APPEAL NO. 91045
FILED NOVEMBER 21, 1991

On September 18, 1991, a contested case hearing was held. The hearing officer concluded that the appellant reached maximum medical improvement on June 18, 1991 and ordered payment of temporary income benefits from the date of the accident resulting in injury through June 18, 1991. The appellant urges error in the hearing officer's determination of his reaching maximum medical improvement on June 18, 1991.

DECISION

Finding an insufficient basis for the hearing officer's determination of the appellant reaching maximum medical improvement on June 18, 1991, we reverse and remand.

The appellant was injured in a truck accident in (state 1) on ________, when the truck slid on ice, jack-knifed, and the tractor ended up in a ditch. Although the appellant did not seek medical attention at the time, he testified he had a bump on his head, injured his hand and felt sore all over. He stayed in bed a couple of days and returned to (city 1), Texas on January 28, 1991 and was terminated and has not been employed since. He had only been with the employer for a week and a half to two weeks at the time of the accident. On January 31, in his first notice of injury to his employer, he called the employer about seeing a doctor. He was referred to a Dr. D whom he saw on February 7, 1991. After a full review of the record and documentary evidence in this case, we adopt the chronological statement of evidence in the hearing officer's report as to the relevant events occurring beginning with the first visit to a doctor.

"February 7, 1991	This is the first time Claimant sought medical treatment; he saw Dr. D of (Clinic 1) for neck, back and leg pains. Had two laminectomy operations in 1980. Diagnosed as mild whiplash type injury. Dr. D prescribed ten sessions of physical therapy in next few weeks. Dr. D advised that in all likelihood, his problems will resolve in the next few months with no sequelae.
February 12, 1991	Mr. S reported for physical therapy. Reported that his arms, neck and back were sore, but no headaches. Also reported two laminectomy operations in 1980 and a low back injury two and one-half years ago, which resolved.
March 12, 1991	Recheck with Dr. DY. Said he was better; physical therapy is helping; has decreased neck and back pain; told to continue physical therapy.
March 31, 1991	Physical therapist reports that Claimant intermittently attended physical therapy, with numerous cancellations and no-shows

for treatment. Claimant reports improvement, with no headaches. Claimant apparently did not do home-exercise program. Returned to Dr. DY.

April 2, 1991 — Claimant reports to Dr. D for follow-up. Reports low back pain worse and some intermittent weakness of left arm. Physical therapist reported that Claimant's course of treatment was variable and hard to make sense of, but that the physical therapist had discharged the Claimant on a home program with the Claimant's examination looking unremarkable. Dr. DY assessed the Claimant as having neck and back strains. Dr. DY further reassured Claimant that in all likelihood his aches and pains will resolve with time. The doctor encouraged full activity for the Claimant, and Dr. DY released Claimant to full duty effective April 3, 1991.

April 2, 1991 — The Claimant indicated that he did not think he was getting (continued) any better, and Dr. DY offered to set up an appointment with Dr. DR, a spinal orthopedic surgeon for a second opinion. Claimant declined, saying he had already made his own appointment with Dr. T. Dr. DY released the Claimant from her care.

April 2, 1991 — Claimant sought second opinion from Dr. T because he does not feel he is ready to work. Complained of low back problems and left arm pain. Dr. T noted no major physical problems, giving his diagnosis as neck and low back strains lasting over a long time and a shoulder strain. Dr. T did recommend light duty for three or four weeks to give Claimant time to ferret out his health choices and further decide what to do. Dr. T indicated that Claimant's injuries were long-lasting and that they would likely not get better over time or will very easily recur with any minimal injury or overuse.

May 31, 1991 — Dr. H, of (Clinic 1), reviewed the x-rays of Claimant. Dr. H reported that the spine at the neck showed "degenerative disc change at C5-6 with some posterior spurs and mild narrowing at intervertebral foramina at both sides of C5-6." Dr. H reported that the spine study showed, "possible minimal degenerative disc changes at L4-5. Apophyseal joint degeneration of mild degree at L4-5 and L5-S1.

June 18, 1991 — Claimant went to see Dr. DR at (Clinic 2), complaining of neck pains. The doctor's examination and his x-rays showed

nothing abnormal. Dr. DR suggested an MRI. If the MRI showed no problem, he would recommend returning to work or be considered for job re-education. On September 6, 1991, Dr. DR wrote that the Claimant could only do light or limited duty work, doubting that he would return to his previous job, or he would have already improved.

