APPEAL NO. 92222

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 24, 1992, a contested case hearing was held in (city), Texas, (hearing officer) presiding. At a benefit review conference held March 6, 1992, the benefit review officer had entered an interlocutory order suspending temporary income benefits (TIBs) because of assumption of maximum medical improvement (MMI) due to abandonment of medical treatment.

The hearing officer found that respondent missed doctors' appointments on December 4 and 23, 1991; that respondent had good cause to miss both appointments; and that respondent did not abandon medical treatment. The hearing officer concluded that respondent has not reached MMI, either by certification or by presumption, and that the injury was compensable under the 1989 Act.

Appellant raises six points on appeal: (1) the hearing officer erred in stating that the issue at hearing was limited to whether or not the presumption of MMI should apply based on abandonment of medical treatment; there was an additional issue properly before the hearing officer that should have been considered, namely whether or not the respondent missed two scheduled health care appointments without good cause; (2) the hearing officer erred in finding that respondent had good cause for missing the scheduled doctors' appointments; (3) the hearing officer erred in finding that the respondent had not abandoned medical treatment; (4) the hearing officer erred in concluding that the claimant had not reached MMI either by certification or presumption; (5) the hearing officer erred in concluding that the injury is compensable under the Act, since this issue was not present for resolution at the contested case hearing; and, (6) the hearing officer erred in concluding that the evidence presented was inadequate to support a presumption of MMI.

DECISION

Finding no error in the decision below relative to missed medical appointments and abandonment of treatment, we affirm the decision of the hearing officer.

Respondent, who does not speak English and testified through a certified interpreter, was employed by (employer) on (date of injury), when he injured his back while removing a cooler from a mold. He was first seen on (date) by (Dr. P) who initially diagnosed lumbosacral sprain syndrome and released him to work with full duties, no restrictions, pending reevaluation. He next saw (Dr. W), who became his treating physician. Dr. W ordered an MRI, a lumbar myelogram, a lumbar CT scan, and electromyogram and nerve conduction studies. On July 18th Dr. W recommended admission for lumbar laminectomy due to a protrusion revealed on a CT scan. Dr. W said respondent was not to return to work, pending reexamination a week after discharge. However, respondent did not see Dr. W after July 18th because, he said, Dr. W needed a second opinion before the surgery could be performed.

Respondent went to (Dr. H) for a second opinion on July 29th, but brought no studies or x-rays with him. Dr. H's initial medical report said "[a]t the present time I think his data is insufficient to form a second opinion as to whether or not he requires surgery," but added that "his present symptoms are not that of a herniated disc, but more of a degenerative disc and I do not feel a laminectomy is indicated for chronic low back pain." Respondent testified that he went to see Dr. H in late July, but that "[h]e didn't see me." In notes prepared August 1st following review of respondent's MRI and CT myelogram Dr. H concluded that "[w]ithout further conservative therapy, I would not recommend surgery in this patient." In a letter dated October 15, Dr. H was still reluctant to recommend surgery, outlining instead a "work hardening" treatment plan.

It was in December 1991 that respondent missed two scheduled appointments with Dr. H. He testified that he had changed his address and was never notified of the first appointment, scheduled for December 4th. On cross-examination he said he continued to receive his benefits on a weekly basis. He said he missed the second appointment, on December 23rd, because he had to go to Mexico where his brother was having surgery. He said he tried to change that appointment, but that he was told the doctor refused. On February 20, 1992, on orders from the Texas Workers' Compensation Commission (Commission), respondent was seen by (Dr. M), who concluded that spinal surgery was not medically necessary.

Respondent testified at the hearing that he had been back to see Dr. W two or three weeks previously, but that Dr. W still could do nothing for him until he got the second opinion on the surgery. However, he testified that Dr. W was going to see him again on April 27th, because he said everything was going to get "cleared up" at the hearing.

Respondent also was not present at the benefit review conference on March 6, 1992. He testified that someone called the place he was living with another family, but that whomever took the call did not tell him about it until that date had passed.

An employee who has disability and who has not reached MMI is entitled to TIBs; TIBs continue until the employee has reached MMI. Art. 8308-4.23. The treating doctor must go through certain specified procedures in order to certify MMI; in addition, under certain circumstances a doctor other than the treating doctor can certify MMI if the treating doctor concurs. *See* Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § § 130.2, 130.3 (Rules 130.2, 130.3).

MMI can be reached, however, either after 104 weeks have passed since TIBs began to accrue, or presumptively pursuant to procedures outlined in Rule 130.4. One of the conditions under which the insurance carrier may utilize these procedures is if it appears that the employee has failed to attend two or more consecutively scheduled health care appointments. Rule 130.4(c). Rule 130.4(n) says that a benefit review officer may by interlocutory order suspend TIBs if the employee has missed such appointments or has otherwise abandoned medical treatment without good cause.

Before discussing this further, two threshold issues must be addressed. The first is appellant's claim that the hearing officer erred in stating that the issue was whether or not MMI should be presumed based on abandonment, and that the hearing officer incorrectly excluded consideration of the issue of whether the claimant had failed to attend two consecutively scheduled health care appointments.

A colloquy between the hearing officer and the parties' attorneys at the beginning of the contested case hearing indicated some confusion about the concept of abandonment. Appellant appeared to distinguish abandonment, which he argued occurred by respondent's failure to return to his treating doctor for some eight months, as an issue separate from the two missed appointments. The hearing officer, however, apparently viewed abandonment as a broader issue which was inclusive of missed medical appointments. Whether or not this is a correct assumption, it appears that appellant suffered no harm because the missed appointments were addressed separately from abandonment in the decision below, in Findings of Fact No. 5 and 6.

