APPEAL NO. 92056

On January 9, 1992, a contested case hearing was held in (city), Texas, with (hearing officer) presiding as the hearing officer. He determined that the claimant, appellant herein, did not suffer a compensable injury on (date of injury), and that she was not disabled as a result of her alleged injury. He denied appellant benefits under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. arts. 8308-1.01 *et seq*. (Vernon Supp 1992) (1989 Act). Appellant contends that certain findings and conclusions made by the hearing officer are not supported by the evidence and requests that we reverse the hearing officer's decision and award her workers' compensation benefits. Respondent, the employer's workers' compensation insurance carrier, contends that the findings, conclusions, and decision of the hearing officer are supported by the evidence and requests that we affirm his decision.

DECISION

The hearing officer's decision is modified to reflect that appellant is not entitled to temporary income benefits (as opposed to nonentitlement to all benefits) and, as modified, is affirmed.

At the hearing, the parties agreed there were only two issues to be decided:

1.During what period of time has the claimant suffered disability?

and,

2.Does the claimant have disability as a result of the injury involved in this case?

These were the two issues reported out of the benefit review conference (BRC). The hearing officer concluded that appellant did not have a disability as a result of her alleged injury. There is no indication whatsoever, in the BRC report, in the statement of issues agreed to at the hearing, or in the hearing record, that respondent ever contested appellant's claim of an injury in the course and scope of employment. Furthermore, the evidence presented at the hearing focused on whether or not, and for what period of time, appellant suffered disability as a result of her injury. Despite the fact that no disputed issue was raised by the parties as to the existance of an injury in the course and scope of employment, the hearing officer nevertheless concluded that appellant failed to prove she had suffered a compensable injury (Conclusion 3); that she did not have a compensable injury under the 1989 Act (Conclusion 5); and that she is not entitled to benefits under the 1989 Act (Conclusion 6). Although the appellant contests Conclusions 3, 5, and 6 solely on the basis of the sufficiency of the evidence, it is our opinion that Conclusions 3 and 5 were unnecessary and were made in error since respondent did not controvert the claim of injury in the course and scope of employment, nor raise it as a disputed issue, but only contested the issue of disability resulting from the injury. *See generally*, Texas Workers'

Compensation Commission Appeal No. 92045 (Docket No. FW-00028-91-CC-1) decided February 25, 1992. The hearing officer should also have limited his denial of benefits under Conclusion 6 to temporary income benefits since the issue of disability relates solely to whether or not the appellant is entitled to temporary income benefits and does not affect entitlement to medical benefits. *See generally,* Texas Workers' Compensation Commission Appeal No. 92078 (Docket No. BU-91143172-02-91-CC) decided April 2, 1992.

We now review the evidence to determine whether it is sufficient to support the hearing officer's conclusion that appellant did not suffer disability as a result of her injury. "Disability" is defined in the 1989 Act 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). According to appellant, who was 40 years of age at the time of her injury, she had been working as a hotel housekeeper for her employer for about four years when, in (date), she started feeling pain in her left leg and left arm as a result of repetitious, physically traumatic activities in her job. She said she reported her leg pain to her supervisor and was sent to a medical clinic on (date), where (Dr. G) diagnosed left wrist and left knee tendinitis and put her on light duty work. She said (Dr. Gr) also diagnosed tendinitis on April 8, 1991.

Sometime in June 1991, she said she started having problems with her hip and back which bothered her when she bent over or walked up or down stairs. She said she reported to her supervisor, Javier, that she could not bend over. (Dr. Gr) referred her to (Dr. D). When asked why she told (Dr. D) that her employer did not have any light duty work, appellant testified that "I couldn't do the work. It wasn't light enough for me." She explained that one of the doctor's she saw restricted her to lifting less than 10 pounds, and that she was unable to lift mattresses or tuck sheets. She also said that during her light duty status her supervisor would make a list of job duties, she would tell him which ones she could not do, and he would give her other job duties. She testified when she cleaned a room while on light duty, she would be teamed with another employee and that she would not have to make beds, vacuum, or move furniture, but would have to clean bathrooms, strip beds of linens, strip floor wax, wash walls, clean stairways, and mop. She stated that she could not perform the light duty work because it was too hard for her to do, although she acknowledged that her employer tried to work with her in finding job duties she could perform. She explained that the problem with the light duty work was she could only use her right arm, which became tired, because her left arm was "clumsy." By clumsy she meant her left arm would go to sleep, get numb, tingle, and let go of things sometimes. Also, she said her left leg was weak causing her trouble in walking. She said she did light duty as long as she could and then stopped working on July 22, 1991.

According to appellant, her symptoms at the time of the hearing were headaches, neck pain, numbness and tingling in her left arm, and pain in her lower back radiating down to her buttocks and left leg. She testified that she is unemployable for housekeeping work, but could do telephone answering work if sitting down.