July 1, 1991 (Center) performed a MRI of the neck spine. Dr. R interpreted the MRI. Dr. R reported that, "No lateralization to help explain the patient's left radicular symptoms is seen." Dr. R's impression of the MRI is that there was a central posterior annular tear, C4, 5 and a small central HNP, C5-6.

July 12, 1991 The Claimant complained of mild neck pain and associated headaches. Dr. DR stated that the Claimant's neurological function was normal. The MRI scan showed nothing that needed surgery or further diagnostic testing or treatment.
Dr. DR suggested that the Claimant be seen by a neurologist for evaluation of his headaches. Dr. DR released Claimant to full-time work and forwarded report to (Clinic 1) because Claimant wanted to change doctors.

July 23, 1991 Dr. L at (Clinic 1) saw the Claimant, who reported arm, neck and shoulder pains, plus Claimant now has headaches 60 - 70% of the time, after not having them previously. The Claimant said he had a long-term headache and pain in the left neck, shoulder, and some arm pains which are probably secondary to long-term neck muscle strain and spasm. Dr. L prescribed physical therapy.

July 29, 1991 Claimant goes to see the physical therapist, RF, at (Clinic 1). Claimant complains of constant headache and neck ache, with arm pain static. The therapist found no strength deficits or deficits in myotomes, although the Claimant showed substantial decrease in range of motion of the neck spine. The physical therapist prescribed nine physical therapy sessions three times a week for three weeks. The Claimant attended only three of the nine physical therapy sessions.

August 13, 1991 Dr. L saw the Claimant, who had discomfort in the neck and left shoulder, and headaches.

August 27, 1991 Dr. L, a neurologist of (Clinic 1), reported that the Claimant continues to undergo therapy, but he could return to light duty

with no lifting over ten pounds.

September 3, 1991 Dr. L of (Clinic 1) saw the Claimant, who was complaining of headaches primarily in the area of the back of the neck."

The hearing officer stated in his Conclusions of Law Numbers 2 and 4 that:

"2. The Claimant reached maximum medical improvement on June 18, 1991.

4. The Claimant is entitled to receive temporary income benefits from the date of the accident through June 18, 1991."

The appellant disagrees with these conclusions. From the evidence before the hearing officer, we find merit to the appellant's position.

The Texas Workers' Compensation Act (1989 Act) provides that "[a]n employee who has disability and who has not attained maximum medical improvement is entitled to temporary income benefits." TEX. REV. CIV. STAT. ANN., art. 8308-4.23(a). The fact of a compensable injury is not under contest here and the only question is when temporary income benefits stop in this case.

Maximum medical improvement is defined in the 1989 Act as "the earlier of:

(A) the point after which further medical recovery from or lasting improvement to an injury can no longer reasonably be anticipated, based upon reasonable medical probability; or

(B) the expiration of 104 weeks from the date income benefits begin to accrue." Article 8308-1.03(32).

Since 104 weeks have not passed in this case only (A) above is pertinent. One method of establishing maximum medical improvement is by certification from a doctor as provided in Rules 130.1-130.3 (Tex. W. C. Comm'n, 28 TEX. ADMIN. CODE ' 130.1-130.3) (Rules). There is no evidence in this case of any doctor's certification of maximum medical improvement. Therefore, we look to other provisions of the 1989 Act and Rules for guidance on the establishment of maximum medical improvement where no physician's certification is present.

Article 8308-4.23(g) provides for rules to be adopted "establishing a presumption that maximum medical improvement has been reached based upon a lack of medical improvement in the employee's condition." Rule 130.4 sets forth a procedure that an insurance carrier may follow to resolve whether an employee has reached maximum medical improvement in the absence of a certification from a doctor. There is no evidence

that this procedure has been employed by the respondent in this case. This is so even though several circumstances during the course of the appellant's treatment triggered the possible invocation of these procedures.

