APPEAL NO. 92203

This appeal arises under the Texas Workers' Compensation Act of 1989 (1989 Act), TEX. REV. CIV. STAT. ANN. arts. 8308-1.01 through 11.10 (Vernon Supp 1992). On April 3, 1992, a hearing was held in (city), Texas. (hearing officer) acted as hearing officer. He concluded that the respondent had complied with rule 130.4 (Tex W. C. Comm'n, 28 Tex Admin Code § 130.4) and that respondent was entitled to discontinue temporary income benefits. Appellant says in his appeal that he could not do the work assigned him under his doctor's limited clearance, that he did not have the money to get to certain doctors for treatment, that he is still in pain, and that he did not receive notices for an ordered medical examination, a benefit review conference, or the contested case hearing before the date of the respective event.

DECISION

Finding that the basis for ceasing temporary income benefits at hearing does not comply with the 1989 Act and that certain factual and legal determinations necessary under the circumstances of this case were not made, we reverse and remand.

The facts relating to the injury in this case are very sketchy since the issue at the hearing was whether temporary income benefits should be stopped and the appellant failed to appear. Appellant strained his back on (date of injury), while working for (employer). On September 25, 1991, (Dr. M) released him to work at desk duty only. On October 7, 1991, Dr. M indicated on a subsequent medical report that he had referred appellant to (Dr. H). In a report prepared in February, Dr. M stated that he could not determine disability since he had not seen appellant since October 7, 1991. An exhibit of respondent indicates that appellant spoke once with Dr. H's office but never saw Dr. H.

Respondent introduced two exhibits that dealt with appellant's failure to see (Dr. R), the doctor that respondent chose to do an examination. A letter from Dr. R's office dated February 17, 1992, says in pertinent part:

> This is written notification of your claimant's second failure to show for his appointment with Dr. [R] on January 28, 1992. His first appointment made by your office for [appellant] was November 26, 1991.

Respondent also introduced a request for, and order of, a medical examination specifying that appellant see Dr. R on January 28, 1992. The order is dated January 21, 1992. Respondent introduced nothing, however, to indicate that appellant had notice that he had an appointment with Dr. R on November 26, 1991.

At hearing respondent argued that temporary income benefits should be discontinued for two reasons: no evidence of disability and appellant's failure to meet "two consecutively scheduled MEO appointments may well bring this matter within the presumption of MMI as set out under Rule 130.4." The hearing officer did not address

disability. He found, in regard to the second reason propounded by respondent for stopping temporary income benefits, "(i)n accordance with Rule 130.4(n)(3) the Benefit Review Officer issued an interlocutory order giving the Carrier permission to suspend payment of temporary income benefits because the Claimant had missed two consecutively scheduled health care appointments." The relevant conclusions of law stated that the carrier had complied with rule 130.4 and that it was entitled to discontinue temporary income benefits.

Temporary income benefits (TIBs) continue until maximum medical improvement (MMI) is reached. They may be discontinued based on the absence of disability. *See* Article 8308-4.23(a) and (b). They may be suspended by an interlocutory order for several reasons, one of which is "the employee has missed two or more consecutively scheduled health care appointments or has otherwise abandoned treatment without good cause." *See* rule 130.4(n).

The decision makes no finding in regard to MMI or disability, and the paucity of evidence does not indicate that an inferred finding should be made. The decision, as rendered, can only approve the interlocutory order to the time of the contested case hearing. *See* Article 8308-6.15 (e). Without a basis tied to either disability or MMI, the decision to discontinue TIBs cannot stand.

In addition, the finding quoted herein as to why TIBs could be suspended by interlocutory order, is open to question. "Health care appointments" are not defined specifically in the 1989 Act. The 1989 Act in Article 8308-1.03(20) does define "health care" as "all reasonable and necessary medical aid, medical examinations, medical treatments, medical diagnoses, medical evaluations, and medical services. The term does not include vocational rehabilitation. The term includes: (A) medical, surgical, chiropractic, podiatric, optometric, dental, nursing, and physical therapy services provided by or at the direction of a doctor; (B) physical rehabilitation services performed by a licensed occupational therapist provided by or at the direction of a doctor; (C) psychological services if prescribed by a doctor; (D) the services of a hospital or other health care facility; (E) prescription drugs, medicines, and other remedies; and (F) medical and surgical supplies, appliances, braces, artificial members, and prostheses, including training in the use of those appliances, braces, members, or prostheses."

It is true that the above definition includes "medical examinations" and "medical evaluations," which could appear to include examinations conducted under the provisions of Article 8308-4.16. An examination of the words "health care" in other parts of the 1989 Act indicates, however, that such words are used in conjunction with treatment of the injured employee under the auspices of the treating doctor. Article 8308-4.16 of the 1989 Act under which an ordered medical examination takes place, does not use the words "health care," but does use the words "submit to medical examinations." Article 8308-4.61 and 4.66 provide more guidance. "An injured employee is entitled to all <u>health care</u> reasonably required by the nature of the compensable injury" (emphasis added) and "[e]xcept in an emergency, all <u>health care</u> must be approved or recommended by the employee's treating

doctor" (emphasis added) are found in Article 8308-4.61. Article 8308-4.66(c) states, "[t]he treating doctor shall be responsible for maintaining efficient utilization of health care" (emphasis added).

Rule 130.4 also looks at "health care" in a similar way to that observed in Article 8308-4.61 and 4.66. Subparagraph (e) of rule 130.4 says in part, "[a]n insurance carrier that identifies . . . an apparent failure to attend health care appointments by an employee may notify the commission in writing, and request that a "Medical Status Request" letter be sent by the commission to the treating doctor." Rule 130.4(f) says in part, "the letter shall request the treating doctor to answer the following questions:

(2)whether the employee has failed to attend two or more consecutively scheduled health care appointments, and the dates of the missed appointments."

At the least, these quoted passages raise the question whether a missed appointment under Article 8308-4.16 can be used as a missed "health care appointment" for purposes of suspending TIBS. We note that the treating doctor did not recommend the examination under Article 8308-4.16 and that Article 8308-4.16 provides a specific remedy enumerated for individuals who do not submit to such an examination.

If an Article 8308-4.16 examination can be used as one of two "health care appointments," the record contains no evidence that the worker knew of the other appointment set for November 26, 1991.

This case is reversed and remanded for further consideration and development of the evidence in regard to the existence of disability, in regard to whether there was an adequate basis for the interlocutory order for suspension of TIBs, and in regard to whether the criteria set forth in rule 130.4(b) and/or (c) can be applied to the facts of this case and if so, whether there has been compliance with other applicable subsections of rule 130.4, so that a decision as to MMI can be made consistent with Article 8308-4.25.

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Joe Sebesta
Appeals Judge

CONCUR:

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Robert W. Potts
Appeals Judge

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Lynda H. Nesenholtz
Appeals Judge