reversed and remanded.

The claimant was involved in a minor motor vehicle accident at work in _____. The claimant felt alright for the first day, developed minor pain on the second day, then by the third day had trouble walking. He received permission from his employer to go to his family doctor. He said that he was referred to a chiropractor by his family doctor and otherwise given prescriptions for pain but said he was never contacted about results of his x-rays. While therapy had been recommended, the claimant said he was not able to get a response as to when this was supposed to start. However, the claimant admitted that he did not see his family doctor after he initially was treated by him, prior to contacting that doctor about a release, nor was there evidence that the claimant sought a follow-up appointment.

After two weeks, the claimant said he obtained the release from treatment from his family doctor because he wanted to transfer to a doctor who had treated him for a prior compensable injury. At the same time, he sought advice from his attorney because he was not getting better. There was evidence that he ended up changing his treating doctor to a doctor suggested by his attorney rather than his previous workers' compensation doctor. He was treated three times a week by the new treating doctor. A required medical examination (RME) doctor examined the claimant on October 25, 2001, and opined that the claimant sustained nothing more than a mild strain/sprain injury that would have resolved in four to six weeks, even without treatment. The RME doctor found no impediment to a return to work and he questioned the frequency of continued treatment four months after the injury.

The reason listed on the claimant's TWCC-53 for the change in treating doctor was that his doctor did not want to treat him anymore. This was accompanied by the release signed by the first treating doctor specifically referring the claimant to the doctor suggested by his attorney. The change was approved, noting that it was an "exception" and referring

to the release from the family doctor. The carrier presented deposition evidence that the family doctor was not unwilling to continue to treat the claimant nor did the claimant tell the family doctor that he was dissatisfied with his treatment.

The sole issue framed and considered at the CCH was whether the claimant should be allowed to change his treating doctor. The carrier opposed the motion of the claimant to add an issue as to whether the Texas Workers' Compensation Commission (Commission) abused its discretion in granting a change. Furthermore, the carrier forcefully argued that the issue was whether a change of doctor was appropriate, and that the hearing officer was not merely an appellate body over the previous actions of a Commission employee granting a change. Finally, the carrier argued that the burden of showing that a change of doctor was appropriate was "always" the claimant's burden.

In light of this argument, the carrier's somewhat contradictory argument on appeal, that the hearing officer was not at liberty to go beyond an evaluation of the truth of the reason set forth on the TWCC-53, is without merit. The 1989 Act, Section 408.022(c), specifically provides that the Commission should prescribe criteria which are in turn to be considered in approving a change of treating doctor. By rule, Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 126.9 (Rule 126.9), the Commission has incorporated these statutory criteria: whether treatment by the current doctor is medically appropriate; the professional reputation of the doctor; whether the employee is receiving appropriate medical care to reach maximum medical improvement; and whether there is a conflict between the employee and the doctor, to the extent that the relationship is jeopardized. In addition, the Commission may consider whether the selected doctor does not want to be responsible for the employee's health care.

At a CCH, a carrier may be relieved of liability for health care provided at the treating doctor's direction, pursuant to Rule 126.9(h), if the doctor is not on the approved list or "the employee failed to comply with commission rules regarding a change in treating doctor." While the Commission has previously considered changes of treating doctor in language encompassing "abuse of discretion," Advisory 2001-01 reflected a concern of the Commission that inconsistency was to be avoided in approving such changes by applying the standards of the 1989 Act. This advisory gave the employees of the Commission latitude to contact the injured worker for information that may not have been clear from the four corners of the TWCC-53.

In Texas Workers' Compensation Commission Appeal No. 012932, decided January 16, 2002, the concurring opinion noted why an appeal and weighing of a Commission order approving a change of doctor to the CCH level permits admission of evidence not available to the employee of the Commission granting the request:

> [T]he approval at the request level is generally a unilateral process; Advisory 2001-01 speaks of a need to call the claimant, but not the carrier. It is at the [CCH] that the carrier first has an opportunity to present information (evidence). When the carrier presents evidence at the CCH, and was not

> afforded that opportunity when the Commission approved the request for a change of treating doctor, the hearing officer must weigh the evidence and decide whether the request for a change of treating doctor should be approved or denied.

Of course, in the case at hand, the issue needed to be and was expressly broader than merely an abuse of discretion in the approval of the TWCC-53, and, consequently, the hearing officer was free to consider evidence as to whether the change was allowable that was not limited to the truth of the reason stated on the TWCC-53.

All this being said, our reason for reversing and remanding for further consideration is that apparently the hearing officer has not correctly applied the criteria for allowing a change of treating doctor that are set forth in Section 408.022 to the facts of this case. Although he made a general fact finding that the claimant's request to change treating doctors was "for an appropriate purpose," there are no findings or discussion articulating the purpose with reference to the allowable reasons in the 1989 Act and Rule 126.9. A review of the hearing officer's discussion shows that he considered the issue from the perspective of whether the claimant subjectively believed that the family doctor's treatment was inadequate. He took the same subjective approach to evaluating the statement on the TWCC-53, which he observed "accurately reflects [claimant's] opinion based upon the failure of the doctor to contact him for a period of almost two weeks." Neither statement applies the required criteria for evaluating a requested change of treating doctor.

The Appeals Panel is not a fact finder and may not independently evaluate the record and apply the criteria set forth in Section 408.022(c) and Rule 126.9. Consequently, we remand so that the hearing officer will consider whether the treatment of the first treating doctor was medically inappropriate, the professional reputation of the doctor, whether the claimant was receiving appropriate medical care to reach maximum medical improvement, whether there was a conflict between the claimant and the treating doctor such that the doctor-patient relationship was jeopardized, and whether the first treating doctor chose not to be responsible for coordinating the claimant's health care.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Commission's Division of Hearings, pursuant to Section 410.202, which was amended June 17, 2001, to exclude Saturdays and Sundays and holidays listed in Section 662.003 of the Texas Government Code in the computation of the 15-day appeal and response periods. *See* Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

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 I
AUSTIN, TEXAS 78701.

Susan M. Kelley
Appeals Judge

CONCUR:

Chris Cowan
Appeals Judge

Robert W. Potts
Appeals Judge