(JM), one of appellant's supervisors, testified that appellant told him she had leg pain;

that he filled out an accident report; that appellant's doctor assigned her to light duty work; and that he and appellant's other supervisor gave her light duty work consisting of dusting, some vacuuming, running errands, and things that "weren't too tedious" and wouldn't involve two hands or too much work. He said that if appellant complained that one of her arms bothered her, or that she was getting tired of the work while on light duty, he would assign her a different task. He also testified that appellant had been given full-time light duty work and was paid the same hourly rate as before going on light duty status. He said her hours did not change much, although she requested to leave work early a few times. He could not recall any complaints from appellant about low back pain, but did recall that she complained about pain in her left arm sometime after her report of leg pain and that he filled out a second accident report. This witness said appellant was not terminated from her job and did not tell him her reasons for leaving her job.

(FM), another of appellant's supervisors, testified that he was also involved in assigning appellant's light duty work and that it consisted of wiping mirrors and counters and did not involve any lifting, scrubbing, or pushing. He recalled that appellant complained about her left wrist, but did not remember any other complaints.

(PS), who is the supervisor of appellant's two supervisors, testified that while appellant was on light duty she told him her legs or knees got tired from stooping and her right arm got tired from continuous use. He said when she told him about her legs and arm he assigned her to do other things to make her more comfortable and that she was free to work at other tasks. He described appellant's light duty work as picking up paper around the hotel, wiping down counters, policing public areas, wiping down baseboards, removing wax along the edges of walls, scraping gum from sidewalks, and delivering pillows, irons, and other items to guests. He recalled that her doctor restricted her from lifting items over 15 pounds with her left hand, and that that was the only restriction. He said that light duty work within appellant's limitations was always available to her and that such work is still available to her. He said that appellant was not terminated from her job and was still on the payroll. (From the record, it appears that "on the payroll" meant being shown as an employee on the employer's record, but not actually being paid.)

(SC), the employer's Benefits Manager, testified that light duty work within appellant's limitation was always available to appellant; that in mid-July 1991 she received a report from a doctor which took appellant completely off work; that appellant never attempted to come back to work after that time; that appellant is still considered to be an active employee and is on the payroll; and that light duty work is available should appellant return to work. She also said she talked to an adjuster who told her appellant's doctor took her completely off work because appellant had told the doctor there was no light duty available. She further testified that no incident report about low back pain was in appellant's personnel file and that she was unaware of any such complaint being made.

Numerous medical records and reports were introduced into evidence by appellant. They revealed the following:

1.Appellant saw (Dr. G) on (date), for complaints of pain from repetitive activities at work. X-rays of her left knee and wrist were negative. The doctor diagnosed left wrist and left knee tendinitis, restricted her to light duty work from March 8 to April 11, 1991 (restricted as to no lifting, pushing, pulling over 10 pounds with left hand), told her to wear a wrist support and get physical therapy, and released her to regular work on April 12, 1991. This doctor stated that no disability was expected.

2.Appellant next went to (Dr. Gr) on April 8, 1991, for complaints of pain in her left leg and left forearm. His initial impression was mild carpal tunnel syndrome secondary to tenosynovitis, but when appellant didn't respond to an injection he though the impression was suspect and requested electrodiagnostic studies. (Dr. M) did the EMG studies on May 31, 1991, and found evidence of chronic denervation with "reinveration" in a lot of the C8 muscles, no evidence of any active radiculopathy, and stated he could not explain any of appellant's symptoms on the basis of a neurological problem. (Dr. Gr) noted the results of the EMG studies and stated that appellant "should continue on light duty." He then referred her to (Dr. D). (Dr. Gr's) latest impression, given on October 7, 1991, was that appellant's major problem is not due to left carpal tunnel syndrome, but rather to a more proximal compression of the cervical spine.

3.(Dr. D) examined appellant on July 22, 1991. He noted that appellant told him her problem dated back to (date) when she was doing a lot of bending, lifting, and walking at work and had an onset of lower back pain. She complained of low back, neck and bilateral arm pain, and bilateral leg numbness. He also noted that she said she had been placed on light duty status, but that there was no light work available. His initial impression was intermittent cervical and lumbar radiculopathy with cervical and lumbar strain, and he asked for MRI scans. In his report of her initial visit (July 22nd) he stated "I do not believe she can return to her regular work which is housekeeping. Apparently, there is no light duty work available at this time." He gave appellant a "disability certificate" which indicated "totally incapacitated."

4.(Dr. D) reviewed the MRI scans and noted degenerative changes at every level in the neck and in the lower back with no evidence of disc herniation. He diagnosed cervical and lumbar degenerative disc disease with cervical radiculopathy and stated that appellant would probably need a light duty restriction. In a September 1991 report he stated "apparently she was not able to go back to work because there was no light duty work available," and that "I will continue her off work pending the therapy."

