APPEAL NO. 94272

This appeal is brought pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on February 1, 1994, in (city), Texas, with (hearing officer) presiding as hearing officer. The sole issue at the hearing, as reported from the benefit review conference (BRC), was whether the respondent (claimant) abandoned medical treatment without good cause, thus justifying the suspension of temporary income benefits (TIBS). The hearing officer determined that the claimant did not abandon medical treatment from his treating doctors and that he established good cause for his failure to attend other required examinations as directed by the Texas Workers' Compensation Commission (Commission). The carrier (appellant) appeals this decision arguing that it is contrary to the great weight of the medical evidence. The claimant has not submitted a response to this appeal.

DECISION

We affirm the decision and order of the hearing officer.

It is undisputed that the claimant suffered a compensable low back strain on (date of injury). According to his testimony, his initial treating doctor was (Dr. W), who, for reasons unknown to the claimant and unexpressed by Dr. W in any correspondence in evidence, terminated his physician relationship with the claimant "without cause" effective May 10, 1993. The claimant next began treating with (Dr. K) on May 17, 1993. According to the records of Dr. K in evidence, the claimant received further treatment one time each in June, July, and August, and twice in December 1993. In addition, the claimant testified he saw Dr. K approximately every two weeks (except in September 1993) and never missed an appointment with him. The claimant also stated he saw a (Dr. G) on October 31, 1993, and on January 20, 1994.

Also introduced into evidence was a Commission order (TWCC-22) requested by the carrier which directed the claimant to be examined by (Dr. J). Three appointments were set up with Dr. J. The first one on July 28, 1993, was cancelled by the claimant, but, according to his testimony, he was "not sure why." The claimant testified he called Dr. J's office and rescheduled his appointment for August 12, 1993. The claimant testified he again rescheduled the August 12, 1993, appointment with Dr. J's office for August 19, 1993, but according to the claimant, he failed to make this appointment because of a death in the family in (state). No further explanation was given. A third appointment with Dr. J was made for September 22, 1993, which the claimant said he was unable to keep because he was incarcerated in the County jail at this time for approximately ten days for contempt of court for failing to pay child support. After his release, he stated that Dr. J's office refused to make any more appointments for him. An affidavit of Dr. J's Front Desk Supervisor stated that the claimant failed to keep appointments on July 28, 1993, August 12, 1993; and September 22, 1993. No mention is made of an appointment on August 19, 1993.

Based on this evidence, the hearing officer made the following findings of fact and conclusions of law:

FINDINGS OF FACT

4.Claimant attended all scheduled medical appointments with his treating doctors [Dr. W, Dr. K and Dr. G]. Claimant did not fail to attend two consecutively scheduled health care appointments with these doctors.

5.Claimant failed to attend two ordered medical examinations with [Dr. J], because of a death in the family and incarceration in the County Jail.

CONCLUSIONS OF LAW

3.Claimant . . . has not abandoned medical treatment of his (date of injury) compensable injury.

4.Claimant has established good cause for his failure to attend the required medical examinations with [Dr. J].

Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.4(n)(3) (Rule 130.4(n)(3)) provides, in pertinent part, that a Benefit Review Officer (BRO) shall order a carrier to suspend temporary income benefits if as a result of a benefit review conference the BRO states that the "employee has missed two or more consecutively scheduled health care appointments or has otherwise abandoned treatment without good cause." Though no documentary evidence to this effect was introduced, it was not disputed by the parties that such recommendations and order of the BRO were made, and that the carrier halted temporary income benefits (TIBS) on November 3, 1993, "per TWCC order."

The Appeals Panel in Texas Workers' Compensation Commission Appeal No. 92203, decided July 6, 1992, addressed, but did not answer the question of whether Rule 130.4(n)(3) encompasses medical examinations by other than a claimant's treating doctor. After an exhaustive review of Rule 130.4, the Appeals Panel concluded that "scheduled health care appointments" probably did not include medical examinations ordered by the Commission. Despite a statement in Texas Workers' Compensation Commission Appeal No. 93470, decided July 26, 1993, that the Appeals Panel in Texas Workers' Compensation Commission Appeal No. 92222, decided July 15, 1992, has held that, based on Appeal No. 92203, *supra*, "medical examinations do not constitute health care" under Rule 130.4, no other case has had to specifically address this issue until now. *See e.g.* Texas Workers' Compensation Commission Appeal No. 92395, decided September 16, 1992. Confronted with the issue in this case, we hold for the reasons stated in Appeal No. 92203, *supra*, that Rule 130.4(n)(3), which mandates the suspension of TIBS in certain cases of missed health care appointments or abandonment of treatment, does not apply to missed appointments with doctors who are primarily rendering evaluations at the request of a carrier, and not providing care or treatment to a claimant. Failure to attend medical examination order appointments may be addressed in other ways, for example, through requests for medical status reports (Rule 130.4(e)), through directives to treating doctors to prepare medical evaluations (Rule 130.4(f)), or through requests for a designated doctor.

For this reason, the findings and conclusions of the hearing officer with regard to the failure of the claimant to attend medical examinations with Dr. J are without legal effect and have no bearing on the issue in this case of whether the claimant abandoned medical treatment without good cause with resultant suspension of TIBS.

Whether a claimant has abandoned medical care from treating doctors through missed appointments or otherwise is a question of fact to be determined based on the "totality of the circumstances." Texas Workers' Compensation Commission Appeal No. 92222, *supra*. Good cause is generally regarded as that degree of diligence that an ordinarily prudent person would follow under the circumstances. Texas Workers' Compensation Commission Appeal No. 93464, decided July 12, 1993.

As noted above, the hearing officer found, as a matter of fact, that the claimant attended all scheduled appointments with his treating doctors. The carrier attached to its appeal a computer generated record from Dr. K which purports to show numerous consecutively missed appointments. The carrier stated in its appeal that it contacted Dr. K for this information after the hearing and now offers it as rebuttal evidence. The Appeals Panel considers only the record developed at the hearing and since this evidence was in existence and could have been introduced there, it will not now be considered for the first time on appeal. Section 410.203(a); Texas Workers' Compensation Commission Appeal No. 93970, decided December 9, 1993.

The hearing officer clearly found the claimant credible in his testimony that he met all the appointments of his treating doctors. His position was supported to the extent that other records of his doctors were introduced into evidence. As finder of fact, the hearing officer is the sole judge of the relevance and materiality of the evidence and of its weight and credibility. Section 410.165(a). An appeals level body is not a fact finder, and does not normally pass upon the credibility of witnesses or substitute its own judgement for that of the trier of fact, even if the evidence would support a different result. National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied). Having reviewed this record, we conclude that the hearing officer's decision that the claimant did not abandon medical treatment from his treating doctors is supported by sufficient evidence and is not so against the great weight and preponderance of the evidence as to be clearly wrong and unjust, which is our standard of review. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Company, 715 S.W.2d 629 (Tex. 1986).

Finding no reversible error in the decision and order of the hearing officer, we affirm.

Alan C. Ernst
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Lynda H. Nesenholtz
Appeals Judge