APPEAL NO. 92671

On November 5, 1992, a contested case hearing was held in (city), Texas, with (hearing officer) presiding as hearing officer. The hearing officer determined that the appellant, claimant herein, abandoned medical treatment without good cause, and that the benefit review officer properly entered an Interlocutory Order suspending temporary income benefits under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq*. (Vernon Supp. 1992) (1989 Act). The claimant appealed, disagreeing with the hearing officer's decision. Respondent, carrier herein, filed a response challenging the appeal as not being timely filed or, if timely filed, asks that the hearing officer's decision be affirmed.

DECISION

Determining that the issue in this case has not been resolved, we reverse and the case is remanded for development of appropriate evidence, if any, and reconsideration not inconsistent with this opinion.

Regarding the allegation that claimant's appeal was not timely filed, Article 8308-6.41(a) requires a written appeal be filed ". . . not later than the 15th day after the date on which the decision of the hearing officer is received from the division of hearings and review . . ." We note the decision of the hearing officer was mailed on November 20, 1992. It is not apparent when this decision was received; however, claimant's appeal was postmarked December 1, 1992, received and date stamped by the Texas Workers' Compensation Commission (Commission) on December 4, 1992, which is within 15 days of the date the decision was mailed. For some inexplicable reason, the appeal did not get to the Commission's Division of Hearings and Review until December 16, 1992 and was not sent to the carrier until December 17, 1992, which carrier acknowledges. The claimant's appeal was timely filed with the Commission; however, because of the delay, carrier did not receive its copy of the appeal until December 17, 1992. The carrier's response was also timely filed on January 4, 1992, which was the next business day after the due date, which fell on a legal holiday and was within 15 days after the request for review was received. *See* Tex. W. C. Comm'n, 28 TEX. ADMIN. CODE § § 102.3(a)(3) and 143.4(a)(3) (TWCC Rules 102.3 and 143.4).

The issue raised at the benefit review conference (BRC) and framed at the contested case hearing (CCH) was "[w]hether or not the Claimant has reached Maximum Medical Improvement by presumption, and if not, does she have disability."

Claimant was employed by the (employer). On or about (date of injury), claimant sustained a leg and lower back injury in a slip and fall accident. Compensability was not contested and the facts surrounding the injury are not evident in the record. Claimant was initially seen at (BIC Clinic) where she was sent by the employer. Claimant testified she was seen there twice. A medical report from the BIC Clinic is dated 7-31-91 and indicates claimant was referred to physical therapy (PT) for "7-10 visits." At some subsequent date

claimant was seen by (Dr. W), M.D. (Dr. W) apparently referred claimant to (Dr. C) for an MRI of the lumbar spine. (Dr. C's) report of August 27, 1991 indicates (Dr. W) then apparently referred claimant to (Dr. Wa), M.D., for a "follow-up neurological evaluation" on September 19, 1991. (Dr. Wa's) report of an exam on 10/16/91 states "CT scan revealed a mild disc herniation at L4-L5." Follow-up studies in (Dr. Wa's) report state "[t]he patient refused further SSEP testing. The patient also refused a repeat EMG of the left lower extremity. MRI of the lumbosacral spine was reported as normal." Claimant was apparently seen by (Dr. C), M.D., on 9/27/91. (Dr. C) gave an estimated MMI of 11-27-91. (Dr. W), on 11/18/91, referred claimant to (Dr. Wi) as a change in treating doctors. (Dr. W) noted in his report that claimant had failed to keep appointments with (Dr. L) on 10/23/91, 11/11/91, 11/12/91 and 11/14/91. (Dr. Wi) initially saw claimant on 11/22/91 with notations that the radiographs ". . . are felt to be normal" but the CAT scan was ". . . not felt to be technically adequate." (Dr. Wi's) report indicated a back school protocol was to be instituted by a therapist at the clinic and the patient "reseen" in three weeks. The back school would constitute "health care" within the meaning of Article 8308-1.03(20). Claimant testified she did not think the back school was worthwhile because it consisted of lectures.

