APPEAL NO. 950295

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE § 401.001 *et seq*. (1989 Act). On February 7, 1995, a contested case hearing (CCH) was held in _____, Texas, with a hearing officer. The issues were:

1.Whether Claimant has abandoned medical treatment without good cause, and

2.Whether Claimant has sustained disability since November 11, 1993.

The hearing officer determined that claimant had not abandoned medical treatment without good cause and that claimant has sustained disability (as that term is defined in Section 401.011(16)). Appellant (carrier) contends that the decision of the hearing officer is not supported by (sufficient) evidence on both issues and requests that we reverse the decision and render a decision in its favor. The file does not contain a response by the respondent (claimant).

DECISION

The decision and order of the hearing officer are affirmed.

The background facts are not in dispute. Claimant was employed as a truck driver, when, on _____, she was involved in a motor vehicle accident where another vehicle hit the truck claimant was in. The accident involved an impact which ruptured the gas tank of claimant's truck causing the truck to explode. Claimant escaped by crawling out of a window. The driver of the other vehicle was killed in the accident. Claimant was taken to the hospital with complaints of right shoulder and left hand pain. Claimant received medical treatment from a provider selected by the employer, where she was diagnosed as having internal injuries and post-traumatic stress.

Claimant testified that she was off work about a month before being released to return to work on July 8, 1993. An undated Report of Medical Evaluation (TWCC-69) from Dr. S certified maximum medical improvement (MMI) on July 8, 1993, with a zero percent impairment rating (IR). The TWCC-69 states "See attached." The attachments all consist of various reports, including those of other doctors, dated after July 8, 1993. Both claimant and Mr. N, employer's customer service manager at the time (now employer's operations manager), testified that when claimant returned to work she was physically and emotionally unable to perform truck driving duties. It is undisputed that at claimant's request she was trained as a front-end loader operator. Claimant testified that although this was a physically demanding job, she was better able to handle operating a front-end loader than driving a truck. Claimant apparently continued working as a front-end loader operator until she was laid off on November 11, 1993, in a reduction in force (RIF). Claimant testified that she has not worked since that time due to her physical and emotional limitations. Mr. N testified at the CCH that if claimant desired employment driving a truck, she would not

have been laid off and would still be working for this employer. Mr. N further stated they have not rehired any front-end operator loaders, but did have openings for truck drivers.

Claimant testified that between July 1993 and May 1994, she attempted to see a number of doctors due to continued pain and stress of the injury date but that carrier had refused to authorize any additional treatment. Claimant testified that she was required to pay for some care out of her own pocket and was led to believe that carrier would not pay for such treatment. At some point in time, not clear in the record, Dr. CS was appointed (apparently as a Texas Workers' Compensation Commission (Commission)-selected doctor) as a designated doctor to examine claimant. In a detailed narrative report dated May 23, 1994, Dr. CS recites claimant's medical history, notes "NO MEDICAL RECORDS ARE AVAILABLE FOR REVIEW TODAY FROM ANY OF THE TREATING PHYSICIANS," details the results of her physical examination and provides the following diagnoses and summary:

1.Blunt trauma secondary to motor vehicle accident.

2.Possible renal contusion by history. No available records to document extent.

3.Lumbar strain with residual myofascial pain and contracture of the quadratus lumborum, iliopsoas, rectus abdominis and other musculature of the right lumbosacral region.

4.Cannot rule out herniated disc as the patient demonstrates decreased reflexes and subjectively decreased sensation and strength in the right lower extremity.

5.Post-traumatic stress disorder with evidence of depression, anxiety, flashbacks and sleep disturbance.

SUMMARY: In summary, this patient does not appear to be at [MMI]. Although medical records are not available for review today, by her report she has had essentially no interventions for her musculoskeletal injury. It also appears from her report that she has not had diagnostic imaging to rule out a herniated disc. She does not recall any testing such as an EMG and nerve conduction studies. She also reports that she has not had any conservative physical therapy to address her musculoskeletal pain. She appears to have a very poor understanding of her symptoms and of the reasons for her problems and her diagnoses.

It is recommended that if the patient has not had these interventions, she be allowed to have a course of physical therapy for approximately two to three months to address her myofascial pain.

Claimant appears to have changed treating doctors from a Dr. H (no specific report of Dr. H was readily identifiable in the records) to Dr. F. Dr. F, in a report dated January 17, 1995, briefly recites the facts of the accident, references Dr. CS's report, quoted above, and gives his assessment:

> ASSESSMENT: I am in basic agreement with the report of [Dr. CS] and I am curious why these recommendations have not be followed. In terms of diagnosis, I do think she has some element of a myofascial pain syndrome but I think she also has a definite right sided SI joint dysfunction. I don't see evidence at this time for contracture of the quadratus lumborum and iliopsoas. She does have evidence for right carpal tunnel syndrome. She certainly has evidence for post traumatic stress disorder.

