APPEAL NO. 950126

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On November 28, 1994, a contested case hearing (CCH) was held in _____, Texas, with _____presiding as hearing officer. A benefit review conference (BRC) was held on October 4, 1994, at which the claimant did not appear. (It was subsequently determined by the hearing officer that claimant had not received notice of the BRC because the Texas Workers' Compensation Commission (Commission) had sent the notice of the BRC to an incorrect address.) The benefit review officer (BRO), at the October 4th BRC, entered an interlocutory order suspending temporary income benefits (TIBS) based on a determination that claimant had abandoned medical treatment without good cause. TIBS were suspended in accordance with Tex. W. C. Comm'n, 28 TEX. ADMIN. CODE § 130.4(n) (Rule 130.4(n)). Another BRC was held on October 26, 1994, attended by the parties, with the sole unresolved issue being: "Has the claimant abandoned medical treatment without good cause, justifying the suspension of [TIBS] under Rule 130.4?"

The hearing officer determined that while it was improper for the Commission to order the suspension of TIBS at a BRC for which claimant was not given sufficient notice, claimant had abandoned medical treatment without good cause from December 7, 1993, through November 1, 1994, thus justifying the suspension of TIBS under Rule 130.4.

Appellant, (claimant), appealed the decision, challenging the credibility and integrity of the treating doctor, the Commission and the carrier. We accept the appeal as challenging the sufficiency of the evidence and the hearing officer's interpretation of the law. Claimant requests that we reverse the hearing officer's decision and restore claimant's income benefits. Respondent, (carrier), responds that the decision is supported by the evidence and requests that we affirm the decision.

DECISION

The decision and order of the hearing officer are affirmed.

Before addressing the merits of the case, we would point out that the listing of claimant's exhibits in the Decision and Order was in complete disarray. The decision listed Claimant's Exhibits A through R (omitting K). In fact, there were no Exhibits C, E and G, and Exhibits S, T, U, V and X were not listed. Some exhibits had been withdrawn, others had been offered and admitted other than as identified and still others were simply not the document identified in the decision. In other instances, the same document was offered and admitted twice under different identifying letters (e.g., exhibits marked F and N are the same). Consequently, it was very difficult to determine which exhibits were admitted, or if, in fact, all the exhibits had been forwarded for review.

On the merits, it is undisputed that claimant sustained a compensable injury to her left wrist on _____. In the next few months, claimant saw a number of doctors (carrier states claimant has had five treating doctors, three referral doctors and a Medical Examination Order (MEO) doctor). A report dated June 17, 1993, from Dr. P K (Dr. PK), who is apparently associated with Dr. AK (Dr. AK), the last treating doctor during the period in question, indicates that claimant sustained a fracture of the left distal radius on _____, and that in _____claimant may have "a possible reflex sympathetic dystrophy." Dr. PK, in his report, recommended "repeat electrodiagnostic study . . . evaluation by a neurologist with thermograms . . . as well as a bone scan." Dr. PK stated that he thought "stellate ganglion blocks" might be required and that he would "await authorization" for the ganglion blocks (apparently from the carrier). A report dated October 19, 1993, from Dr. P (Dr. P), one of the referral doctors, comments that claimant has "bilateral carpal tunnel syndrome [CTS] which electrodiagnostically is more severe on the asymptomatic side." A report dated December 3, 1993, from the treating doctor, Dr. AK, indicates that claimant was seen by Dr. P, that there was evidence of "ulnar nerve dysfunction" and recommends a bone scan. Dr. AK notes claimant "has not been seen in our office since June of 1993" and requests that claimant ". . . make a follow-up visit in our office for re-evaluation immediately following the bone scan." Dr. AK recites claimant saw Dr. P on "10-19-03." A bone scan was done on December 6, 1993, with no abnormal findings.

What happened after the December 6th bone scan is the area of dispute? Claimant testified that on more than one occasion she attempted to make appointments with Dr. AK but he refused to see her because the carrier had refused to approve further medical treatment or testing. Carrier's adjustor testified and denied claimant's allegations stating that only the thermogram had been denied and only because the doctor had failed to properly request approval for the procedure.

Carrier, in March 1994, requested an MEO assessment to determine if MMI had been reached. The examination of claimant by Dr. J (Dr. J) was ordered on March 4, 1994, and an appointment was tentatively set for April 4, 1994. Dr. J, in a Report of Medical Evaluation (TWCC-69), dated April 5, 1994, and narrative dated April 4, 1994, indicated MMI had not been reached, and that while claimant has evidence of bilateral CTS, Dr. J did not recommend surgery and recommended organized physical therapy. Dr. J concluded:

> At this point, I would recommend that interval observation by the treating physician be made and any change in treatment predicated upon the particular condition at any one time. As far as a possible residual sympathetic dystrophy is concerned, I feel that this should be looked at from the viewpoint

> of optimistic expectancy (with the patient's continued use of the left hand). Under such a program, observation at three month intervals may well be reasonable.

Again, what happened next is in dispute. Claimant testified that she again called Dr. AK's office in April 1994 but was unable to obtain any treatment because such treatment had not been approved. According to claimant, she was unable to make an appointment with Dr. AK because of lack of carrier approval and because Dr. AK was waiting on Dr. J's report. The number of times claimant alleges she called Dr. AK's office for an appointment is unclear but claimant alleges at least once (and perhaps more). Claimant testified that she believed seeing Dr. J constituted treatment and that she was waiting for an MMI determination, or BRC, or other information from the Commission or doctors.

