APPEAL NO. 92049

This appeal arises under the Texas Workers' Compensation Act of 1989 (1989 Act), TEX. REV. CIV. STAT. ANN. arts 8308-1.01 *et seq* (Vernon Supp. 1992). On October 2, 1991 and January 7, 1992 a contested case hearing was held at (city), Texas, (hearing officer) presiding as hearing officer. The delay in the hearing was occasioned by a request for continuance by the respondent because of the hospitalization of one of its witnesses. The hearing officer determined that the appellant's disability terminated on May 20, 1991, and that temporary income benefits (TIBs) entitlements ceased on that date. Appellant disagrees with the finding that he has no current disability and has had no disability since May 20, 1991. He seeks reversal and continuation of weekly benefits because there is no evidence to support the hearing officer's determination.

DECISION

Finding sufficient evidence to support the decision of the hearing officer, we affirm.

The appellant worked for (Employer) on (date of injury), when he claims he was injured by inhalation of toxic paint fumes. He and several other employees had been told to come into the meat market area of the supermarket at night to do cleaning and repainting. He testified the meat market was a close area with little ventilation. Although breaks were taken, after a couple of hours he became sick and nauseous, and was allowed to go home. He claims he is still unable to work and that he continues to have pain, numbness and tingling in his legs. He also has headaches and sometimes has something in his chest, like "a cold or something." He has seen several doctors since his episode of inhaling the paint fumes and their reports are a part of the record. The appellant also stated that "whatever time I have, I help (my wife) out" in her business.

The respondent called three witnesses who worked with the claimant on the evening that the meat market was cleaned and painted. All three denied they ever developed any symptoms like the appellant or became ill at all. A couple of the witnesses indicated the appellant had stated he was not feeling well before he came to work and that he, the appellant, had a phobia against working at night. One of the witnesses testified that sometime after (date of injury), he saw the appellant in the outfield at a baseball game with his glove on.

The appellant's supervisor, (Mr. W) testified that the employer is and has been ready to put the appellant back to work, but that appellant has never brought in a doctor's release. The appellant acknowledges that he was informed the employer had a job for him. He does not indicate that he has attempted to get a release.

The appellant has seen four different doctors since the night of the paint fumes inhalation. The medical reports introduced into evidence indicate that the first treating doctor was (Dr. T). On February 13, Dr. T estimated "disability" to last three (3) days. On February 26, Dr. T described appellant's status as "complains of new vague symptoms that

need reassurance only." He further stated that appellant had been released from further medical care and stated "[N]o medical impairment as far as I can tell." Dr. T referred appellant to (Dr. L), a neurologist, for evaluation. Dr. L treated appellant from March 6th to May 20th when he released him as a patient. His reports of May 2nd and 20th state:

May 2, 1991

". . . he says he is getting little jumpy motions in his legs. What he is describing are fasciculation. On prolonged observations of the arms and legs I do not see any evidence of fasciculation . . . . I could not detect any weakness or atrophy . . . ."

May 20, 1991

". . . I have discussed with him the discrepancy of his stories, why he wanted me to refer him to (Dr. C), etc. No clear cut explanation was forthcoming and I simply do not have any credibility in what (Mr. C) says and therefore I have recommended that he seek another doctor."

(Dr. C) saw the appellant on April 23, 1991, and wrote a diagnosis of severe migraine headache brought on by exposure to spray paint. Dr. C states "[t]he brisk reflexes in the legs are not consistent with any type of toxic peripheral neuropathy." Dr. C also states, "[o]f significance, patient does have a history of Migraine headaches" and that "[r]egarding the episode of headache, lightheadedness, etc, this would all be consistent with severe Migraine triggered by the spray paint." Dr. C in a statement dated May 1, 1991, indicated that [r]egarding the lumbar region compression, I feel this is totally inconsistent with any type of toxin exposure." He states, however, that with the abnormal exam in the lower back he, Dr. C, can not make a decision about returning to work.

