APPEAL NO. 92566

On August 19, 1992, a contested case hearing was held in (city), Texas, with (hearing officer) presiding as the hearing officer. The hearing was held under the provisions of the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq*. (Vernon Supp. 1992) (1989 Act). The hearing officer determined that the claimant, (claimant), who is the appellant, did not have a disability between the date of his work-related injury of (date of injury) and the date of the contested case hearing, and is, therefore, not entitled to temporary income benefits (TIBS) during that period of time. The claimant disagrees with the hearing officer's determination and requests that we reverse the hearing officer's decision. Respondent, hereafter the carrier, responds that the decision is supported by the evidence and requests its affirmance.

DECISION

The decision and order of the hearing officer are reversed and remanded.

The issue to be determined at the hearing was: "Is the claimant still suffering disability caused by his on-the-job injury of (date of injury)?" Article 8308-1.03(16) defines "disability" as the inability to obtain and retain employment at wages equivalent to the preinjury wage because of a compensable injury. The hearing officer determined that the claimant did not have disability from the date of his work-related injury to the date of the hearing.

The claimant's position at the hearing was that he had continuing disability from the date of his work-related injury and that he had not abandoned medical treatment. The claimant has not worked since the day of his accident at work. The carrier's position was that the claimant did not have disability because: (1) a medical examination order doctor had released him to restricted work in January 1992; (2) the claimant did not seek medical treatment from October 14, 1991 to May 1992; and (3) the doctor who performed surgery on the claimant's knee stated that findings in a pathology report showed a condition that was not related to any traumatic episode. In regard to the pathology report, the carrier stated in opening argument that "we will introduce evidence from (Dr. B) that indicates that his [the claimant's] current problems are not a result of his injury on (date of injury)." The carrier paid the claimant TIBS from the date of injury to April 22, 1992.

The claimant is a 44-year-old male who does not speak English. An interpreter was used at the hearing. There was no testimony on how the injury occurred. The medical reports reflected that the claimant reported to his health care providers that while he was working on (date of injury), he was crawling on his knees on a cement basement floor when his left knee fell into a crack or the floor gave way and his left knee fell into a hole, and that he experienced immediate pain in his left knee. The carrier did not dispute the occurrence of the work-related accident. The claimant said that his employer sent him to the (the Clinic) on the day of his accident.

(Dr. G), M.D., examined the claimant at the Clinic on (date of injury), diagnosed a contusion of the left knee, and released the claimant to regular work. (Dr. G) next examined the claimant on May 2nd and took him off work for three days. The claimant had five follow-up visits to the Clinic and on his last visit of May 27th the claimant was examined by (Dr. C), M.D., who also diagnosed a contusion of the left knee, indicated that the claimant could return to light duty work from May 8th through an undetermined date, and referred the claimant to (Dr. L), an orthopedic surgeon.

(Dr. L), M.D., examined the claimant on May 28, 1991, diagnosed a possible internal derangement of the left knee, took the claimant off work, and scheduled surgery for June 3rd which the claimant cancelled in order to seek another opinion.

The claimant said that "somebody" recommended that he see (Dr. M), M.D. (Dr. M) examined the claimant on June 5, 1991, diagnosed the claimant as having acute tendinitis of the left knee, an internal derangement of the left knee, and a torn meniscus of the left knee, and referred the claimant to (Dr. B), an orthopedic surgeon, for evaluation.

(Dr. B) examined the claimant on June 13, 1991 and stated in a written report that he "agreed with the clinical impression of medial meniscal tear and the indication for a diagnostic arthroscopy." He instructed the claimant to continue care under (Dr. L). When (Dr. B) performed surgery on the claimant's left knee on June 28th, he found a tear of the medial meniscus and a partial meniscectomy was done arthroscopically. On July 9th he referred the claimant for physical therapy and stated that the claimant was to "continue off work." In a pathology report dated June 29, 1991, (Dr. Mc) reported a preliminary diagnosis of shavings from the claimant's left knee as "[c]hronic synovitis with multiple non-caseating granulomas." In a July 1, 1991 addendum to (Dr. Mc's) pathology report, Dr. Cunningham reported that his final pathological diagnosis of shavings from the left knee was the same as the preliminary diagnosis and noted that special stains for acid-fast bacilli and fungus were negative.

