APPEAL NO. 92198

On April 8, 1992, a contested case hearing was held in (city), Texas, with (hearing officer) presiding as the hearing officer. It was undisputed that the claimant, (claimant), respondent herein, sustained an injury in the course and scope of his employment with (Employer) on (date of injury). The issues at the hearing were:

1.Whether respondent has disability resulting from his injury, and

2.Whether respondent has reached maximum medical improvement.

The hearing officer determined that as a result of the injury respondent had disability commencing December 11, 1991, which continued after that date, and that respondent had not attained maximum medical improvement (MMI). The hearing officer decided that respondent is entitled to temporary income benefits (TIBs) commencing December 11, 1991, and ordered appellant, the employer's workers' compensation insurance carrier, to pay TIBs with interest on the accrued but unpaid benefits in accordance with the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq*. (Vernon Supp. 1992) (1989 Act).

Appellant contends that certain findings and conclusions of the hearing officer are not supported by any evidence, or are not supported by sufficient evidence. Appellant asks that the decision of the hearing officer be reversed and a decision rendered in its favor, or, alternatively, that the decision be reversed and the case remanded for further development of the evidence. Respondent asserts that the findings, conclusions, and decision are supported by sufficient evidence and asks that the decision be affirmed.

DECISION

Finding the decision of the hearing officer to be supported by sufficient evidence and finding it not to be against the great weight and preponderance of the evidence, we affirm.

Respondent's position at the hearing was that he had continuing disability from October 29, 1991, and that there was no valid certification of MMI. Appellant's position was that respondent has not had disability and that there was a valid certification of MMI, although appellant acknowledged that there may be a question as to when the certification became effective. The hearing officer determined that respondent had disability starting on December 11, 1991, which had continued since that date, and that respondent had not reached MMI.

"Disability" means the inability to obtain and retain employment at wages equivalent to the preinjury wage because of a compensable injury. Article 8308-1.03(16). "Maximum medical improvement" means the earlier of: (A) the point after which further material recovery from or lasting improvement to an injury can no longer reasonably be anticipated, based on reasonable medical probability; or (B) the expiration of 104 weeks from the date

income benefits begin to accrue. Article 8308-1.03(32). An employee who has disability and who has not attained MMI is entitled to TIBs. Article 8308-4.23(a).

Respondent was the only witness at the hearing. He testified that he injured his back while working for the employer on (date of injury), when he twisted and knocked a 65-gallon drum of glue off of its stand in order to keep the glue from coming out of a broken valve. The day of the accident, respondent's supervisor sent him to the (Center) where he was treated by (Dr. H), M.D. Dr. H prescribed physical therapy and released respondent to restricted work duty that same day. Respondent said he worked light duty and continued with physical therapy under Dr. H until October 28th when (Dr. M), M.D., who is also associated with the (Center), released him to regular work duty. Respondent said he was hurting and was not capable of doing his ordinary job and returning to full duty status when Dr. M released him to regular work duty. On the day respondent was released to regular work, he and two or three other workers were laid off by the employer because the job they had been working on was nearing completion. He has not worked since being laid off. Respondent said that in order to support his family he applied for and received unemployment compensation benefits up until at least the time of the benefit review conference held on February 11, 1992. He said he cancelled his unemployment compensation benefits upon receiving his first check for workers' compensation benefits. Respondent said he did not go out and apply for jobs while receiving unemployment compensation, but that he did make calls for jobs from his home. On November 18, 1991, respondent said he was treated by a doctor at the Urgent Care Center for back pain. On December 11, 1991, respondent said he went to (Dr. T), D.C., who took him off work. Respondent said (Dr. T) has not released him to return to work, and that (Dr. T) continues to treat him with physical therapy. Respondent said that, except for his one visit to the (Center), which he paid for himself, he did not seek medical treatment between the date he was laid off and the date he saw (Dr. T) because he did not have money to pay a doctor and had been told by the employer that the employer would not pay. He said he did not understand that it was the insurance carrier, and not the employer, that was responsible for paying medical bills. Respondent also related that (Dr. T) referred him to (Dr. P) who told him that he had a "fractured disc." Respondent further testified that he still "hurts," that he was not able to do his ordinary job when he was laid off, and that since that time he has continued to be unable to do his ordinary job.

The following medical reports and records were admitted into evidence:

1. An Initial Medical Report (TWCC-61) dated October 1, 1991, and signed by (Dr. H). It contains a diagnosis of "Sprain, Strain - Back, Lumbar," prescribes physical therapy, and places respondent on restricted work status.

