APPEAL NO. 020321
FILED MARCH 18, 2002

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). Following a contested case hearing held on January 16, 2002, the hearing officer resolved the disputed issues by concluding that the appellant (claimant) was entitled to change treating doctors; that the claimant has had disability from August 3, 2001, through the date of the hearing, except for the period of August 13 through 15, 2001; that the claimant did not have good cause for failing to submit to the required medical examination (RME) on August 17, 2001, and is therefore not entitled to temporary income benefits (TIBs) from August 17, 2001, through the date of the hearing; and that the respondent (carrier) is not entitled to an offset against TIBs because there is no time when the claimant unjustifiably failed or refused to accept a bona fide offer of employment (BFOE). The claimant has appealed the conclusion that he had no good cause for not attending the RME with the resultant suspension of TIBS, and three supporting findings of fact, on evidentiary sufficiency grounds as well as the asserted failure of the carrier to comply with the provisions of Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 126.5 (Rule 126.5). The claimant also asserts error by the hearing officer in allowing the carrier to elicit testimony from a witness whom the claimant asserts was not previously identified and who testified to matters which should have been disclosed in the carrier's response to certain of the claimant's interrogatories. The carrier's response details the evidence, including references to the transcript pages of the claimant's testimony and his responses to the carrier's interrogatories, which the carrier contends sufficiently support the challenged factual findings and legal conclusion. The carrier further points out why, in its view, the claimant's assertions of the carrier's having failed to comply with various provisions of Rule 126.5 are without merit. The claimant filed a response to the carrier's response which contains additional argument about the carrier's failure to answer certain of the claimant's interrogatories, references to various alleged misrepresentations by the carrier as to what the hearing record reflects, and a recitation of the claimant's posthearing effort to obtain a rescheduling of the RME examination. The hearing officer's determinations concerning the change of treating doctor, disability, and BFOE issues, not having been appealed, have become final. Section 410.169.

DECISION

Affirmed.

In addition to the conclusion that he did not have good cause for failing to submit to the RME on August 17, 2001, and is therefore not entitled to TIBs from August 17, 2001, through the date of the hearing, the claimant challenges the factual findings that he agreed to attend the medical examination with Dr. L on August 17, 2001; that he made a conscious decision not to attend the medical examination on August 17, 2001; and that, as of the date of the hearing, he has not attended a rescheduled medical examination. The claimant took the position in his opening statement at the hearing that there was no

evidence of an agreement to an RME and that "no RME agreement ever occurred." In his closing argument he contended that no agreement by him to undergo an RME was proven; that it would not be right to find such an agreement based on evidence of a telephone call he allegedly made to the carrier or its agent; and that there was no RME agreement because the carrier failed to comply with various provisions of Rule 126.5 concerning the preparation and filing of a Request for Medical Exam Order (TWCC-22).

The claimant introduced a copy of the report of the benefit review conference (BRC) held on November 14, 2001, which reflected that the claimant's position was that the "RME was not done properly" in that the carrier did not file a TWCC-22 with the Texas Workers' Compensation Commission (Commission); that the claimant did not agree with the RME; and that sufficient notice of the appointment was not given. The recommendation of the benefit review officer (BRO) was that the claimant did not have good cause for failing to attend the RME, noting that he acknowledged receiving carrier letters about the RME as well as telephone calls, that he had agreed to attend, and that the only reason he did not attend was that he was advised by his attorney not to attend because an "order" had not been filed with the Commission. In his answer to one of the carrier's interrogatories, all of which are in evidence, the claimant states that the BRO's report accurately describes his position on the disputed issues. In another answer, the claimant stated that he disagreed with the BRO's recommendation because the carrier had failed to file the required TWCC-22. And in still another answer the claimant stated that he only agreed to the examination by Dr. L because he was told by the carrier's representative that his failure to agree to the RME appointment would result in the carrier's terminating his income benefits; that he felt threatened and consulted with an attorney; and that after advising the attorney that the carrier had not filed a "proper TWCC-21 [sic]" and that the Commission had not ordered him to attend the appointment with Dr. L, the attorney "advised [him] not to attend."

Testifying through a translator, the claimant stated that on a date he cannot recall, a neighbor gave him a piece of paper with a phone number, advising that he had received a telephone call and had been asked to have the claimant return the call; that he did return the call but does not know the name of the person with whom he spoke nor who the person worked for; and that he was told by this person that "they" wanted to perform a medical examination. The claimant stated that he subsequently received a letter which advised him that the medical examination was scheduled for August 17, 2001, and which stated the location of the examination. He also testified that he told them he would attend the examination because he did not want his benefits stopped but that "[he] decided at the last moment not to go" and did not inform the carrier or the doctor's office. The claimant did not testify that at any time after August 17, 2001, he sought to have the RME rescheduled.