A report of Dr. V dated November 16, 1994, gives an impression of "1. . . . hypertension. 2. Microscopic hematuria, etiology to be determined. 3. Anxiety disorder. 4. Musculoskeletal pain."

Carrier's position at the benefit review conference (BRC) on January 3, 1995, was that "[c]laimant has not been treating with a doctor since July 8, 1993 and that she has abandoned medical treatment without good cause, therefore their [sic] not liable for additional temporary income benefits." (We note that there is a report dated August 1993 from Dr. S in the record as well as Dr. CS's comprehensive report of May 1994.)

Claimant denied that she had abandoned medical care and states that carrier has refused to authorize care and has refused to pay for care that she has received on her own. Carrier's adjustor testified that based on her review of the file from another adjusting company, there were no disputed medical charges. In any event, carrier's adjustor said carrier would dispute any charges incurred without a proper referral from a treating doctor.

The hearing officer commented in her discussion of the case:

> . . . the requirements of Commission Rule 130.4 do not appear to have been followed in this case. The Hearing Officer also notes that a failure to obtain medical care does not necessarily indicate abandonment of medical treatment, since bona fide reasons may exist for failure to obtain health care. In this case, Claimant testified that her financial status prevented her from obtaining some reasonable and necessary health care, and that she was unaware that Carrier was statutorily required to pay for all reasonable and necessary health care due to the compensable injuries Claimant sustained on _____. As Claimant appeared to be sincere in her testimony as it related to her failure to obtain medical care, it does not appear particularly relevant that Carrier either received no requests for payment of medical bills

or denied such requests for payment on the basis that the medical care was not sought in conformity with the Act.

Insofar as Claimant's alleged disability is concerned, it is important to note that disability need not be based on an injured worker's physical limitations, alone, but can, under proper circumstances, be based upon the psychological injuries which an injured worker has sustained. Although the record does not contain an opinion from any doctor to the effect that Claimant should remain off work, disability can be established by the testimony of an injured worker, alone.

The following determinations of the hearing officer have been challenged:

CONCLUSIONS OF LAW

3.Claimant has not abandoned medical treatment without good cause.

4.Claimant has sustained disability since November 12, 1993.

5.Income and medical benefits which are payable on account of Claimant's compensable injury of _____, are payable by Carrier.

We would note at this point that the submission by claimant of some 85 pages of unindexed medical records, many of which are handwritten, from various providers, is not particularly helpful in the review of this case.

Carrier appealed the challenged determinations stating that "[t]he decision that the Claimant did not abandon medical treatment without good cause is in conflict with the hearing officer's own finding that the requirements of Commission Rule 130.4 did not appear to be followed in this case." Carrier requests that we find claimant has abandoned medical treatment, did not have disability and is not entitled to temporary income benefits (TIBS) from November 12, 1993, "since Claimant reached [MMI] when released to work on July 8, 1993." We are somewhat unclear what carrier's theory is, but speculate that carrier wants a literal implementation of the title of Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.4 (RULE 130.4) which is:

Rule 130.4: Presumption that [MMI] has been Reached and Resolution when [MMI] has not been Certified.

If that is the case, and carrier is arguing that a presumption of MMI has attached because claimant has "abandoned medical treatment," the Appeals Panel has early held that "contrary to what the title of Rule 130.4 might suggest, MMI cannot be reached or presumed due to the abandonment of treatment. . . . Rule 130.4 is only a device to move

the case by suspending TIBS." Texas Workers' Compensation Commission Appeal No. 92671, decided February 3, 1993. The Appeals Panel has also held that the "only true presumption of MMI occurs at the expiration of 104 weeks from the date TIBS first began to accrue." Section 401.011(30)(B). Texas Workers' Compensation Commission Appeal No. 92456, decided October 8, 1992. Rule 130.4(b) outlines the procedure a carrier may follow if there has not been a certification of MMI; Rule 130.4(d) prohibits a carrier from suspending TIBS unless there is an interlocutory order; subsection (e) deals with what a carrier may do if there is "an apparent lack of medical improvement," Rule 130.4(f) and (g) deal with the doctor's requirements and Rule 130.4(h) and (i) deal with procedures whereby a carrier may request a BRC.

A concurring opinion in Appeal No. 92671, *supra*, commented that confusion engendered by Rule 130.4 possibly comes from Rule 130.4(n)(3) which provides that the benefit review officer (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.

Dr. S certified MMI on July 8, 1993, with a zero percent IR. This apparently was disputed by claimant in that Dr. CS was appointed as a designated doctor. Consequently, whether claimant saw doctors between July 8, 1993, and May 24, 1994, or whether carrier has refused to authorize medical care has become irrelevant in that the benefit dispute resolution process has been reinitiated by the appointment of a designated doctor. We find no inconsistency in the hearing officer's statement that claimant has not abandoned medical care and that "the requirements of Commission Rule 130.4 did not appear to have been followed in this case." The hearing officer did not specify how the requirements of Rule 130.4 were not followed, but, she apparently meant carrier had not followed the procedures required by Rule 130.4. Nor do we disagree with the hearing officer that failure to obtain continued medical care does not necessarily indicate an abandonment of medical treatment.