2. A report of (Dr. M) dated October 28, 1991, which returns respondent to regular work and states that he has been discharged from treatment.

3. A Specific and Subsequent Medical Report (TWCC-64) dated October 29, 1991,

which recites that the doctor's name is (Dr. H) , but which is not signed. It contains the same diagnosis as the TWCC-61, and states that respondent is doing much better, that he has a full range of motion and normal gait, and that his straight leg raises are "90/90." It also discharges respondent to regular work, and states that he is recovered and has "no disability." It further states that October 28, 1991, is the anticipated date respondent may achieve MMI.

4.A record from the (Center) dated November 18, 1991, which indicates that respondent was seen by a doctor on that date for complaints of back pain. It gives two histories of the onset of respondent's back pain. The first recites that the onset of pain occurred when respondent picked up a barrel of glue at work on (date of injury). The second recites that respondent bent over to tie his shoe and could not get up and began hurting in his lower back.

5.A report of (Dr. T) dated December 11, 1991, which states that he saw respondent on December 11th, and which contains a diagnosis of lumbar subluxation, myofascitis low back, radiculitis, and sciatic radiculitis. It recites that respondent is under (Dr. T's) daily professional care and that respondent is "totally incapacitated until further notice."

6.A Report of Medical Evaluation (TWCC-69), signed by (Dr. H), but undated (the report form does not appear to contain a specific place for stating the date of the report). In answer to the question "[h]as employee reached maximum medical improvement?", (Dr. H) marked the "yes" box and gave the date of MMI as October 28, 1991. (Dr. H) also indicated that respondent had "0" percent whole body impairment rating. In this report (Dr. H) stated that on October 28, 1991, respondent was doing much better, that he had a full range of motion and normal gait, that his straight leg raises were "90/90," and that he was discharged to regular work. In written responses to questions asked by respondent's attorney in a letter dated March 25, 1992, (Dr. H) related that he last saw respondent on October 28, 1991, that the TWCC-69 was completed on February 27, 1992, and made no mention of having sent the report to (Dr. T) when he indicated to whom he had sent the TWCC-69.

Appellant does not contest the hearing officer's findings that respondent sustained an injury on (date of injury), that on December 11, 1991, (Dr. T) became respondent's treating doctor and that (Dr. T) found that respondent was unable to work because of the injury on (date of injury). We now consider the challenged findings and conclusions.

Finding of Fact No. 7 is to the effect that from December 11, 1991, to the date of the hearing, respondent has not been physically capable of performing the duties of a

construction worker and has not been paid wages because of the injury sustained on (date of injury). We find that this finding is sufficiently supported by the evidence and is not against the great weight and preponderance of the evidence. The hearing officer is the trier of fact in a contested case hearing, and is the sole judge of the weight and credibility to be given the evidence. Article 8308-6.34(e) and (g). Respondent's testimony as an interested witness only raised a fact issue for the hearing officer. *See* Baugh v. Highlands Insurance Company, 605 S.W.2d 314 (Tex. Civ. App.-Eastland 1980, no writ). The trier of fact is entitled to believe all or part or none of the testimony of any one witness. Taylor v. Lewis, 553 S.W.2d 153 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.). The hearing officer could reasonably infer from the evidence that respondent was able to work at preinjury wages from October 28, 1991, when he was given a full release to return to work by (Dr. M), until December 11, 1991, when (Dr. T) said he was "totally incapacitated," and, according to respondent, took him off work. From December 11th to the date of the hearing, the hearing officer could reasonably infer from (Dr. T's) report and respondent's testimony that respondent could not perform the duties of a construction worker and that he was not paid wages because of his injury of (date of injury). The hearing officer could disbelieve respondent's testimony concerning his inability to work from the time he was laid off until the date (Dr. T) took him off work, but believe his testimony concerning his inability to work after he was taken off work by (Dr. T).

We note that "disability" as defined by Article 8308-1.03(16) is not premised on the inability to obtain and retain employment in the type of work the employee was doing when injured, but that it is the inability to obtain and retain "employment" at wages equivalent to the preinjury wage because of a compensable injury. *See* Texas Workers' Compensation Commission Appeal No. 92083 (redacted Docket No.) decided April 16, 1992. Thus, if Finding of Fact No. 7 had only related to respondent's ability to perform the duties of a construction worker, it would probably not suffice to meet the requirements for disability as defined by the 1989 Act. However, Finding of Fact No. 7 also finds that from December 11th to the date of the hearing respondent has not been paid wages because of the injury sustained on (date of injury). With this additional finding, we determine that Finding of Fact No. 7, which is supported by the evidence, supports Conclusion of Law No. 2 that respondent sustained a disability on December 11, 1991, as a result of the injury on (date of injury), which has been continuous since December 11, 1991.