In August 1991 (Dr. B) stated that the claimant's knee was making slower progress than he would like to see, that he was dissatisfied with the claimant's progress, and that instead of improving, the claimant's knee function was deteriorating progressively. He continued the claimant on physical therapy and recommended that the claimant have a "medical work-up." In September 1991 (Dr. B) indicated that the claimant's knee was improving, but in October said that the knee was not doing much better and said that he would refer the claimant to (Dr. G), an orthopedic surgeon, for further evaluation. He also stated in an October 1991 report that the claimant was to be off work. In a TWCC-64 Subsequent Medical Report dated October 1, 1991, (Dr. B) reported that the claimant was changing treating doctors and that the new treating doctor was (Dr. G).

Written evaluations and progress reports from the physical therapy center (the Center) to which the claimant was referred by (Dr. B) were in evidence and showed that the claimant attended about 19 physical therapy sessions for his knee from August 23 to

September 27, 1991, and that he cancelled three sessions. One of the Center's initial evaluation reports indicated that the claimant had a moderate limp on the left, that he had swelling around the left knee, that he could not perform straight leg raising from the supine position, and that he had noticeable muscle atrophy around the "left quads." Progress notes of August 1991 reflected that the claimant was very cooperative and well motivated and progress notes of September 1991 reflected that the claimant still had intermittent swelling and pain in his left knee. In a September 1991 evaluation report the physical therapist indicated that the claimant was not in compliance with his scheduled program but did not specify the area of noncompliance, that an area of improvement would be "electrical stimulation," and that the claimant needed to be talked to about his possible fears of the electrical stimulation machine.

(Dr. G), the orthopedic surgeon to whom the claimant was referred by (Dr. B), examined the claimant on October 14, 1991, and reported his diagnostic impression as: 1. Torn medial meniscus left; 2. Quad atrophy with extreme weakness left lower extremity; 3. Osteoporosis left knee; and 4. Reflex sympathetic dystrophy left lower extremity. (Dr. G) noted that the pathology report showed chronic synovitis with multiple non-caseating granuloma and stated that:

> I'm not certain what that means, but normally we think a possible tuberculosis but the pathology report says special stains of acid-fast bacilli and fungus are negative. So again, I'm not certain what that non-caseating granuloma mean.

(Dr. G) recommended that the claimant go through an extensive rehabilitation treatment to the "quadricep mechanism" before going back to work. (Dr. G) also stated in his report that the claimant said that (Dr. B) told him he was not going to see him any longer and that (Dr. G) was going to take his case. (Dr. G) noted that he told the claimant that he was only giving a second opinion, that he did not want his case, that he could not take the case unless he had prior approval, that he could not continue to see the claimant. (Dr. G's) report showed that he referred the claimant back to (Dr. B) because the claimant needed further care.

The claimant testified that he attempted to see (Dr. B) on two occasions after he saw (Dr. G) but was told by someone at (Dr. B) office that (Dr. B) was no longer his doctor and that he should go see (Dr. G). The claimant said that (Dr. G) told him he was "just a second opinion doctor" and would not see him after the examination of October 14th. The claimant said that he just wanted to know which of the two, (Dr. B) or (Dr. G), was going to be his doctor, and that neither one wanted to be his doctor. He said that when he called the carrier he was told that he could not see any more doctors because he had "changed already too many doctors."