Carrier requested a BRC on August 12, 1994, stating that claimant's treating doctor, Dr. AK, had not seen claimant since June 1993. The notice for the BRC setting the October 4, 1994, date was sent to claimant's prior address (the Commission had claimant's current correct address on record). As noted previously, the BRO, at the October 4th BRC, entered an interlocutory order suspending TIBS based on abandonment of medical treatment pursuant to Rule 130.4(n)(3). Although a considerable amount of discussion and testimony about this error was offered at the CCH, in view of the hearing officer's decision and order, it is a nonissue here, other than to acknowledge the Commission was in error in failing to give claimant proper notice of the October 4th BRC. Another BRC was held on October 26, 1994, the unresolved issue was defined and the October 26th BRO "left in effect" the interlocutory order issued at the October 4th BRC.

Claimant returned to see Dr. AK on November 2, 1994. Dr. AK, in a report dated November 2nd, recited that he had not seen claimant since May 17, 1993, referenced the December 6, 1993, bone scan and stated "I recommended that the patient make a follow-up visit in our office for re-evaluation following the bone scan. . . . The patient never returned to my office following that bone scan." Other portions of that report state:

> It is my understanding, from talking to the husband on 11-2-94, that they did not return to my office since they were unaware that she was to return to my office following the bone scan.
>
> * * * *
>
> The patient remains clearly symptomatic. She continues to have complaints of discomfort along the ulnar nerve distribution. At the present time, I cannot

> state what is the best line of treatment for the patient. I doubt if the patient has reflex sympathetic dystrophy because her bone scan was normal, there are no trophic changes, and there are no contractures. Unfortunately, I do not have any clear-cut answers for her continued problems.
>
> * * * *
>
> In my opinion, the patient's husband was quite upset, in my office, because of the continued symptomatology the patient had experienced as well as the difficulty with workers compensation.
>
> * * * *
>
> I have advised the patient and her husband that they will need to seek another physician.

Claimant's version of what occurred at the November 2nd office visit with Dr. AK is that the doctor:

> ". . . became enraged and staged a shouting match at [claimant] and her husband accusing them of yelling when it was only he who was yelling and refused to treat [claimant] and threw them both out of his office and told them not to return . . . he erupted like a child in a temper tantrum in frustration that he could not controll [sic] [claimant] and get her to aquiese [sic] like a good little claimant.

Claimant, on November 10, 1994, requested a change in treating doctors to Dr. Lorente (Dr. L) because Dr. AK ". . . has become disinterested in helping the patient." Claimant's request was approved on November 10, 1994.

The hearing officer's decision has been recited earlier. Claimant's eight-page appeal is indicative and representative of claimant's testimony at the CCH, and seeks to show how claimant was harmed. Claimant characterizes Dr. AK as "unreliable" and "unstable," that Dr. AK "intentionally destroy [sic] all evidence of phone conversations," that the Commission "either through grotesque incompetence or complicity" failed to send claimant mail, that the carrier "lies," obtains "benefits by deception and fraud" and that there is a conspiracy to deny claimant her benefits. The question simply boils down to a question of credibility as to whether claimant did attempt to seek medical attention as she alleges, or whether claimant simply did not return to Dr. AK's office after the December

1993 bone scan and the April 1994 MEO examination, as carrier's adjustor states and the medical records appear to reflect.

Rule 130.4(n)(3) provides that TIBS may be suspended if the employee has abandoned treatment without good cause. Claimant attempted to establish good cause by her testimony that she was unable to obtain medical treatment because the carrier had denied payment for such treatment. Claimant alleges that she sought treatment at times between December 6, 1993, and November 1, 1994, including one or more efforts in April 1994.

The hearing officer advised the parties at the outset of the CCH, and the Appeals Panel has frequently noted, that the hearing officer is the sole judge of the relevance and materiality of the evidence and of the weight and credibility to be given to the evidence. Section 410.165(a). The hearing officer could believe all or part or none of the testimony of any witness. Taylor v. Lewis, 553 S.W.2d 153 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.). In this case, the hearing officer was able to hear the testimony of claimant and carrier's adjustor, observe their demeanor and was obligated to resolve any conflicts in their testimony. Aetna Insurance Co. v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ); Garza v. Commercial Insurance Co. of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). The hearing officer is entitled to reject a witness' testimony, including that of claimant, where the manner or demeanor of the witness created doubt concerning the accuracy of the testimony. English, *supra*. In this case, the hearing officer made a factual determination that the "claimant did not act like an ordinarily prudent person under the same or similar circumstances when she failed to obtain treatment from [Dr. AK] for her . . . injury between December 7, 1993, and November 1, 1994." The hearing officer, in her statement of evidence and discussion, makes clear that she did not believe that the carrier denied treatment by Dr. AK, or other health care providers, except that of the thermogram which had not been approved because it was never properly requested. The hearing officer apparently did not believe that a reasonably prudent person would exist in pain for 11 months simply waiting for a report or an "MMI determination." An appeals level body is not a fact finder, and does not normally pass upon the credibility of witnesses or substitute its own judgment 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). We find the evidence sufficient to support the hearing officer's decision.

Upon review of the record submitted, we find no reversible error and we will not disturb the hearing officer's determinations unless they are so against the great weight and preponderance of the evidence as to be manifestly unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). We do not so find and consequently the decision and order of the hearing officer are affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Lynda H. Nesenholtz
Appeals Judge