APPEAL NO. 93415

This appeal arises under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq*. (Vernon Supp. 1993) (1989 Act). A benefit contested case hearing (CCH) was held in (city), Texas, on May 3, 1993, (hearing officer) presiding, to consider the sole disputed issue unresolved at the benefit review conference (BRC), namely, whether the appellant (carrier) was entitled to suspend temporary income benefits (TIBS) payable to the respondent (claimant) because the claimant abandoned medical treatment under Texas Workers' Compensation Commission (Commission) Rule 130.4(n), Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.4(n). The hearing officer, upon finding that claimant treated with his treating doctor on May 19 and June 23, 1992, but failed to comply with the prescribed treatment, and that he failed to obtain follow-up treatment with his own choice of physician and refused to submit to examination or treatment by any other physician after June 25, 1992, concluded that claimant did abandon medical treatment pursuant to Rule 130.4(n). Neither party has appealed from such findings and conclusion.

Near the conclusion of the hearing and at the suggestion of the hearing officer, an additional issue was added by agreement of the parties, namely, whether claimant continues to have disability as the result of his (date of injury), compensable injury. The hearing officer determined that claimant had disability from (date of injury), the date of the undisputed injury to his left hand and wrist, through November 10, 1992; did not have disability from November 11, 1992, through April 14, 1993, because of his incarceration and inpatient residence at a drug rehabilitation center; and again had disability from April 15, 1993, through the date of the hearing. The carrier appeals from two factual findings and the legal conclusion concerning the disability issue arguing that, as found by the hearing officer, claimant abandoned medical treatment for his injury; that claimant refused to cooperate with examinations by the carrier's doctor as well as the designated doctor; and that he has not since returned to medical treatment for his injury. Further, the carrier asserts that its doctor certified that claimant reached maximum medical improvement (MMI) on August 24, 1992, with a one percent whole body impairment rating; that based thereon the carrier paid claimant three weeks of impairment income benefits (IIBS); and that no further TIBS are therefore due him. There were no disputed issues over MMI and the impairment rating nor did the hearing officer make any findings on those matters. Claimant's timely response urges our affirmance.

DECISION

Finding the great weight of the evidence against the decision of the hearing officer that claimant had disability on April 15, 1993, through the date of the CCH, we reverse and render a new decision that claimant did not have disability on April 15, 1993, through the date of the CCH.

Though not recited in the hearing officer's Decision and Order, the parties stipulated to certain facts including the fact that claimant sustained a compensable injury on (date of injury). Claimant, the sole witness, testified that he had worked for his employer as a

bricklayer/laborer for approximately two months when, on (date of injury), a cinder block fell on his left hand and "crushed" it. He said he felt pain but did not remove his glove and examine his hand until sometime later that day at mealtime. When he did so, he noticed he had a "knot" on it, that his small finger was "disfigured," and that his hand was becoming "numb." He advised his supervisor and continued to work. Later, claimant returned to his supervisor and was sent to a doctor at an occupational health center. Claimant's medical records indicated he was seen by Dr. T on March 31, 1992. The record of that visit shows no diagnosis but does state claimant could return to work that day with "limited use of left hand," and contains a referral to (Dr. C). Claimant, then 34 years of age, was seen by Dr. C on April 6, 1992. Dr. C obtained x-rays which showed no osseous abnormalities other than an ossicle consistent with an old avulsion. Claimant's history stated he had a prior injury to that wrist a year earlier which had resolved without medical treatment. While Dr. C noted tenderness over the extensor tendons, the sole record of that visit does not reflect that Dr. C diagnosed claimant to have suffered torn ligaments in his hand as the hearing officer stated in his Summary of Evidence. Dr. C did determine that claimant had a painful ganglion cyst formation which appeared to be directly related to his injury and referred him to (Dr. D) for possible surgical intervention. Claimant declined aspiration/injection treatment from Dr. C who released him for "limited type of work" on April 6th and to "return to full-time work" on July 6, 1992.

On April 17th, Dr. D examined claimant and noted in the history that claimant had sustained a "contusion" across his left hand, that a "dorsal swelling-ganglion" had developed, and that claimant said he rubbed and "mashed" the swelling and it disappeared. Dr. D saw no visible swelling or tumor on the dorsal left wrist but noted tenderness to palpation over the dorsal central carpus. Dr. D reviewed the prior x-rays and noted a minor dorsal avulsion fracture fragment present over the carpus. Dr. D's plan required home therapy (heat and massage) for continuing pain, Darvocet-N 100, an MRI evaluation, and light duties (3-4 pounds) at work if available. He also noted the prognosis as "uncertain." Dr. D stated he explained to claimant that since there was "no obvious tumor at this time nor is there any evidence of structural derangement such as fracture or instability, he was safe for light duties if they are available." Dr. D further noted that claimant "may have some ligamentous tear that would have caused a ganglion to occur," that claimant "seemed quite reluctant to return to work even at light duties," and that claimant "will have his MRI for evaluation." Claimant said that his pain never subsided, that he tried "to show" that to Dr. D but "we clashed," and that he did not obtain an MRI because of his fear of the machine.