Findings of Fact No. 8 and 9 are to the effect that (Dr. H's) Specific and Subsequent Medical Report (TWCC-64) dated October 29, 1991, is not a proper certification of MMI under Tex. W. C. Comm'n, 28 Tex. Admin. Code Sections 130.1 and 130.2. Rule 130.1 provides that a doctor who is required to certify, or who determines during the course of treatment, whether an employee has reached MMI, must complete and file a medical evaluation report as required by the rule. In relation to MMI, Rule 130.1 provides that "certification," or to "certify," means the formal assertion of medical facts or opinion by a doctor supporting or relating to whether an employee has or has not reached MMI. Among other things, Rule 130.1 requires that the report made under that rule be on a form prescribed by the Commission, contain the doctor's signature, and contain a statement that the employee has reached, or an estimate of when the employee will reach, MMI. The form

prescribed by the Commission for the certification of MMI is the TWCC-69 Report of Medical Evaluation, and not the TWCC-64 Specific and Subsequent Medical Report under discussion. Texas Workers' Compensation Commission Appeal No. 92127 (redacted Docket No.) decided May 15, 1992. The TWCC-64 offered by appellant as a certification of MMI is not signed by (Dr. H). We previously determined that the absence of the signature of a doctor purporting to certify that an employee had reached MMI resulted in an insufficiency of the evidence to support a determination that MMI had been certified pursuant to Rule 130.1. Texas Workers' Compensation Commission Appeal No. 92027 (redacted Docket No.) decided March 27, 1992. Appellant urges that since the TWCC-64 states that the anticipated date the injured employee may achieve MMI is October 28, 1991, and the report is dated October 29, 1991, it is an apparent indication that the anticipated date was not prospective, but was rather an actual date of MMI. We previously considered and rejected the same argument under similar circumstances in Appeal No. 92127, *supra*. In that decision we observed that an anticipated dated of MMI given in a TWCC-64 is not a statement that MMI has been reached. We noted that while Rule 130.1(7) requires a statement that the employee has reached, or an estimate of when the employee will reach MMI, such an estimated date for MMI corresponds to Item 14 on the TWCC-69 Report of Medical Evaluation (the new TWCC-69 form has this as Item 16) which requests the doctor to give an estimated date if the doctor has checked "no" to the question "[h]as the employee reached [MMI]."

As previously noted, the hearing officer found that in addition to not complying with the provisions of Rule 130.1, the TWCC-64 dated October 29, 1991, also did not comply with the provisions of Rule 130.2, which relates to certification of MMI by the treating doctor. The hearing officer made no finding as to whether (Dr. H) was respondent's treating doctor on October 29, 1991, when he purportedly certified MMI, and we need not address that matter for the reason that both Rule 130.2, and Rule 130.3 which relates to certification of MMI by a doctor other than the treating doctor, require the doctor to complete the medical evaluation report required by Rule 130.1, which in either case was not done by (Dr. H) on October 29, 1991.

Finding of Fact No. 10 is to the effect that (Dr. H) did not properly certify MMI on February 27, 1992 (the date he signed the TWCC-69) under Rule 130.3 because he failed to send a copy of the report of medical evaluation to respondent's treating doctor within seven days after the examination. (Dr. H) indicated that he last examined respondent on October 28, 1991. The hearing officer found that (Dr. T) became respondent's treating doctor on December 11, 1991. There is no evidence that (Dr. H) ever sent the TWCC-69, which he completed on February 27, 1992, to (Dr. T). In fact, the evidence indicates that the TWCC-69 was not sent to (Dr. T). There is no evidence that (Dr. H) was a designated doctor or that the designated doctor procedures were invoked. We observed in Texas Workers' Compensation Commission Appeal No. 92176 (redacted Docket No.) decided June 10, 1991, that Rule 130.3(a) requires a doctor (other than a treating or designated doctor) who certifies that an injured employee has reached MMI to complete a medical evaluation report, as required by Rule 130.1, and to send a copy to the treating doctor no later than seven days after the examination. Rule 130.3(b) requires the treating doctor