Mr. T, the operations manager for (company), represented by the carrier as a "third party vendor" retained to arrange the RME, testified by telephone. The claimant did not object to the calling of this witness on the ground that he had not been previously identified as a witness. The claimant's own list of potential witnesses exchanged with the carrier, which he introduced, listed the names of two persons, not including Mr. T, with the name and address of the company. The claimant did object to this witness testifying on the

grounds that he may testify to matters which were the subject of certain of the claimant's interrogatories, apparently questions eight and nine, which the carrier failed to answer. At the outset of the hearing, the record indicated that there had been some prehearing, off-the-record discussion concerning the carrier's responses to certain of the claimant's interrogatory questions. The carrier indicated then (and does so again in its response on appeal) that in preparing its responses to the claimant's interrogatories, it inadvertently substituted its own "standard template" claimant interrogatory questions for the first eleven questions actually propounded by the claimant, having apparently assumed those particular questions were the standard, prepared questions adopted by Rule 142.19, and then prepared responses to those questions and to the claimant's additional questions 12 through 16. While not conceding that the claimant's actual interrogatory questions one through eleven were not read before its "standard template" questions were applied, the carrier points out that the claimant's first eleven questions did fail to follow the standard, prepared form questions adopted by Rule 142.19 and that the carrier's counsel "did not catch" the claimant's counsel's "violation of the rule and respond with an objection to all the questions." The record was not well developed concerning this evidence problem. The claimant introduced only his answers to the carrier's interrogatories. The carrier introduced "Claimant's Interrogatories to Carrier" consisting of 16 questions, including the standard, prepared first eleven questions, answered by an employee of the company, with each page bearing at the bottom the statement, "Rule 142.19 Form Interrogatories Claimant to Carrier adopted 7/09/01." With the record in this posture, we can only surmise that the carrier substituted its own form claimant interrogatories using the standard, prepared questions for the first eleven of the sixteen questions. The record does not contain a copy of the questions framed by the claimant which varied from the form questions answered by the carrier.

The hearing officer overruled the claimant's objection to testimony from Mr. T, stating that he would entertain a later motion from the claimant for a continuance to permit further discovery if he felt that fairness required such after hearing Mr. T's testimony. Mr. T testified that he had the company's file notes in hand; that according to the notes the company called the claimant's neighbor on July 17, 2001, in an effort to contact the claimant; that on July 23, 2001, the claimant returned the call, spoke with customer service representative Ms. M, and stated that he was willing to attend the examination but asked that it not be scheduled on a Tuesday or Thursday. Mr. T further testified that the company sent a letter to the claimant by certified mail on July 18, 2001, which was signed for by the claimant on July 23, 2001, requesting that the claimant consent to the RME and respond within seven days by calling the telephone number provided, and advising that if the claimant failed to do so, a request for the RME would be made to the Commission. The claimant introduced a copy of this letter as one of his exhibits. Mr. T also stated that a letter confirming the RME appointment was sent to the claimant. The claimant introduced a copy of a July 24, 2001, letter from the company, sent to him by certified mail, which stated that a medical examination was scheduled for him with Dr. L on Friday, August 17, 2001, at 11:45 a.m., which further provided him with the address and telephone number for Dr. L's office, and which advised him of telephone numbers to call if he was unable to attend the appointment or had any questions. Mr. T further stated that on August 9, 2001,

the claimant called saying he needed transportation for the RME; that on August 16, 2001, the company called and left a message for the claimant confirming the RME appointment. Mr. T also stated that the company did not file a form with the Commission concerning the claimant's RME because the claimant had agreed to the examination and Commission approval was not required.

After Mr. T concluded his testimony, the hearing officer indicated that he would not entertain a motion from the claimant for a continuance for further discovery, commenting that he felt that any additional discovery and evidence related to the content of Mr. T's testimony would not only be cumulative but could actually bolster the carrier's case. The claimant did not request a continuance or object but appeared to acquiesce in the hearing officer's statement. The Appeals Panel reviews evidentiary rulings which are appealed using the abuse of discretion standard. Texas Workers' Compensation Commission Appeal No. 001841, decided September 20, 2000. Based on this record, we do not find abuse of discretion by the hearing officer in admitting the testimony of Mr. T.

The claimant introduced a letter he wrote to the BRO the day after the BRC concerning his contention that pursuant to Rule 126.5(a) and (b) the carrier was required to request the RME by submitting a TWCC-22 and was required to obtain an order from the Commission authorizing the RME. The claimant conceded in that letter he could find no authority for his position in Appeals Panel decisions. The version of Rule 126.5 in effect at the time of the RME in question provides in subsection (a) that the Commission may authorize an RME at the request of the carrier and that such request shall be made in the form and manner prescribed by the Commission. Rule 126.5(b) provides in part that the Commission shall not require an employee to submit to a medical examination at the carrier's request "until the carrier has made an attempt to obtain the agreement of the employee for the examination"; that the carrier shall notify the Commission in the form and manner prescribed by the Commission of any agreement or nonagreement by the employee regarding the requested examination; and that if an agreement is secured for an RME beyond that which the carrier is entitled to require the employee to attend, the written notification must also include an explanation of why good cause exists for the additional RME. Rule 126.6(a) provides in part that an agreement between the parties for an examination pursuant to Rule 126.5 has the same effect as the Commission's formal order. The Commission's instruction sheet accompanying the TWCC-22 form states in part that "after the carrier has tried and failed to obtain the employee's consent," a carrier's request for a medical examination should be sent to a local Commission field office.

The hearing officer is the sole judge of the weight and credibility of the evidence (Section 410.165(a)) and, as the trier of fact, resolves the conflicts and inconsistencies in the evidence (Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ)). Concerning the three findings of fact appealed by the claimant, we are satisfied that these findings are not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951); Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986). We are also satisfied that the challenged legal conclusion is adequately

supported by factual findings.

The decision and order of the hearing officer are affirmed.

The true corporate name of the insurance carrier is **FREMONT INDUSTRIAL INDEMNITY COMPANY** and the name and address of its registered agent for service of process is

C T CORPORATION SYSTEM
350 NORTH ST. PAUL ST.
DALLAS, TEXAS 75201.

Philip F. O'Neill
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Terri Kay Oliver
Appeals Judge