On January 16, 1992, the claimant was examined by (Dr. R), an orthopedic surgeon. According to the carrier, the examination was done at its request and pursuant to a medical

examination order. (Dr. R) reported that he thought the claimant's primary problem at the time of examination was left quadriceps muscle weakness without an intrinsic abnormality of the knee, and recommended that the claimant engage in vigorous active exercise. He also reported that the claimant could return to work in a limited capacity with the only restriction being "not climbing on heights or ladders since the knee could be prone to giving way of a quadriceps weakness." The claimant said that he did not return to (Dr. R) because (Dr. R) was the carrier's doctor.

According to the carrier, a benefit review conference (BRC) was held in April 1992 at which time the benefit review officer told the claimant to see a doctor or he would lose his benefits. The report from the April BRC was not in evidence. The report from the June BRC wherein the disability issue was not resolved was in evidence. One of the claimant's exhibits was a business card from (Dr. G's) office. On the back of the card is a notation that the claimant attempted to see (Dr. G) on April 30, 1992, but was not seen "due to approval," and that he made a second attempt which was also unsuccessful. The claimant said that he then went to (Dr. S), a chiropractor. In a reports dated May 22 and 28, 1992, (Dr. S) diagnosed the claimant's condition as internal derangement left knee and recommended that the claimant be excused from work until further notice in order to avoid aggravation of his condition. By letter dated June 8, 1992, the carrier gave the Commission its written objection to the claimant's treatment with (Dr. S).

In a letter dated August 4, 1992, (Dr. B) referred to the preliminary diagnosis in (Dr. Mc's) pathology report--chronic synovitis with multiple non-caseating granulomas--and stated that "this is a condition that is absolutely not related to any traumatic episode."

As previously noted, the issue at the hearing was whether the claimant was still suffering disability caused by his (date of injury) work-related injury. The hearing officer made the following findings of fact:

FINDINGS OF FACT

3.The claimant did not see a doctor for medical treatment between the period of October, 1991 and April, 1992.

4.That claimant did not cooperate by following the instructions of the doctors and physical therapists in the treatment of his injury.

5.That claimant's present condition is not related to his injury of (date of injury).

6.That the carrier has proven by a preponderance of the evidence that the claimant is not suffering from a disability caused by his on-the-job knee injury of (date of injury), and that he has abandoned treatment for the knee injury of that date.

From the above findings the hearing officer made the following conclusion of law from which the claimant appeals:

CONCLUSION OF LAW

3.That claimant did not have a disability between (date of injury), and the date of the Contested Case Hearing on August 19, 1992, and is therefore not entitled to Temporary Income Benefits during that period of time.

We do not believe that Conclusion of Law No. 3, which in effect concludes that the claimant had no period of disability, can stand. First, while the record does support a finding that the claimant did not see a doctor for medical treatment from October 14, 1991 through about May 22, 1992, (the claimant saw (Dr. R) in January 1992 due to a medical examination order), the claimant testified that the doctors he had seen immediately before that period of time, (Dr. B) and (Dr. G), refused to see him subsequently, and the medical reports of those doctors tend to support the claimant's testimony on this matter. On October 1, 1991, (Dr. B) reported that the claimant was changing treating doctors to (Dr. G) which would indicate that (Dr. B) no longer wanted to be considered as the claimant's treating doctor. However, on October 14, 1991, (Dr. G) wrote that he would not see the claimant again as his only function was to render a second opinion, that he did not want the case, and then referred the claimant back to (Dr. B), who had already indicated that (Dr. G) was to be the new treating doctor. We do not believe that the evidence supports a finding of abandonment of treatment. We note that if the carrier had sought suspension of TIBS under Rule 130.4, the benefit review officer would have had to find abandonment of treatment without good cause in order to suspend TIBS. We believe that a similar good cause analysis should be made by the contested case hearing officer when abandonment of treatment is asserted as part of the evidence on the issue of disability.