receiving such a report to send to the Commission within seven days either a statement indicating agreement with the certifying doctor's certification of MMI and impairment rating or the Rule 130.1 report if the treating doctor disagrees with either the MMI certification or the impairment rating. We note that Article 8308-4.26(d) requires that a certification of MMI and evaluation for assignment of impairment rating, if performed by other than the treating doctor, must be submitted to the treating doctor, and the treating doctor must indicate agreement or disagreement with the certification and evaluation. As we observed in Appeal No. 92176, *supra*, if the medical evaluation report is not sent to the treating doctor, the treating doctor is in no position to agree or disagree with the certification of MMI made by a doctor. We hold here, as we did under similar circumstances in Appeal No. 92176, that since there is an utter lack of evidence that (Dr. H) ever sent the TWCC-69 Report of Medical Evaluation to (Dr. T), who was the treating doctor on the date the TWCC-69 was completed, for a response pursuant to Rule 130.3(b), the issue of whether respondent reached MMI was not ripe for determination. Consequently, we find no merit in appellant's challenge to Finding of Fact No. 12 which found that it had not been established that MMI had been reached, or its challenge to Conclusion of Law No. 3 which concluded that respondent has not attained MMI.

Finding of Fact No. 11 is to the effect that there was no evidence that (Dr. H) used the second printing, dated February 1989, of the Guides to the Evaluation of Permanent Impairment, third edition, published by the American Medical Association, in determining the existence and degree of respondent's impairment, if any. Respondent's impairment rating was not an issue at the hearing. Consequently, Finding of Fact No. 11 may be disregarded as unnecessary to the determination of the issues presented for resolution at the hearing. *See generally* Texas Indemnity Ins. Co. v. Staggs, 134 Tex. 318, 134 S.W.2d 1026 (1940) wherein the court stated that unwarranted findings may be disregarded and judgment rendered on the valid findings.

Conclusion of Law No. 4 concludes that respondent is entitled to receive TIBs from appellant commencing December 11, 1991. This conclusion is supported by Conclusion of Law No. 2 that respondent sustained disability on December 11, 1991, which has been continuous since that date, which is supported by Finding of Fact No. 7, and Conclusion of Law No. 4 is supported by Conclusion of Law No. 3 to the effect that respondent has not attained MMI, which is supported by Finding of Fact No. 12. An employee who has disability and who has not attained MMI is entitled to TIBs. Article 8308-4.23(a); Texas Workers' Compensation Commission Appeal No. 91060 (redacted Docket No.) decided December 12, 1991.

Conclusion of Law No. 5 concludes that respondent is entitled to recover interest on TIBs accrued but not paid, with the accrued but unpaid TIBs and interest paid in a lump sum. This conclusion is in accordance with the requirements of Article 8308-4.13.

Appellant also contends that the determination that respondent has disability is in conflict with the determination of the Texas Employment Commission (TEC) that appellant is able to work. We note that no final determination of the TEC relating to respondent's

eligibility for unemployment compensation benefits was offered into evidence, although respondent did testify that he applied for and received unemployment compensation benefits at least up to the time of the BRC on February 11, 1992. Article 5221b-2 of the Texas Unemployment Compensation Law provides in part that an unemployed individual is entitled to receive unemployment benefits only if the TEC finds that he is able to work and he is available to work. Article 5221b-3(e) disqualifies an individual from receiving unemployment compensation benefits for any period he is receiving or has received remuneration in the form of compensation for disability under the Workmen's Compensation Law of any State or under a similar law of the United States. The Texas Workers' Compensation Act of 1989 does not contain a provision corresponding to Article 5221b-3(e) which would disqualify an individual from receiving workers' compensation income benefits for any period he is receiving or has received unemployment compensation benefits. In view of the absence of such a provision, we have previously held that even when unemployment compensation benefits are received, it does not serve as a credit against workers' compensation benefits. *See* Texas Workers' Compensation Commission Appeal No. 91132 (redacted Docket No.) decided February 14, 1992. *See also* Aetna Casualty & Surety Company v. Moore, 386 S.W.2d 639 (Tex. Civ. App.-Beaumont 1964, writ ref'd n.r.e.) wherein the court held that a workers' compensation claimant was not judicially estopped to deny his unsworn statements to the TEC that he was available to work, able to work, and willing to work. Appellant's contention concerning respondent's receipt of unemployment compensation benefits is overruled.

The decision of the hearing officer is affirmed.

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Robert W. Potts
Appeals Judge

CONCUR:

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Stark O. Sanders, Jr.
Chief Appeals Judge

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Philip F. O'Neill
Appeals Judge