Apparently claimant failed to attend the prescribed back school in that exhibits show failure to attend on November 25, 1992, "[c]alled to cancel;" December 3, 1992, "no show;" January 17, 1992, "no show;" February 3, 1992, "no show;" February 10, 1992, "no show for re-eval;" and February 14, 1992, "no show" with a notation claimant had called and reported car trouble. By conference note, dated February 19, 1992, (Dr. Wi) notes "[p]atient . . . as not being reliable in making clinic appointments. At todays (sic) date the therapist tells me she has made three clinic visits over the past three months. She should be discharged from the clinic."

By letter dated February 20, 1992 to claimant and TWCC-64 dated the same date, (Dr. Wi) states "[p]atient has not been seen in this clinic since her initial evaluation oin (sic) 11/22/91 and has not kept her physical therapy visits with our therapist." In the letter to claimant, the doctor states "[d]ue to your noncompliance in therapy and in returning for follow-up visits . . . you are being discharged from the clinic." In a May 6, 1992 letter, (Dr. Wi) states that he is not in a position to make a designation of MMI or assign impairment, and restates claimant was discharged for noncompliance with scheduled appointments.

A BRC was held on September 15, 1992 with the carrier's position being that the claimant has not had medical treatment since February 1992, and is presumed to be at MMI based on Rule 130.4 and no longer has disability. The benefit review officer (BRO) agreed and, on September 16, 1992, based on Rule 130.4, issued an interlocutory order suspending temporary income benefits (TIBS) on a presumption of MMI. Claimant thereafter saw (Dr. B), D.O., on September 24, 1992 who, by note dated October 22, 1992, declared claimant "totally incapacitated" from 9/24/92 and indicated he wished to perform "manipulation under anesthesia."

At the CCH the hearing officer attempted to elicit from the claimant the reason she

had missed so many appointments. The claimant testified she didn't like the classes and she was not benefiting from them and that absence of transportation or car problems prevented her from attending other appointments.

We note the hearing officer made some minor errors in listing the evidence presented. Claimant's Exhibit 1 ((Dr. B's) certificate of 10/22/92) is shown "Admitted--No Objections." In fact, the record disclosed carrier objected to this exhibit on the ground it had not been exchanged, but the hearing officer admitted it over objection based on good cause in failing to exchange the report. The hearing officer did not abuse his discretion in admitting this report.

Carrier's Exhibit 4 is listed as (Dr. W) TWCC-64 dated November 18, 1991. Actually, Carrier's Exhibit 4 is (Dr. C's) TWCC-64 regarding claimant's visit of 10/3/91. Carrier's Exhibit 5 is listed as (Dr. Wa's) report but is actually (Dr. W) TWCC-64 dated November 18, 1991, which is listed as Carrier's Exhibit 4. The hearing officer fails to list Carrier's Exhibit 6, which was marked as Carrier's Exhibit 6, but erroneously admitted as Carrier's Exhibit 5. Carrier's Exhibit 6 is (Dr. Wa's) evaluation. Although not raised as an issue on appeal, we note for purposes of clarification the confusion regarding the correct listing of exhibits. It is clear from the hearing decision and discussion of the evidence that all of the carrier's admitted exhibits were considered and we have reviewed the entire record in reaching our decision on appeal. Texas Workers' Compensation Commission Appeal No. 92184, decided June 25, 1992.

