APPEAL NO. 010407

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing was held on January 26, 2001. On the sole issue before him, the hearing officer determined that the respondent (carrier) was entitled to suspend the payment of temporary income benefits (TIBs) from September 29, 2000, through November 19, 2000, for the appellant's (claimant) refusal to submit to a required medical examination (RME) without good cause. The claimant urges reversal, asserting that the hearing officer's determination that the claimant did not submit to the RME on September 29, 2000, is contrary to the great weight of the evidence. The carrier requests the decision be affirmed.

DECISION

Affirmed.

The claimant sustained a compensable injury to her right shoulder, right knee, and lower back, as a result of falling off a ladder at work. On May 18, 2000, the carrier requested that the claimant be examined by its own doctor, Dr. N. The request was approved by the Texas Workers' Compensation Commission (Commission) and the RME was scheduled for September 15, 2000. On September 14, 2000, the claimant, who suffers from celiac disease, called to reschedule the appointment due to a flare-up of her digestive disorder. The carrier rescheduled the RME for September 29, 2000.

After attempting to once again reschedule the examination, the claimant appeared for the RME on September 29, 2000, complaining of diarrhea, nausea, and weakness associated with her celiac disease. Although the claimant denies that she refused to be examined, Dr. N's records reflect that the claimant stated "she did not feel that she could be examined or she was going to pass out." Believing that the claimant was attempting to avoid the examination by means of subterfuge and believing that any attempted examination would be rendered useless, Dr. N rescheduled the RME for November 20, 2000.

On October 12, 2000, the claimant underwent an intra-discal, electro-thermal annuloplasty/partial discectomy at L3-4, L4-5, and L5-S1. On November 20, 2000, the claimant appeared for the RME and informed Dr. N's staff of her recent surgery, resulting soreness, and physical restrictions. In view of the claimant's condition, Dr. N elected to defer her RME for another three months.

Section 408.004(e) provides, in pertinent part, that an employee is not entitled to TIBs, and a carrier may suspend TIBs, during, and for, a period in which the employee fails *to submit* to an RME unless the Commission determines that the employee had good cause for the failure to submit to the examination. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 126.6(h) (Rule 126.6(h)), which implements the statute, provides that a carrier may suspend TIBs if an employee fails to *attend* an RME, including a designated doctor

examination, without good cause. We construe the term "attend" in Rule 126.6(h) to include and require *submission to* an RME. This reading is consistent with the express intent of Section 408.004(e), stated above, and is consistent with the Commission's use of the term in the preamble and subsequent subsections of the rule. *See* 24 Tex. Reg. 11399 (1999); Rule126.6(h)(1)-(3) and (i).

As stated above, the claimant asserts on appeal that the hearing officer erred in determining that she did not submit to the RME on September 29, 2000. This was a fact issue for the hearing officer. The hearing officer is the sole judge of the weight and credibility to be given to the evidence. Section 410.165(a). It was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). The trier of fact may believe all, part, or none of the testimony of any witness. Taylor v. Lewis, 553 S.W.2d 153, 161 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.). The hearing officer could disbelieve the claimant's testimony and infer that she refused to submit to an RME on September 29, 2000, based on the statement that "she did not feel that she could be examined or she was going to pass out." The Appeals Panel will not substitute its judgment for that of the hearing officer, unless the hearing officer's finding is so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust, and we do not find it so in this case. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986). Additionally, in view of the evidence presented, we cannot conclude that the hearing officer abused his discretion in determining that the claimant did not have good cause for failing to submit to the RME on September 29, 2000.

The decision and order of the hearing officer are affirmed.

Susan M. Kelley
Appeals Judge

CONCUR:

Judy L. S. Barnes
Appeals Judge

Elaine M. Chaney
Appeals Judge