5In a letter to respondent's adjustor dated October 10, 1991, (Dr. D) stated "there appears to be light duty work available, I certainly will encourage her to attempt this." In a November 1991 report (Dr. D) noted that appellant told him she had tried light duty but was not able to tolerate it because it involved scrubbing a lot of floors and doing strenuous activities with her neck and back.

6.In a letter to respondent's adjustor dated December 12, 1991, (Dr. D) stated "I do feel that she would have been capable of doing some type of light duty work at the time of her initial visit on July 22, 1991. It was my understanding at that time that light duty work was not available and she was, therefore, kept off work and not allowed to return to her regular work which is housekeeping." He went on to state that appellant's symptoms had increased over the last few months, that he considered her to be incapacitated at the time of the report (December 1991), and that she should be kept off work. On January 6, 1992, he recommended an awake cervical discogram due to lack of objective findings to explain appellant's pain and issued a "disability certificate" which stated "totally incapacitated" to February 6, 1992.

7.(Dr. A) (who respondent selected to examine appellant from a list of doctors provided by appellant's former attorney) saw appellant for complaints of neck, left arm, and lower back pain on December 18, 1991, examined her, and reviewed her medical records. He stated "Frankly, there appears to be no good reason why the patient is not back at work. It seems like the degenerative changes she has in her cervical and low back is (sic) nothing unusual for someone her age and I see, at the present time, no contraindication of the patient to not return to her former duties."

Although there was a conflict in the evidence as to whether appellant was capable of performing light duty work, with appellant testifying she could not and her doctors reporting that she could (except for (Dr. D) who was apparently misinformed by appellant as to the availability of light duty work, but who later clarified she was capable of light duty work), such conflict in the evidence was a matter for the hearing officer to resolve after weighing the evidence and assessing the credibility of the witnesses. Garza v. Commercial Insurance Co. of Newark, N.J., 508 S.W.2d 701 (Tex. Civ. App.-Amarillo, 1974, no writ); Article 8308-6.34(e). There was also a conflict between the December 1991 reports of (Doctor D) and (Doctor A), with (Dr. D) stating that appellant was totally incapacitated and (Dr. A) stating that he saw no good reason why appellant wasn't back at work. As the trier of fact, the hearing officer also judges the weight to be given expert medical testimony, and resolves conflicts and inconsistencies in the testimony of expert medical witnesses. Texas Employers' Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ); Atkinson v. United States Fidelity Guaranty Co., 235 S.W.2d 509 (Tex. Civ. App.-San Antonio 1950, writ ref'd n.r.e.). After reviewing the entire record, we cannot

conclude that the hearing officer's decision to give more weight to the doctors' reports stating that appellant was capable of light duty work than he gave to appellant's testimony that she was unable to do light duty work, was unreasonable. Nor can we conclude that his decision to give more weight to (Dr. A's) report of December 1991 than to (Dr. D') report of the same month was unreasonable. Since the evidence shows that light duty work within appellant's limitations was available to appellant, that appellant was capable of performing light duty work, that the wage for the light duty work was the same as her preinjury wage, and that appellant left her job voluntarily and not as a result of her compensable injury, we conclude that there was sufficient evidence to support the hearing officer's conclusion that appellant is not disabled, and we find that such conclusion was not against the great weight and preponderance of the evidence. *See* Texas Workers' Compensation Commission Appeal No. 91045 (Docket No. AU-00055-91-CC-2) decided November 21, 1991.

Appellant also contests Finding No. 6 which states that appellant's condition is the result of a degenerative process, including her age, and is not caused by her employment. We believe that this finding was not necessary to the hearing officer's decision. It appears to us that Finding No. 6 relates directly to the hearing officer's conclusion that appellant did not sustain an injury in the course and scope of her employment, a matter which was not in dispute. In that context, it was unwarranted and may be disregarded. *See* Bittick v. Ward, 448 S.W.2d 174 (Tex. Civ. App.-Beaumont 1969, writ ref'd n.r.e.).

We find that Conclusion No. 3 that appellant did not suffer a compensable injury and Conclusion No. 5 that appellant does not have a compensable injury to be in error. Injury in the course and scope of employment was not controverted by respondent. We find that Conclusion No. 4 that appellant does not have a disability as a result of her injury to be supported by the evidence. Conclusion No. 6 is also in error and should have read "the Claimant is not entitled to temporary income benefits under the Texas Workers' Compensation Act." The hearing officer's decision is modified to read that "Claimant, (claimant), is not entitled to receive temporary income benefits from National Union Fire Insurance Company of Pittsburgh, PA, as a result of her injury on (date of injury), and as modified, is affirmed.

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Robert W. Potts
Appeals Judge

CONCUR:

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Philip F. O'Neill
Appeals Judge

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Susan M. Kelley
Appeals Judge