Carrier complains that the hearing officer, in noting that "claimant appeared to be sincere" in her testimony that she was unaware that carrier was required to pay for medical care, "fails to address or acknowledge the fact that the claimant is and has been represented by an attorney, who is certainly aware of [carrier's] duty to cover certain medical expenses." Claimant's attorney offered to stipulate on the record that he was retained on June 21, 1994, almost a month after Dr. CS had rendered her report stating claimant had not reached MMI. Claimant's allegations that she did not know she was

entitled to medical care appear to pertain to the period before Dr. CS's appointment as the designated doctor.

As to the determination of disability, carrier emphasizes that claimant had been released to work, had, in fact, worked satisfactorily in a physical demanding job for four months before being laid off in a RIF, and that no doctor has stated that claimant should remain off work. Carrier points out that the hearing officer's determination is based only on claimant's testimony and the nature of the accident, implying that such reliance by the hearing officer is improper, but failing to cite any authority. First, we note that the hearing officer is the sole judge of the weight and credibility to be given to the evidence. Section 410.165(a). Further, in a workers' compensation case, the issue of disability may be based on the sole testimony of the injured employee. Gee v. Liberty Mutual Fire Insurance Co., 765 S.W.2d 394 (Tex. 1989); Reina v. General Accident Fire and Life Assurance Corp., 611 S.W.2d 415, 416 (Tex. 1981). The fact that claimant returned to work for the employer, albeit in a job for which claimant was trained in order to accommodate her psychological problems with truck driving, was a factor for the hearing officer to consider. We have previously noted that disability is not necessarily a continuing status only, and that an employee may have intermittent periods of disability. Texas Workers' Compensation Commission Appeal No. 92641, decided January 4, 1993; Texas Workers' Compensation Commission Appeal No. 91122, decided February 6, 1992; and Texas Workers' Compensation Commission Appeal No. 91045, decided November 21, 1991, where the Appeals Panel generally discussed evidence of disability. Consequently, while claimant was training and working the front-end loader position, claimant did not have disability, but when she was laid off it was within the province of the hearing officer to determine whether claimant's inability to obtain and retain employment at the preinjury wage was due to claimant's compensable injury or was due to other factors caused by the lay-off. As we have previously indicated, disability may be based on the claimant's testimony alone and medical evidence is not necessarily required in each case. As the hearing officer notes, disability need not be based on an injured worker's physical limitations alone, but may be based on psychological injuries as well. Texas Workers' Compensation Commission Appeal No. 93571, decided August 20, 1993. The hearing officer determined that claimant's psychological conditions of stress and anxiety regarding the accident have precluded claimant from obtaining other employment, based on claimant's testimony and the medical reports noting anxiety disorder and post-traumatic stress disorder. We find the hearing officer's determinations to be supported by sufficient evidence.

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:

Gary L. Kilgore
Appeals Judge

DISSENTING OPINION:

I cannot agree with the majority opinion regarding the disability issue. I do not question that there was some psychological impact and trauma caused the claimant as a result of the serious motor vehicle accident; however, that does not establish ongoing disability under the circumstances of this case. As I view the evidence, the claimant has established no more than that she is not able to return to driving a truck because of the psychological impact the accident had on her. There is no medical evidence that she has been taken off work. To the contrary, she was returned to work by her then treating doctor, trained for the physically demanding job of operating a front end loader, performed this position without any difficulty or problems until a reduction in force ended the position, and then, without any changed physical condition, claims disability starting the next day. As defined, disability under the 1989 Act is the inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage. I find the evidence lacking that the cause of the inability to obtain or retain employment was because of a compensable injury. Clearly it was not; rather, the reduction in force on November 11, 1993 was the reason. And, while I recognize that there is authority that a claimant's testimony can itself establish disability, as cited by the majority, in my opinion a conclusory statement that I am not able to work cannot suffice when it clearly flies in the face of the fact that the claimant was working without any problem until the position ceased, and there was no other event or changed circumstance affecting the ability to work. Without some changed condition or circumstance, other than a particular position ceasing, I can find no support for a determination that the claimant suffered disability one day but not the

previous day, "because of a compensable injury." In my view, a bald assertion under these circumstances is simply not enough. From the hearing officer's comments cited in the majority opinion, I believe she misapplied the facts in this case to the provision regarding disability. The hearing officer stated "it is important to note that disability need not be based on an injured worker's physical limitations, alone, but can, under proper circumstances, be based upon the psychological injuries which an injured worker has sustained." As I read the evidence, the psychological impact only concerned driving a truck. That I can appreciate, but I fail to see how that applies to other work which the claimant demonstrated she was able to quite capably perform. I would reverse the determination on disability as being so against the great weight and preponderance of the evidence as to be clearly wrong and unjust.

Stark O. Sanders, Jr.
Chief Appeals Judge