APPEAL NO. 92193

This appeal arises under the Texas Workers' Compensation Act of 1989 (1989 Act), TEX. REV. CIV. STAT. ANN., arts. 8308-1.01 through 8308-11.10 (Vernon Supp. 1992). On March 12, 1992, a contested case hearing was held in (city), Texas, with the assistance of a Spanish-English interpreter. The hearing officer, (hearing officer), held the record open until April 2, 1992, at which time she ruled on the admissibility of documentary evidence that was not admitted at the hearing. She found that maximum medical improvement (MMI) had not been reached, that respondent has disability, and that temporary income benefits (TIBs) should continue. Appellant asserts that maximum medical improvement had been reached, that no disability exists, and that temporary income benefits paid while respondent worked should be reimbursed.

DECISION

Finding that the evidence is sufficient to support the decision of the hearing officer, we affirm, but modify the order to assure credit is given for temporary income benefits paid while respondent held another job.

Respondent is a welder employed by (employer) who fell from a ladder on (date of injury), and injured his back and pelvis. Appellant paid temporary income benefits from (date), to January 20, 1992. A benefit review conference was held on January 21, 1992, to determine whether maximum medical improvement had been reached. Appellant thereafter notified the commission on a TWCC Form 21 that the reason for terminating temporary income benefits was "BRC agreed to have TIBS suspended."

Respondent testified that in 1989, while working for the same employer inside a silo, dry cement was erroneously pumped into it. He had a problem exiting because of inability to breathe, to see, and to use a ladder that was too short to reach the exit. He received medical care for his post-traumatic stress which was said to have affected his thyroid gland. He takes drugs to control the thyroid, and other symptoms, such as dizziness, continued even after he reached a settlement in regard to that injury. He continues to see (Dr. P) for management of the thyroid condition.

After the injury of (date of injury), respondent has seen (Dr. ES). He placed respondent in a work hardening program and respondent states that he released him to light duty work. Dr. ES' reply to appellant's form on September 21, 1991, indicates that light duty would be allowed in six weeks after completion of a work hardening program. There is no evidence that Dr. ES has returned respondent to full duty or has found that he has reached maximum medical improvement.

Appellant in requesting the benefit review conference held on January 21, 1992, cited an "MEO" performed by (Dr. H) on respondent (see H. O. Exhibit 2). Dr. H, on June 24, 1991, submitted a seven page letter to appellant describing his examination of respondent. He concluded by saying, "this gentleman has incurred little or no permanent medical

impairment attributable to the accident of (date of injury). I see no reason why he could not return to the work that he was doing as a welder without restrictions." Subsequently a form that appears to be a TWCC Form 69 was submitted as written by Dr. H, but it was unsigned. It found maximum medical improvement on June 24, 1991, with "none" as a percentage of impairment. This form was not admitted at hearing and it, along with an affidavit of an employee of appellant, was not admitted when submitted within the time frame allowed by the hearing officer after hearing.

Appellant obtained employment with (employer 2) on October 28, 1991. After a month and a half, he was "laid off." His job there involved ground leveling for pouring concrete and he was paid more than he had made for employer. Respondent also testified that his supervisor told a friend of his that respondent had to work faster (being laid off was mentioned at that time), but respondent replied that he was doing as much as he could do. Two weeks later he was laid off. Appellant also said that he still has pain and still gets dizzy. He added that the dizziness and loss of balance is the same as it was after the 1989 accident. In December 1991, respondent applied for unemployment compensation testifying both that he provided that agency a copy of his "light duty" note and that he told them that he was able to work. He has looked for work in a warehouse and as a welder without success since then.

(WG) testified for appellant and identified himself as the purchasing agent for employer. He said that much of their welding is on the ground or at a height of only six to eight feet from the ground. He added that employer would not have employment for respondent under the light duty restrictions which were represented at the hearing as being imposed on respondent.

Appellant asserts that the form addressing maximum medical improvement by Dr. H should have been admitted at the hearing or should have been admitted later when offered with the affidavit as to its authenticity. Article 8308-6.34(e) of the 1989 Act does not require that the hearing officer admit an unsigned report. Similarly, the hearing officer is the sole judge, not only of weight and credibility to be given evidence admitted, but is also sole judge of whether evidence offered is relevant and therefore admissible. The affidavit of (DG) dated April 1, 1992, only addressed efforts to get the unsigned form signed and attempted, unsuccessfully, to authenticate it when still unsigned. As a result, the hearing officer could conclude that the affidavit was not relevant to the issues at the hearing. While the form was initially objected to by respondent as not timely exchanged, that objection was subsumed by the decision to give appellant time after hearing to get the form signed--which was not accomplished. However, there was no evidence offered that a copy of the form had been sent to respondent's treating doctor for review as called for by rule 130.3. Without the treating doctor's concurrence as to MMI, the provisions of Article 8308-4.25 of the 1989 Act would control and added steps in regard to a designated doctor would need to be followed.