Claimant said he saw (Dr. M) on May 19th. Dr. M's report indicated claimant was unhappy with his previous medical care and complained of a "knot" on his wrist and numbness in his hand. Dr. M's report stated that he diagnosed a left wrist ganglion which was tender to palpation and with range of motion (ROM), that he rendered an ultrasound treatment, that his treatment plan included x-rays, physical therapy (PT), and medications, and that he anticipated a treatment time frame of 30 to 60 days. Claimant said he returned

to Dr. M on June 23rd, but not thereafter. According to his letter of October 20, 1992, to the carrier's adjuster, Dr. M, on May 19th, felt claimant "had a ganglion cyst of the left wrist with some possible neural impingement." He prescribed a PT regimen of three times a week, medications and a wrist orthosis. Dr. M saw claimant again on June 23rd for "continued complaints of pain and numbness in the wrist and hand." He felt an MRI was indicated. However, claimant had not returned to his office since that time and Dr. M felt claimant had not complied with his treatment. He stated that if claimant required future medical care he should go elsewhere since "he has obviously been noncompliant with my care."

Claimant testified that at the carrier's request he saw (Dr. S) on August 24, 1992, that he became "uncomfortable" with Dr. S's questions, that he was "intoxicated" at the time of his visit, and that he thought his intoxication "might have helped" the problems he had with Dr. S. He said Dr. S told him to get the prior x-rays, that he returned to Dr. C's office to get them but Dr. C, who he said shared offices with Dr. M, was moving, and that he was told the x-rays could not be found so he never returned to Dr. S.

The carrier introduced Dr. S's Report of Medical Evaluation (TWCC-69), signed on September 4, 1992, which reflected the August 24th visit and stated in the narrative portion, the following:

> Patient complained of inability to flex all digits of his left hand because any motion caused pain in his little finger which he stated was crushed. No history of injury was obtained because the patient was belligerent and uncooperative. No new x-rays or previous x-rays were obtained because of patient's attitude.

The TWCC-69 further stated that claimant had a "dropped DIP joint of the left little finger which may or may not involve a fracture," and that he reached MMI on "8-24-92" with a one percent whole body impairment rating for his left little finger. Attached to Dr. S's TWCC-69 was his letter of August 31st to the carrier's adjuster which stated that he had been "unable to evaluate [claimant] adequately" on August 24th, and that claimant had ethanol on his breath and was somewhat belligerent and uncooperative in attitude. The letter went on to state that Dr. S's examination of claimant's little finger showed it "remains in a flexed attitude of thirty to thirty-five degrees at the PIP joint and forty-five degrees at the DIP joint," that he saw no dorsal left wrist ganglion despite the history, that he was unable to obtain the previous x-rays or new ones but that his impression was that claimant had a dropped DIP joint of the left little finger, and that "the status of claimant's wrist problem cannot be determined with the information available."

According to the carrier's Payment of Compensation form (TWCC-21), the carrier paid claimant TIBS from April 6th until it commenced the payment of IIBS for three weeks based on Dr. S's one percent impairment rating. Claimant acknowledged receiving the

TIBS and IIBS payments. Claimant said the carrier requested a BRC which he indicated was held on October 27, 1992. There was no BRC Report in evidence for a BRC of that date and thus we do not know why the BRC was requested. However, claimant introduced a BRC Agreement dated October 27th which stated the "disputed issue" as "[d]isputed [TIBS] pursuant to rule 130.4," and which stated the "resolution" as follows:

> All parties have agreed to continue T.I.B. until next [BRC] or until [claimant] fails to show for his designated Drs appointment with Dr. D on November 2, 1992. At next BRC it will be decided if T.I.B. will continue the decision will be made based on the designated Drs report.

The hearing officer introduced a BRC report for a BRC held on November 17, 1992. In that report, the benefit review officer (BRO), after noting claimant's absence because he was in a "Rehab Center," commented that the Commission had attempted to resolve the dispute by sending claimant to (Dr. DB), the designated doctor, but that Dr. DB indicated claimant was not sufficiently cooperative to be examined or evaluated; that no decision was rendered concerning disability, MMI or impairment rating; that claimant had no information to support disability; and that claimant had abandoned medical treatment which entitled carrier to suspend TIBS per Rule 130.4(n)(3). The BRO entered an Interlocutory Order on November 18th ordering the suspension of TIBS payments as of November 17th.