Second, the overwhelming weight of the evidence showed that the claimant sustained some period of disability. He was initially diagnosed as having a contusion but was then diagnosed as having an internal derangement of the left knee and a torn meniscus in his left knee for which he underwent surgery and physical therapy after surgery. The claimant did not work after his work-related accident. The medical reports showed that he consistently complained of swelling and pain in his left knee and physical examinations indicated that he could not perform a straight leg test with the left leg. The first two doctors to treat him took him off work for three days and then returned him to light duty work for an undetermined period of time. There was no showing that light duty work was available for the claimant. In Texas Workers' Compensation Commission Appeal No. 91045, decided November 21, 1991, the Appeals Panel stated that:

Where the medical release is conditional and not a return to full duty status because of the compensable injury, disability, by definition has not ended unless the employee is able to obtain and retain employment at wages equivalent to his preinjury wages. Evidence to establish this must show there is employment

> at preinjury wage levels reasonably available to the employee meeting the conditions of the medical release, taking into consideration reasonable limitations on the type of work suitable within the frame work of the employee's abilities, training, experience and qualifications, and that the employee has not availed himself of such employment opportunities.

Furthermore, (Drs. L and B) recommended that the claimant not work and (Dr. R) only returned the claimant to restricted work. Again, there was no showing that work within the restrictions was available to the claimant. In fact, the claimant testified that he called his employer and was told that he didn't work there anymore and that there was no more work for him. The claimant also underwent surgery for his torn medial meniscus of the left knee. In describing the surgery, (Dr. B) stated that the claimant had a "complex tear of the medial meniscus, which was exercised." Following surgery, the claimant underwent about a month of physical therapy. Except for the release to return to regular work given by (Dr. G) on (date of injury), which apparently was given under an initial impression that the claimant merely had a contusion when it turned out that he had a derangement of the knee and a torn medial meniscus, no doctor has discharged the claimant to regular work duties. In Spillers v. City of Houston, 777 S.W.2d 181 (Tex. Civ. App.-Houston [1st Dist.] 1989, writ denied), the court recognized, as we do in our review of a hearing officer's decision, that unless the record shows that a jury's finding on an issue is factually insufficient, or so against the great weight and preponderance of the evidence as to be manifestly unjust, the reviewing court may not interfere with the jury's verdict, and that because the jury is the sole judge of the credibility of the witnesses and the weight to be given their testimony, the reviewing court may not substitute its opinion for that of the jury merely because it might have reached a different factual conclusion. However, in reversing a jury finding that the employee did not sustain any partial, permanent disability, the court stated that "[but] a reviewing court must set aside a jury's verdict if the record shows that the jury totally ignored the evidence establishing a worker's disability or the duration thereof." We find that to be the case here as the court did in Spillers.

Third, (Dr. B) opinion that the pathology diagnosis of "chronic synovitis with multiple non-caseating granulomas" is a condition that is absolutely not related to any traumatic episode, does not shed any light on what the described condition is, how it relates to the diagnoses of internal derangement of the knee and a torn meniscus for which surgery was performed, or how the condition is in any way related to the claimant's inability to obtain and retain employment. These matters should be developed on remand. Without such evidence, we cannot comprehend how the hearing officer could use (Dr. B)' opinion as to the pathology diagnosis as a basis for finding no disability from the date of injury as urged by the carrier in its response. The carrier is incorrect in stating that (Dr. G) made the same diagnosis as (Dr. B) did in relation to the pathology report. (Dr. G) wrote that he didn't know what the pathology diagnosis meant.

Fourth, as to Finding of Fact No. 6 that the claimant did not cooperate by following the instructions of the doctors and physical therapists in the treatment of his injury, the

hearing officer failed to specify what instructions the claimant failed to follow, when such noncompliance occurred, and also failed to connect any such failure to follow instructions to his conclusion that the claimant had no disability since the date of injury. Consequently, we do not believe that Finding of Fact No. 6 supports Conclusion of Law No. 3.

The decision and order of the hearing officer are reversed and the case is remanded to the hearing officer for further development of the evidence, as appropriate, and consideration of the evidence not inconsistent with this decision. Pending resolution of the remand, a final decision has not been made in this case.

Robert W. Potts
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Thomas A. Knapp
Appeals Judge