The appellant was also seen by a (Dr. F). Following his examination and nerve conduction studies, he determined the results were "normal nerve conduction studies." He stated he did not see much evidence of neurologic injury in the appellant. In a report dated August 23, 1991, he states that he is "unable to find a physical cause for (Mr. C's) symptoms" (leg pain).

The hearing officer determined that from May 20 on, the appellant was no longer disabled from the inhalation of toxic paint fumes and that he was no longer entitled to temporary income benefits. We believe the evidence of record is sufficient to support his determinations. However, we have concern with his statement of fact to the effect that an insurance carrier can unilaterally stop temporary income benefits simply based upon a doctor's report.

In Texas Workers' Compensation Commission Appeal No. 91045 (Docket No. AU-00055-91-CC-1) decided November 21, 1991, we held that temporary income benefits are

no longer due once maximum medical improvement has been reached or when there is no longer disability. As we observed, "determining the end of disability within the meaning of the 1989 Act can be a very difficult and imprecise matter." Appeal 91045 *supra* at page 6. The matter is always a factual issue and it is not uncommon to have conflicting evidence and unclear medical reports. In the case before us, for example, we do not have an unconditional medical release to full duty status, but only various medical reports, when taken together, support a fact finder's determination that disability ceased on and after May 20, 1991.

In Texas Workers' Compensation Commission Appeal No. 91060 (Docket No. DA-00022-91-CC-1) decided December 12, 1991, we determined that where a report from a carrier's physician, pursuant to a request for medical examination [Article 8308-4.16(b)] provides that a claimant is fully capable of unrestricted return to work, the carrier was not authorized to stop or suspend further compensation without any further action by the Commission. We pointed out that subsection (e) of Article 8308-4.16 provided that a carrier may not suspend benefit payments pending the benefit review conference and observed that the purpose of the benefit review conference was to mediate and resolve, if possible, disputed issues such as the end of disability. Further, we noted that the Benefit Review Officer can issue appropriate interlocutory orders.

While the case before us involves not a carrier's physician's report about return to work, but involves several reports of the appellant's physicians, none of which specifically states the appellant is released to unconditional, full time work, we do not believe it is on any better footing for a unilateral determination to stop temporary income benefits. Rather, expeditious action in the dispute resolution process, where all sides can be heard and all evidence considered, is what is contemplated by the 1989 Act. We are not unmindful of the provisions of Article 8308-5.23 and Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 124.4 (TWCC Rule 124.4), which provide for 10 days notice to the Commission whenever compensation is terminated or reduced and provides for an administrative violation if the grounds are determined not to be reasonable. However, it is appropriate, and generally advisable, to seek a benefit review conference and an interlocutory order to terminate compensation. *See* Montford, Barber, Duncan, A Guide to Texas Workers' Comp Reform, Vol. 1, Sec 5.22, page 5.57, Butterworth Legal Publishers, Austin, Texas, 1991. Without this procedure, a carrier who stops compensation does so at risk of administrative penalty. Where an issue is in dispute, such as is the case here, the resolution process is the avenue that should be taken rather than the unilateral cessation of benefits by the carrier.

As indicated, the hearing officer determined that disability ceased on May 20, 1991, and we have found the evidence sufficient to support his determination. Although there was no determination as to reasonableness as far as entitlement to TIBs is concerned, we infer that the hearing officer was so finding in his conclusion of law that the respondent was acting within the Act and Rules when it terminated temporary income benefits effective May 7, 1991. (The subsequent benefit review conference in August 1991 resulted in temporary ncome benefits being restored.) Of course, a determination of reasonableness where the issue is whether or not an administrative violation has occurred is resolved under the

provisions of Article 8308-10.21 with an entitlement to a hearing under the Administrative Procedure and Texas Register Act as provided by Article 8308-10.33.

The decision and order of the hearing officer are affirmed.

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Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

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Joe Sebesta
Appeals Judge

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Robert W. Potts
Appeals Judge