The hearing officer's decision and the carrier's response both cite Texas Workers' Compensation Commission Appeal No. 92389, decided September 16, 1992, as controlling. In that case, as in the present case, the BRO had issued an interlocutory order authorizing termination (or suspension in the instant case) of TIBS based on abandonment of medical treatment pursuant to Rule 130.4. Appeal No. 92389 sets forth and discusses the requirements of Rule 130.4 in some detail, which we will not repeat here. The key issue in that case was that Rule 130.4(f) requires the treating doctor's confirmation of missed medical appointments, which must be sought by the Commission. The carrier, in the cited case, had not requested the Commission to send the treating doctor a medical status request letter, which is also the case before us. In both cases the BROs, at a duly convened BRCs, had before them the articulated issue which was appropriate for mediation and resolution in an informal dispute setting. In both cases the treating doctor had noted missed medical appointments after the initial consultation. In Appeal No. 92389, *supra*, claimant was absent and did not present any controverting evidence or any showing of good cause. In the instant case, the claimant was present at both the BRC and the CCH and, at least at the CCH, attempted to establish good cause for failure to keep the medical appointments. We do note there is a concurring opinion in Appeal No. 92389, *supra*, which states that the doctor's ". . . initial medical report to the Commission stating that `[p]atient did not show for scheduled appointments', together with her outpatient notes indicating that respondent did not return for scheduled appointments . . . constitute . . . the response from the treating doctor concerning missed health care appointments contemplated in Rule

130.4(f) . . ." In the instant case, (Dr. Wi), in completing a TWCC-64 on 2/20/92, recounted "[p]atient has not been seen in this clinic since her initial evaluation oin (sic) 11/22/91 and has not kept her physical therapy visits with our therapist." The BRO, considering this language could properly conclude that claimant had abandoned treatment, suspended TIBS under Rule 130.4(n)(3).

A principal difference between the instant case and Appeal No. 92389, *supra*, is whether good cause for missing treatments existed. In the cited case, the claimant apparently did not appear and presented no evidence on the point. In the instant case, claimant testified as to her reasons for failing to keep the appointments. In Texas Workers' Compensation Commission Appeal No. 92222, decided July 15, 1992, citing Hawkins v. Safety Casualty Co., 207 S.W.2 370 (Tex. 1948), we held the test for "good cause" is that of ordinary prudence; that is, the degree of diligence that an ordinarily prudent person would have exercised under the same or similar circumstances. The determination of good cause is a decision which is left to the discretion of the trier of fact, in this case the hearing officer. Morrow v. HEB, Inc., 714 S.W.2d 297 (Tex. 1986). In this case, the hearing officer solicited claimant's reasons for failing to keep her appointments and there was some discussion regarding how far away the doctor's office was and how to best get there. That evidence being presented, the hearing officer did not abuse his discretion in specifically finding no good cause existed.

Texas Workers' Compensation Commission Appeal No. 92456, decided October 8, 1992, dealt with the same issue of suspension of TIBS due to abandoned medical treatment without good cause. We do note, in that case, the conclusions of law seemed to "imply that the hearing officer was reviewing the benefit review officer's decision rather than deciding the case before him on its own merit." Similarly, in this case, the hearing officer in Conclusion of Law No. 2 states "[t]he Benefit Review Officer properly entered an Interlocutory Order suspending Temporary Income Benefits." We do not disagree that the interlocutory order was properly entered under this fact situation; however, as in Appeal No. 92456, the hearing officer here merely seems to be reviewing the BRO action and finding it proper. As noted, citing Appeal No. 92456, *supra*, the hearing officer should decide the case on its own merits rather than review the BRO interlocutory order suspending TIBS. Pursuant to Article 8308-6.34(g) and Rule 142.16, the hearing officer makes written findings of fact and conclusions of law, a determination whether benefits are due, and if so, enters an order awarding benefits. The hearing officer is not authorized to review and affirm a BRO's interlocutory order. Rather, the hearing officer should make his own determinations.

In the order portion of his decision, the hearing officer quite correctly states "[c]ertification of Maximum Medical Improvement and assignment of impairment is crucial to the disposition of this issue. Abandonment of medical treatment standing alone cannot dispose of this issue." However, having correctly analyzed the problem, the hearing officer failed to follow up by resolving the identified problem. Instead, the hearing officer affirms the interlocutory order of the BRO and without resolving the issue states "[t]he parties, or the Commission, may take whatever steps are appropriate to move this dispute to its

ultimate conclusion."