A second threshold issue concerns the hearing officer's failure to exclude respondent's testimony regarding his reasons for missing the appointments and his return to Dr. W. At hearing, appellant objected to any such testimony because of respondent's alleged failure to timely answer interrogatories inquiring into the reasons for failing to attend the two appointments, as well as respondent's position on alleged abandonment of medical treatment.

Rule 142.13(d) provides that, with one exception not relevant here, interrogatories "shall be presented" no later than 20 days before the hearing, unless otherwise agreed. Answers to interrogatories "shall be exchanged" no later than five days after receipt of the interrogatories. Appellant's attorney stated at the hearing that the interrogatories were sent April 3, 1992, and received April 7th. However, no "green card" was produced to support this statement. Included in the record as a hearing officer's exhibit was the Commission's file copy of respondent's answers to the interrogatories, showing a certificate of service date of April 15, 1992 and a Commission receipt date of April 20, 1992. Appellant claimed never to have received these answers. Respondent claimed to have received a green card indicating receipt by appellant, but no such card was produced at hearing.

Appellant's interrogatories consisted of the Commission-prescribed form interrogatories, with three additional questions: "(1) . . . your reasons for missing each scheduled health care appointment you have missed since your date of injury; (2) . . . your reasons for not continuing to seek medical treatment during the period from July of 1991 to the present; and, (3) if you contend that you have not abandoned medical treatment, please state the name of each doctor you have seen since July of 1991 to the present and the dates on which you were seen."

There was a fact issue before the hearing officer as to whether respondent had answered appellant's interrogatories. Each attorney stated the dates on which they filed and responded to the interrogatories, and stated that green cards had been received, though

none were produced. While appellant claimed not to have seen respondent's answers, they clearly had been sent to the Commission. Under these circumstances, we hold that the hearing officer did not demonstrate an abuse of discretion in finding that the answers were filed and in allowing testimony based on the answers.

Turning to the question of the missed medical appointments, we note that we have previously raised the question of whether a "health care appointment" is limited to appointments with the treating doctor. *See* Texas Workers' Compensation Commission Appeal No. 92203 (Docket No. redacted) decided July 6, 1992. In this case, the two missed appointments were not with the treating doctor, nor does the record reflect whether respondent was referred to Dr. H by the treating doctor or whether respondent saw him because of appellant's request or for some other reason. However, it is not necessary to reach that issue because we find that there was sufficient evidence to support the hearing officer's finding of good cause for the missed appointments. Under the former law there was no concept of missed appointments without good cause raising a presumption of medical improvement. However, a "good cause" test was used to determine whether an untimely filing of a compensation claim should be allowed. The Supreme Court held that under those circumstances the test for good cause "is that of ordinary prudence . . . whether the claimant prosecuted his claim with that degree of diligence that an ordinarily prudent person would have exercised under the same or similar circumstances," Hawkins v. Safety Casualty Co., 207 S.W.2d 370 (Tex. 1948). In accordance with these guidelines, the totality of the claimant's conduct must be considered to determine whether the test of ordinary prudence has been met. It is normally a question of fact to be determined by the trier of fact. Lee v. Houston Fire & Casualty Co., 530 S.W.2d 294 (Tex. 1975).

Using the foregoing as a guide, the following evidence appears from the record: the respondent knew nothing of the December 4th appointment with Dr. H because he had changed his address and was never informed of the appointment; respondent was notified of the December 23rd appointment and made an unsuccessful attempt to change it because of his brother's surgery; respondent spoke no English and was dependent upon a relative or other people who spoke Spanish to communicate; respondent saw Dr. M in February, 1992, and Dr. W in April, 1992. While the record could have been much better developed on this issue, we do not believe, considering the foregoing facts, that the hearing officer erred in finding that respondent had good cause for missing the two appointments.

In so holding, we also reject respondent's contention that "good cause" is a mitigating factor only for the abandonment of medical treatment. Rule 130.4(h) says the benefit review officer shall enter an interlocutory order suspending TIBs if, *inter alia*, "the employee has missed two or more consecutively scheduled health care appointments or has otherwise abandoned treatment without good cause." The word "otherwise" in a statute makes it inclusive of methods of performing duties other than those enumerated. Sheppard v. Rotary Engineering Co., Inc., 208 S.W.2d 656 (Tex. Civ. App.-Austin 1948, no writ). It would thus be anomalous to say "good cause" applied only to other unspecified types of abandonment and not to abandonment by the two missed appointments.

Whether respondent had abandoned medical treatment was a question of fact for the hearing officer. We find sufficient record evidence to support the hearing officer's finding that respondent did not abandon treatment. He testified to his understanding that Dr. W could do nothing further for him until he received a second opinion on spinal surgery; despite the two missed appointments with Dr. H, he did go to see Dr. M, and later returned to Dr. W. Under these circumstances, we agree with the hearing officer that no abandonment occurred.

Finally, we note appellant's point of error with regard to the hearing officer's conclusion of law on compensability. We note that this was not an issue from the benefit review conference, nor was evidence on this issue presented at the contested case hearing. Therefore, it was superfluous for the hearing officer to reach this conclusion, although neither party was prejudiced thereby.

The hearing officer's decision is affirmed.

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Lynda H. Nesenholtz
Appeals Judge

CONCUR:

_____
Robert W. Potts
Appeals Judge

_____
Philip F. O'Neill
Appeals Judge