From the record, it appears that the hearing officer may have based his conclusion that the appellant reached maximum medical improvement upon the determination that the appellant was able to return to full duty. We have held that a full release to normal duty is not the same or equivalent to maximum medical improvement. Texas Workers' Compensation Commission Appeal No. 91014 decided September 20, 1991. Parenthetically, we recognize that, although a release to normal duty is not maximum medical improvement, and, therefore, not a basis anchored in maximum medical improvement to discontinue entitlement to temporary income benefits, there are circumstances where earnings or potential earnings are effectively credited against temporary income benefits. For example, a bona fide offer of employment may have an effect in determining the amount, if any, of temporary income benefits. Article 8308-4.23(f) and Rule 129.5. In the situation where an employee has been terminated for separate reasons, it is reasonable to assume the offer of employment of any kind by that employer, is not likely.

Determining there was no basis for the hearing officer's conclusion that maximum medical improvement was reached on June 18, 1991, causes us to reverse and remand. In doing so, another issue requires our attention in this case.

As indicated, temporary income benefits are also predicated upon disability. Disability is defined as "the inability to obtain and retain employment at wages equivalent to the preinjury wage because of a compensable injury." Article 8308-1.03(16). If disability is necessary for the continued payment of temporary income benefits, it would follow that where disability ceases, temporary income benefits stop. Although we have determined that return to full, normal duties does not directly affect attainment of maximum medical improvement, the same is not necessarily the case as to the determination of continued disability.

Eligibility for temporary income benefits, once established, continue as long as there is disability and maximum medical improvement has not been reached. See Montford, Barber, Duncan, A Guide to Texas Workers' Comp Reform, Vol. 1, Sec. 4.23, page 4-91, Butterworth Legal Publishers, City, Texas, 1991. Therefore, once the employee no longer has disability, his entitlements stop. However, determining the end of disability within the meaning of the 1989 Act can be a very difficult and imprecise matter. Where the employee remains in the employment of the preinjury employer, a problem is less likely to arise. However, where as here, the employee is precluded from working for the preinjury employer, for whatever cause, the removal of disability, as defined, is somewhat more convoluted.

The 1989 Act and Rules do not give definitive guidance in this area. However, we

conclude 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. Montford, supra. An unconditional medical release to return to full duty does not, in and of itself, end disability. See Article 8308-4.16(e). If an employee cannot obtain and retain employment because of a compensable injury, disability continues. Where the evidence sufficiently establishes an unconditional medical release to return to full duty status of the employee, the employee has the burden to show that disability is continuing. 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 temporary income benefits. See generally Larson, Workmen's Compensation Law, Vol. 2, ' 57.61(d), pp. 10-208 through 10.247 (Matthew Bender, NY, 1989). Where the medical release is conditional and not a return to full duty status because of the compensable injury, disability, by definition, has not ended unless the employee is able to obtain and retain employment at wages equivalent to his preinjury wages. Evidence to establish this must show there is employment at preinjury wage levels reasonably available to the employee meeting the conditions of the medical release, taking into consideration reasonable limitations on the type of work suitable within the frame work of the employee's abilities, training, experience and qualifications, and that the employee has not availed himself of such employment opportunities.

In the situation where a medical release is to less than full duty and the only employment reasonably available is at a wage less than the preinjury wage, Article 8308-4.23(f) provides for an adjustment when a bona fide offer of employment is made. Rule 129.5 places additional requirements concerning bona fide offers; however, it does not place any requirement for positive action on the part of the employee to seek out employment. Consequently, these provisions have little, if any, effect on a disability determination.

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 condition and generally within the parameters of his training, experience and qualifications. On the other hand, we do not believe the 1989 Act is intended to be a shield for an employee to continue receiving temporary income benefits 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, where necessary, a bona fide offer.

In the case before us, there has been no determination as to the appellant's continued disability within the confines of his ability to obtain and retain employment at his preinjury wages. While he has testified that there is no light duty in the trucking industry and that he cannot work his normal duties because of his injuries, he also stated he has not made any attempts to obtain any kind of employment. There is no evidence as to the

availability of either full duty or light duty employment suitable under the circumstances. In addition, the conflicting medical evidence indicates he may have been restricted to light duty up to the time of the hearing although there is evidence one physician released him to full or normal duty. In sum, whether his disability has continued or is continuing cannot be determined from the record.

The decision of the hearing officer is reversed and the case is remanded for development of appropriate evidence, if any, and reconsideration not inconsistent with this opinion.

Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Robert W. Potts
Appeals Judge