A November 2nd report from Dr. DB stated that claimant had been worked up for an assessment of his left wrist and small finger, that Dr. DB had reviewed certain medical records, but that claimant would not give "direct answers to questions about his past medical history regarding his left wrist because he feels that I may possibly represent the insurance company and the work place." Dr. DB said he explained to claimant that he could not examine him without obtaining an adequate history and suggested he return to one of the two hand surgeons who had previously evaluated him. Claimant testified that, basically, "the same thing happened" with Dr. DB as occurred with Dr. S except that he was not intoxicated when he saw Dr. DB. He said that Dr. DB's questions put him "on the defensive," and that Dr. DB eventually told him to leave and see another doctor.

Claimant testified that he was incarcerated on November 11, 1992, for violating his probation terms imposed for a drug offense, that he was released from jail on January 17, 1993, and entered a drug rehabilitation center as an in-patient on January 19th. He said he remained there at the time of the hearing and was scheduled to be released from the center on July 17, 1993. He also stated that he never sought any medical treatment for his injured hand while at the center although he could obtain a pass to obtain medical treatment. He also indicated that as of April 15th, he was permitted to seek employment while remaining in residence at the center and was "in the process" at the time of the hearing. He said he felt he could not perform strenuous work because his hand still "goes numb," his little finger is still "dislocated," and he still has a "knot."

The factual findings and legal conclusions as well as the Decision which follow are pertinent to the resolution of the appealed issues.

FINDINGS OF FACT

7.The Claimant was unable to obtain or retain employment at his preinjury wage because of his compensable injury from March 27,1992, through November 10, 1992.

8.From November 11, 1992 through April 14, 1993, the Claimant was unable to obtain or retain employment at his preinjury wage because of incarceration and because he was an inpatient at a drug rehabilitation center.

9.The Claimant has been unable to obtain or retain employment at his preinjury wage because of his compensable injury from April 15, 1993, through the date of the [CCH]

CONCLUSIONS OF LAW

3.The Claimant had disability as defined under the Act from (date of injury), through November 10, 1992. From November 11, 1992, through April 14, 1993, the Claimant did not have disability as defined under the Act as his inability to obtain and retain employment was due to reasons other than his compensable injury. Effective April 15, 1993, through the date of the [CCH], the Claimant has had disability as defined under the [1989 Act].

DECISION

The Interlocutory Order dated November 17, 1992, is affirmed. The Claimant's [TIBS] were properly suspended under commission Rule 130.4(n) as he had abandoned medical treatment. However, the Claimant established that he continued to have disability through the date of the [CCH] <u>with the exception</u> of that period of time during which he was incarcerated and later retained as an inpatient in a drug rehabilitation center. Therefore, the Carrier is liable for [TIBS] to the Claimant for the period during which he had disability through the date of the [CCH]. [TIBS] shall continue until the Claimant no longer has disability or reaches [MMI]. Accrued [TIBS] shall be paid in a lump sum with interest allowable under the [1989 Act]. Medical

benefits are to be paid in accordance with the Act and this decision.

Carrier challenges Findings of Fact Nos. 7 and 9, Conclusion of Law No. 3, and the Decision, and the Order which followed the Decision. We find no merit to carrier's challenge of Finding of Fact No. 7 and so much of Conclusion of Law No. 3 which determines claimant had disability from March 27 through November 10, 1992. The carrier paid TIBS after the (date of injury), injury until some time after receiving Dr. S's one percent impairment rating after which it paid IIBS. However, the carrier voluntarily agreed to continue the payment of TIBS pursuant to the BRC agreement of October 27, 1992, until sometime after Dr. D unsuccessfully attempted to examine claimant on November 2, 1992, after which the carrier obtained the Interlocutory Order suspending its payment of TIBS effective November 17th. Given that the carrier elected to continue the payment of TIBS to the date claimant commenced incarceration, and given the temporal proximity of the period of disability in Finding of Fact No. 7 to the dates of his injury and last medical treatment, we do not find a basis for further reviewing the evidentiary sufficiency of Finding of Fact No. 7.

Carrier does not of course challenge Finding of Fact No. 8 which is favorable to carrier, nor that portion of Conclusion No. 3 relating thereto. We have previously held that a workers' compensation claimant does not have disability when incarcerated. *See* Texas Workers' Compensation Commission Appeal No. 92674, decided January 29, 1993; *see also* Texas Workers' Compensation Commission Appeal No. 92428, decided October 2, 1992.