Consistent with Article 8308-4.26 of the 1989 Act and Tex W. C. Comm'n, 28 Tex Admin Code § 130.1 through 130.3 (rule 130.1 through 130.3), the appeals panel has held

in Texas Workers' Compensation Commission Appeal No. 92027 (redacted Docket No) dated March 27, 1992, that the physician's signature was necessary to certify that maximum medical improvement had been reached. We have not ruled that such an unsigned form could not be admitted and given whatever weight the hearing officer determined in regard to another issue, such as existence of disability. Even had the hearing officer admitted the form and affidavit in question, however, she still could have determined that the form did not certify maximum medical improvement consistent with Appeal No. 92027. Alternatively, had she admitted the form and affidavit and found that the affidavit so authoritatively addressed the issue of the missing signature on the form that maximum medical improvement had been certified, she still would have to consider the provisions of rule 130.3 and Article 8308-4.25.

Appellant also contends that no disability exists. It is true that appellant did work approximately six weeks beginning in late October 1991. Article 8308-1.03 (16) of the 1989 Act defines disability as "the inability to obtain and retain employment at wages equivalent to the preinjury wage because of a compensable injury." He did obtain work with employer 2 at a wage greater than the preinjury wage, but he testified that he could not retain that job because he was laid off when he could not keep up the pace of the work. Since he could not retain the job because of the compensable injury (there was no indication that he was working at any height that could raise an issue as to retainability affected by a prior injury), disability is again present after he lost the job with employer 2. Appellant also attempts to tie respondent's inability to work to heights and dizziness by referring to his testimony. That testimony, at the page of the transcript cited by appellant says:

Q.Did he tell you what restrictions you have?
A.Yes.

Q.What is that?
A.Do not push -- not to push things that were very heavy, not to pick up heavy things.

Q.Did he put any restrictions on you about your balance or working at heights?
A.Yes.

Q.What was that?
A.I cannot work at high places.

Q.Why not?
A.Because I'm dizzy. And I don't feel too well, or I might break my legs.

Q.Are you afraid?
A.Yes.

Q.Why?

A.I think in the accident that I had, I don't feel well.

Q.Did you try to go back to work?
A.Yes.

Q.Where?
A.(Employer 2)

In addressing appellant's question as to dizziness and heights, we note that Article 8308-4.30 of the 1989 Act only allows contribution in regard to impairment or supplemental income benefits. An injury in the course of employment does not have to be the sole cause of disability and an employee's predisposing condition does not preclude compensation. Baird v. T.E.I.A., 495 S.W.2d 207 (Tex. 1973).

In addition the appeals panel has not held that an employee under a conditional medical release has to show that work is not available. *See* Texas Workers' Compensation Commission Appeal No. 91045 (redacted Docket No.) decided November 21, 1991. Respondent's employer stated at hearing that it did not have work for him under the limitations imposed. Finally appellant says that Dr. ES on September 21 said that respondent could return to work light duty (emphasis added) when work hardening is complete and quotes a physical therapist as stating that respondent is physically capable of performing his work. The therapist in this case does not represent himself as a physician and the record does not even include a statement by Dr. ES, after hardening was completed, that authorized light duty as he earlier recorded that he would do at that point. The hearing officer can consider any medical evidence but was on firm ground in giving the opinion of a technician or therapist very little weight in comparison to that of the medical doctor, especially since the doctor is charged with the responsibility to consider various recommendations from ancillary personnel in arriving at his opinion. The evidence supports the hearing officers' determination that Dr. ES only stated that respondent could be returned to light duty, which does not contradict the existence of disability. The hearing officer could consider the testimony of respondent as to his inability to keep a job and his continuing pain plus the documents of Dr. ES in determining that disability still exists.