Initially we would point out that MMI does not necessarily end disability, as defined by the 1989 Act. One can have reached MMI, still be in pain and be unable to obtain/ retain employment at the preinjury wage because of a compensable injury. Conversely, one can also have no disability but still not have reached MMI. In Texas Workers' Compensation Commission Appeal No. 91045, decided November 21, 1991, we held "that a full release to normal duty is not the same or equivalent to maximum medical improvement." We point out that even if MMI has been reached it is possible for an employee to still be disabled, as defined by the 1989 Act, although no longer eligible for TIBs. The phrasing of the issue in this case would seem to indicate that claimant can only have disability if MMI has not been reached. Such is not the case. The hearing officer should have clarified this issue at the CCH and/or added such issues necessary to resolve the case. *See* Article 8308-6.31(a) and Rule 142.7 on how issues may be added at the CCH.

As the hearing officer correctly notes, certification of MMI and assignment of impairment are crucial for the disposition of this issue. In addition to presenting evidence of abandonment of medical care, the carrier, in its request for a benefit review conference, could have requested a required medical examination and/or a request for a designated doctor in accordance with Rule 130.4(i)(1) and (2). In the absence of such a request, the hearing officer has responsibility with regard to ensuring the full development of facts required for the determinations to be made. *See* Article 8308-6.34(b) and *generally* Texas Workers' Compensation Commission Appeal No. 92570, decided December 14, 1992. As suggested in the concurring opinion, examination by a Commission-appointed doctor might be appropriate under the circumstances.

As noted earlier, after the BRC, claimant saw (Dr. B) and (Dr. B's) report declaring claimant "totally incapacitated" was admitted over objection. Having admitted this medical report, the hearing officer appears to have totally disregarded it. It is unclear to us whether claimant has resumed medical care or not. Nor does the hearing officer discuss or make any findings and conclusions regarding the effect of claimant's seeing (Dr. B). We note that the "presumption" of maximum medical improvement under Rule 130.4 is not actually a presumption of MMI at all, but rather a device for suspending TIBS, and the interlocutory order is only a temporary suspension of TIBS. There is no discussion, evidence or resolution of how (Dr. B's) treatment or opinion effected the suspension of TIBS pursuant to Rule 130.4. Consequently, it is unclear how the hearing officer arrived at his decision and what effect (Dr. B's) report had in making that decision.

Further, we note that the issue raised at the BRC, and agreed upon at the CCH, is at best inartfully phrased, if not actually erroneous. Contrary to what the title of Rule 130.4 might suggest, MMI cannot be reached or presumed due to abandonment of treatment. As noted above, Rule 130.4 is only a device to move the case by suspending TIBS. We have above noted how the hearing officer could have clarified or added such issues necessary to resolve this case.

Because the hearing officer's decision, which had the effect of only continuing a temporary suspension of TIBS by affirming the interlocutory order, did not address the issue of an MMI date, the effect of (Dr. B's) report and possible treatment, continued disability based on (Dr. B's) report and impairment, if any, we reverse and remand for further consideration and development of the evidence necessary to resolve this case. The hearing officer may wish to consider action under Article 8308-4.16 (which we note has a remedy if the employee, without good cause, fails or refuses to appear for the scheduled appointment) or the hearing officer may wish to consider appointment of a designated doctor under Articles 8308-4.24 and 4.25.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitates the issuance of a new decision and order by the hearing officer, a party, including the claimant, who wishes to appeal from such new decision must file a request for review no later than 15 days after the date on which such new decision is received from the Texas Workers' Compensation Commission's Division of Hearings, pursuant to Article 8308-6.41. *See* Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

Thomas A. Knapp
Appeals Judge

CONCUR:

I concur and agree with the comments in the concurring opinion below.