An employee is entitled to income benefits to compensate him or her for a compensable injury (Article 8308-4.21) and is entitled to TIBS where he or she has disability and has not reached MMI (Article 8308-4.23). Disability is not the same thing as impairment. *See* Article 8308-1.03(24); Texas Workers' Compensation Commission Appeal No. 92064, decided April 3, 1992. Article 8308-1.03(16) defines "disability" as the "inability to obtain or retain employment at wages equivalent to the preinjury wage because of a compensable injury."

We have previously observed:

> There is no requirement that postinjury employment be precisely the same as that held prior to the injury. A claimant must be able to show a causal connection between his diminished wage and the compensable injury. It is possible for an injured worker to be back at work for wages equivalent to preinjury wages, and thus not have disability, but still recuperating such that achievement of MMI is yet in the future. A worker who returns to light duty at a wage less than equivalent to preinjury wage can still be considered to have disability under the 1989 Act. Texas Workers' Compensation Commission

Appeal No. 92270, decided August 6, 1992.

We noted in Texas Workers' Compensation Commission Appeal No. 91045, decided November 21, 1991, that determination of the end of disability as defined in the 1989 Act can be "a very difficult and imprecise matter," particularly where the employee is precluded from working for the preinjury employer for whatever cause. Observing that the 1989 Act and Commission Rules do not provide definitive guidance in this area, we concluded:

> The more consistent, reasonable, and supportable approach, where as here, there is a question as to the continuance of disability, is to require some showing of the employee's inability to obtain and retain employment at preinjury wages because of a compensable injury. . . . If an employee cannot obtain and retain employment because of a compensable injury, disability continues. . . . Evidence such as reasonable efforts made to secure employment, suitable to a person in his circumstances, the availability or unavailability of such employment, and the acceptance or rejection of any employment offer or opportunity may be probative evidence in proving a case for continued [TIBS]. (Citation omitted.) . . . We do not perceive the intent and purpose of the 1989 Act to impose on an injured employee the requirement to engage in new employment while still suffering some lingering effects of his injury unless such employment is reasonably available and fully compatible with his physical conditions and generally within the parameters of his training. On the other hand, we do not believe the 1989 Act is intended to be a shield for an employee to continue to receive [TIBS] where, taking into account all the effects of his injury, he is capable of employment but chooses not to avail himself of reasonable opportunities or, when necessary, a bona fide offer.

The question whether claimant had disability for any period of time after (date of injury), "because of a compensable injury" was one of fact for the hearing officer to resolve. Article 8308-6.34(e) provides that the hearing officer is the sole judge of the weight and credibility to be given the evidence, and we do not disturb the hearing officer's factual findings 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); Pool v. Ford Motor Co., 751 S.W.2d 629 (Tex. 1986).

While the evidence is sufficient to support the finding of disability from March 27 to November 10, 1992, we are unable to find sufficient evidence to support the determination that claimant had disability from April 15, 1993, through the date of the hearing. Dr. C's record indicated claimant could return to limited work on April 6th and to full-time work on July 6, 1992. Dr. D's record stated that claimant, on April 17, 1992, "seemed quite reluctant to return to work even at light duties." Dr. M's record of May 9, 1992, stated he anticipated claimant's treatment to go on for 30 to 60 days. According to the medical records and

claimant's testimony, not only did he decline treatment (aspiration/injection) from Dr. C and the diagnostic procedure (MRI) sought by Drs. D and M, he never sought medical treatment after June 23, 1992. While as of April 15, 1993, claimant said he began a phase of his drug treatment which would permit him to look for work while remaining in residence at the drug center until July 17th, he had not done so but was "in the process." The only evidence tending to prove claimant had disability after April 15, 1993, more than a year after his injury, was his testimony that he could only do "limited work" because his hand "goes numb" and is painful, that his finger is still "dislocated," and that he still has "the knot."

We are convinced from the evidence as above set forth that the great weight and preponderance of the evidence is against Finding of Fact No. 9 and that it is wrong. In re King's Estate, *supra*. We view our comments in Texas Workers' Compensation Commission Appeal No. 92503, decided October 29, 1992, as appropriate here:

> We do accord appropriate deference to a hearing officer in his or her fact finding role and are instructed to do so as clearly set forth in Article 8308-6.34(e) which provides 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 the evidence. However, where our careful and thorough evaluation of all the evidence in the record compellingly leads us to conclude that the evidence in opposition to a finding is so great in weight and preponderates against the finding, we must set aside such finding on a legal sufficiency basis. *See* Texas Workers' Compensation Commission Appeal No. 91038, decided November 14, 1991. This is the situation in this case.