Appellant calls attention to the absence of emphasis by the hearing officer concerning respondent's application for unemployment insurance. This appeals panel has held that even when unemployment benefits are received, there is no credit against workers' compensation benefits. *See* Texas Workers' Compensation Commission Appeal No. 91132 (redacted Docket No.) decided February 14, 1992. Similarly, a claimant was not estopped to assert that his testimony in a workers' compensation forum was true as opposed to his representations elsewhere unless the contrary assertion was made in a former judicial proceeding. *See* Aetna Life Ins. Co. v. Wells, 577 S.W.2d 144 (Tex. Civ. App.-San Antonio 1977, writ ref'd n.r.e.).

Appellant labels the hearing officer as biased for not discussing the opinion of a

technician, the respondent's application for unemployment insurance, or the reason why respondent was unsuccessful in seeking employment; and appellant also states that the hearing officer should have discussed, what it says is evidence, that respondent could return to work except for a dizziness problem. The hearing officer was not required to make a finding as to any of the referenced items and under the facts and the applicable law as set forth in this opinion, a decision not to discuss each was reasonable and does not reflect bias or error.

Appellant makes a valid point in stating that the hearing officer erred in not allowing credit for temporary income benefits paid to respondent while respondent worked and was paid wages exceeding what his preinjury wage was. Rule 129.4(a) provides for adjustment of TIBs. In modifying the decision on this point, we acknowledge that respondent has agreed in writing to credit appellant for benefits received during that period.

Appellant states that the great weight and preponderance of the evidence do not support the hearing officer's Findings of Fact Nos. 5, 6, 7, and 8 which read as follows:

FINDINGS OF FACT

5.Claimant attempted to perform light duty construction work in October and November, 1991, but was unable to satisfactorily perform this work as a result of his (date of injury) injury.

6.Claimant has attempted to find other light duty work, without success to the date of this hearing.

7.Carrier did not have reasonable grounds for terminating temporary income benefits on January 20, 1992.

8.Dr. H's June 24, 1991 required medical examination report does not reference the American Medical Association Guidelines nor state that claimant reached maximum medical improvement.

Finding of Fact No. 5 was supported by the testimony of the respondent. He testified that he was laid off because he could not keep up with the work. While the hearing officer does not have to believe an interested witness, she was not precluded from doing so. As trier of fact she could believe all, none, or part of any witness' testimony. Ashcraft v. United Supermarkets, Inc., 758 S.W.2d 375 (Tex. App.-Amarillo 1988, writ denied). She could also make reasonable inferences from the evidence. Atlantic Mutual Ins. Co. v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.)

Finding of Fact No. 6 was not necessary to the decision. It is nevertheless supported by the testimony of respondent.

Finding of Fact No. 7 is supported by the benefit review conference report which was made part of the record at the hearing, by the respondent's treating doctor's release only to light duty, and by respondent's testimony that he was not able to retain work that he had obtained after the 1991 injury.

Finding of Fact No. 8 is supported by the document it references in that Dr. H's report of June 24, 1991, does not reference the correct guidelines and it does not state that respondent has reached maximum medical improvement. It does not even state whether there is no "impairment" or some percentage of impairment because it says, "little or no impairment."

The hearing officer's conclusion of law that respondent has not been certified as having reached maximum medical improvement is sufficiently supported by all the medical evidence of record. This conclusion, along with the conclusion that disability is still present are both sufficiently supported by findings of fact and evidence of record as previously discussed.

Respondent in its response attempts to raise an issue on appeal that the injury of 1989 combined with the injury of 1991 entitle respondent to a claim under the Second Injury Fund. As stated, "contribution" is governed by Article 8308-4.30 of the 1989 Act which allows a reduction of impairment or supplementary income benefits, not temporary income benefits which are at issue here. ("Contribution" may affect lifetime benefits also but that is not at issue.) This issue was not raised within 15 days of receipt of the hearing officer's decision, which was deemed as received within five days after the date mailed. *See* Rule 102.5(h) and Article 8308-6.41(a) of the 1989 Act. The cover letter to the decision of the hearing officer was dated April 27, 1992, and the issue on which review is sought was included in the response of the respondent dated June 1, 1992. This issue was not timely filed for review by this panel.

Finding that the decision is sufficiently supported by the evidence, we affirm, but modify the first sentence of the Order by adding to the end of that sentence the words "subject to a credit for temporary income benefits paid during the period that respondent was paid wages equivalent to his preinjury wage."

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Joe Sebesta
Appeals Judge

CONCUR:

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Robert W. Potts
Appeals Judge

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Susan M. Kelley
Appeals Judge