Stark O. Sanders, Jr.
Chief Appeals Judge

CONCURRING OPINION:

I concur in the result of this decision, but I wish to distinguish this case, factually, from previous decisions of this panel so as to prevent inconsistent determinations where the question of abandonment of medical treatment arises.

By way of background, Rule 130.4(c) allows a carrier to invoke the procedures of that rule if it appears that an employee has failed to attend two or more consecutively scheduled health care appointments. The rule also sets up a procedure by which, upon request of the

carrier, the Commission contacts the employee's treating doctor for a medical status report, including whether the employee has reached MMI. Should the treating doctor fail to respond, or if he certifies that the employee has not reached MMI, the rule contemplates that the Commission will order examination by a Required Medical Examination doctor (*see* Article 8308-4.16), or will appoint a designated doctor. Thus, the rule appears to force medical resolution of the issue of whether the employee has reached MMI--the failure to attend schedule medical treatments being one indication that this might have occurred.

Any confusion engendered by this rule may come from its final subsection. Rule 130.4(n)(3) provides that the BRO shall enter an interlocutory order directing the insurance carrier to suspend TIBS, and begin payment of impairment income benefits, if any, if the BRO's recommendations state that the employee has missed two or more consecutively scheduled health care appointments "or has otherwise abandoned treatment without good cause." Unfortunately, despite the fact that the rule states the order is interlocutory only, this portion of the rule may appear to indicate that abandoned medical treatment is the issue for resolution. As mentioned earlier, abandonment of medical treatment only serves to trigger an inquiry to the appropriate doctor as to whether MMI has been reached. Standing alone, abandonment is not an issue that can be finally resolved.

As the majority opinion points out, Appeal No. 92389 involved a carrier's attempt to suspend TIBS for a claimant who had missed medical appointments and, indeed, was not present at any phase of the dispute resolution process. That case reversed the hearing officer's determination that the carrier was not entitled to invoke the protection of Rule 130.4 because the procedures of that rule had not been followed. We held that those procedures are not exclusive, and our reversal reinstated the BRO's interlocutory order. Despite our ruling, we recognized that the process outlined by Rule 130.4 is designed to move a claimant along through the income benefits process, assuming the medical evidence so indicated.

A later opinion in Appeal No. 92456 concerned a hearing officer's own determination, in applying the facts of the case to the procedures of Rule 130.4, that TIBS should be suspended. In affirming the hearing officer's decision (as reformed to correct language indicating the claimant was "presumed to have reached MMI" as well as certain language which could be read to imply the hearing officer was affirming the BRO's order) we stated "the effect of the hearing officer's order is only to suspend TIBS pending [claimant's] return to health care treatment and resolution of the issue of MMI. It is then up to the parties to move this case to the next level of determination--the [claimant] by voluntarily complying with her own doctor's orders and the written agreement for medical examinations, or the [carrier] by such means provided by statute and rule."

The instant case, like the two previous cases on this subject, concludes with the suspension of TIBS via an interlocutory order. What distinguishes the facts of this case, however, is that the BRO's initial order appears to have achieved, in part, the desired effect of getting the claimant back into medical treatment. The report of this doctor provided further evidence at the contested case hearing on the issue of MMI. Remembering that the issue, however unfortunately worded from the BRC, was MMI and not abandonment, it

would have become appropriate at that point for the hearing officer to order examination by a Commission-appointed doctor in an effort to resolve the ultimate issue.

One additional consideration bears mentioning. As we stated in Appeal No. 92389, time, effort, and expense can be saved by following the procedures set forth in Commission rules. While not mandatory, the procedures of Rule 130.4 can expedite the resolution of the issue of MMI in cases such as this, and a hearing officer should not be hesitant to seek appropriate medical information or issue an appropriate order in an effort to determine the underlying issue: whether an employee who has ceased to attend medical appointments has indeed achieved MMI.

Lynda H. Nesenholtz
Appeals Judge