We have often said that the testimony of a claimant alone may be sufficient to prove disability and we do not retreat from that position in the present case. However, we find the probative force of claimant's testimony so weak as to be against the great weight and preponderance of the evidence when juxtaposed with all the compelling evidence against claimant's having disability from and after April 15, 1993.

Finding of Fact No. 7 is affirmed. Finding of Fact No. 9, Conclusion of Law No. 3, and the decision and order are reversed insofar as they determined that claimant had disability on April 15, 1993, through the date of the CCH. A new decision is rendered that claimant did not have disability on April 15, 1993, through the date of the CCH. The claimant remains entitled to medical benefits under the 1989 Act, Article 8308-4.61.

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Philip F. O'Neill
Appeals Judge

CONCUR:

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Gary L. Kilgore
Appeals Judge

DISSENTING OPINION:

I respectfully dissent. The majority opinion recites the evidence in some detail, including claimant's being intoxicated when examined by Dr. S on August 24th; "clashed" with Dr. D on April 17th; and his uncooperative attitude with Dr. DB on November 2nd. While I in no way condone these actions, I believe they go to the weight and credibility to be given the evidence. As the majority points out, the hearing officer is the sole judge of the weight and credibility to be given the evidence. Article 8308-6.34(e). The hearing officer had available to him all of the evidence recited by the majority plus the hearing officer was in a position to observe the demeanor and see the claimant. As such, I believe the hearing officer should be given wide lattitude in making determinations of fact.

The majority states "[w]e have often said that the testimony of a claimant alone may be sufficient to prove disability, and we do not retreat from that position in the present case." I would add that we have made that statement plus adding "even when contradicted by medical testimony." *See* Texas Workers' Compensation Commission Appeal No. 91024, decided October 23, 1991; Texas Workers' Compensation Commission Appeal No. 92167, decided June 11, 1992; Texas Workers' Compensation Commission Appeal No. 92147, decided May 29, 1992; Texas Workers' Compensation Commission Appeal No. 92184, decided June 25, 1992; Texas Workers' Compensation Commission Appeal No. 92402, decided September 23, 1992, and more. Many of these opinions are based on Director, State Employees Workers' Compensation Division v. Wage, 788 S.W.2d 131 (Tex. App.-Beaumont 1990, writ denied) which stated "[t]he Texas Supreme Court has long held that incapacity and disability can be a question answered inferentially by a jury (trier of fact) either through circumstantial evidence or lay witness testimony even if contradicted by testimony of medical experts. (Citation omitted.) This case makes it clear that a jury is entitled to decide causation with or without medical testimony in areas of common experience." The hearing officer, as the trier of fact, had all the medical evidence, including evidence of claimant's misconduct, available to him. The hearing officer recited that claimant testified "that the injury to his hand continues . . . and he remains unable to perform any strenuous activity with his left hand." Apparently, the hearing officer believed claimant, as he was entitled to do, and found that claimant has been unable to obtain or retain

employment at his preinjury wage because of his compensable injury. The majority opinion, citing medical evidence and claimant's uncooperative attitude, would substitute its judgment for that of the hearing officer.

We have also on numerous occasions held that the Appeals Panel should not set aside the decision of a hearing officer because the hearing officer may have drawn inferences and conclusions different than those the Appeals Panel deem most reasonable, even though the record contains evidence of inconsistent inferences. Garza v. Commercial Insurance Co. of Newark, N.J., 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). Texas Workers' Compensation Commission Appeal No. 93334, decided June 14, 1993; Texas Workers' Compensation Commission Appeal No. 93053, decided March 1, 1993; Texas Workers' Compensation Commission Appeal No. 92539, decided November 25, 1992; and others.

The majority, in essence, concedes that there is some evidence to support the hearing officer's determination on this point but finds "the probative force of claimant's testimony so weak as to be against the great weight and preponderance of the evidence when juxtaposed with all the compelling evidence against claimant's having disability . . . ." By characterizing claimant's testimony as weak, it would appear to me that the majority is invading the realm of the fact finder in giving some evidence greater weight than other evidence. This is not to say that the Appeals panel can never overturn a hearing officer based on the great weight and preponderance standard and, although the majority opinion is very well reasoned and written, making a compelling argument in this case, I believe that claimant's misconduct weighed heavily in judging his credibility and a more sympathetic claimant, I speculate under the same circumstances, would have fared better.

I would have affirmed the hearing officer as being supported by sufficient evidence.

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Thomas A. Knapp
Appeals Judge