APPEAL NO. 92209

This appeal arises under the Texas Workers' Compensation Act of 1989 (1989 Act), TEX. REV. CIV. STAT. ANN. arts. 8308-1.01 through 11.10 (Vernon Supp. 1992). On April 16, 1992, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. He awarded medical benefits but ruled that claimant, appellant herein, beginning on November 11, 1991, was no longer entitled to temporary income benefits (TIBs). Appellant asserts that the decision, especially in concluding that disability no longer exists, is against the great weight and preponderance of the evidence.

DECISION

Finding that the decision is adequately supported by the evidence, we affirm.

Appellant worked for (employer) from June 15, 1977 to November 15, 1991. Appellant testified that he had been injured in 1985, and a fusion of the fifth and sixth cervical vertebra resulted therefrom. He returned to work in 1986 or 1987. On (date of injury), his job was to operate a forklift, but he was not on it when struck from the right, back side by another forklift which he estimated was traveling 10 to 15 miles an hour. Appellant was knocked down by the impact and was bruised. He was sent to the office of a physician, named (Dr. D), by employer, where he was seen by an associate. Appellant was returned to light duty, but testified that he was in "excruciating" pain and did little work. He saw Dr. D the next day but did not believe Dr. D to be concerned about his pain so he saw his family doctor, (Dr S). Dr. S referred appellant to (Dr. T) who appellant saw several times for approximately one month. Appellant reached a point wherein he did not wish to see Dr. T anymore. He then asked Dr. S to send him to (Dr. N), who appellant testified he first saw on November 15, 1991.

Dr. T released appellant to return to work without restriction on October 30, 1991, and in written interrogatories, admitted as Claimant's Exhibit 19, said that he also released him to return to work on November 11, 1991. Dr. N, on the other hand, by a document dated November 15, 1991, stated that appellant was unable to return to work. Appellant testified that he was still in severe pain and indicated that he could not do the work employer had assigned him even though he acknowledged that it was not his regular pre-injury job. (RM) testified that he is the personnel manager for employer and commented as to scenes depicted on two video cassettes introduced into evidence which purport to show the work assigned to appellant and show the appellant on the weekend of November 9-10, 1991. In the latter, appellant bent over repeatedly at the waist and raised his hands above his head. RM opined that appellant could do the work shown in one video based upon his movements shown in the other video.

Appellant asserts that Dr. T was a consultant and that the evidence does not support Finding of Fact No. 3 that says:

3.Claimant's doctor of choice after his injury was Dr. T who released claimant to

return to work, full-time, with no restrictions on November 11, 1991.

While the identity of a treating doctor is necessary to determine that maximum medical improvement (MMI) has been reached unless 104 weeks have passed since TIBs began, no finding as to treating doctor is necessary to determine whether disability exists. Article 8308-4.23 of the 1989 Act does not limit the evidence that may be considered concerning the question of disability. Texas Workers' Compensation Commission Appeal No. 91024 (Docket No. redacted) dated October 23, 1991, approved the hearing officer's examination of all relevant medical evidence plus the claimant's testimony in deciding whether claimant was physically capable to return to restricted duty. That appeal referenced Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 129.5 (Rule 129.5), however, which requires either a treating doctor or the claimant to provide certain information on which an employer's offer of limited work must be based.

Disability is defined in Article 8308-1.03 (16) of the 1989 Act as:

"Disability" means the inability to obtain and retain employment at wages equivalent to the preinjury wage because of a compensable injury.

Rule 133.3 requires a treating doctor to file certain reports and these reports in most cases provide information as to when a claimant is physically ready to return to work without restriction, in the opinion of the doctor making the report. Dr. T filed at least two of these reports. His filing of reports, which the rule requires of a treating doctor, is consistent with appellant's own testimony that Dr. S, his family doctor, whom he chose to see, never treated him and "advised me to see Dr. (T) and that was it." Dr. S referred appellant to a specialist, not to get a consultation to use in preparing a treatment plan, but to provide extended treatment. The fact that appellant testified that Dr. T was not his treating doctor was a matter for the hearing officer to weigh when he determined whether Dr. T was a treating doctor. Finding of Fact No. 3 is sufficiently supported by the evidence.

Appellant also disagrees with Finding of Fact Nos. 4 and 5 which read as follows:

4.Claimant was physically capable of returning to full-time work with no restrictions effective November 11, 1991.

5.The employer offered claimant light duty work that was available to claimant on November 11, 1991, and thereafter, at claimant's preinjury wage.

The hearing officer is the sole judge of the weight and credibility of evidence. Article 8308-6.34(e) of the 1989 Act. He could consider the opinion and medical documents of Dr. T as worthy of more weight and as more credible than Dr. N's opinion and the documents he generated. Similarly he could consider the movement of appellant on video as indicative that he could return to work. The evidence is sufficient to support Finding of Fact No. 4.

The employer showed on video the type of work it provided appellant after he was returned to work without restriction. Light duty was not required in such a circumstance, but RM testified that it was made available because, "(h)e on more than one occasion threatened me with a new injury if I put him back on his regular job." In addition to RM's description of the character of the work provided, a video depicted the type of work assigned to appellant for the hearing officer to weigh. The evidence was sufficient to support Finding of Fact No. 5.

Next, the appellant contests Finding of Fact No. 6 stating that there was no *bona fide* offer. That finding reads as follows:

6.Claimant refused employer's offer of employment performing this light duty.

Appellant was returned to work without restriction, therefore the criteria of Rule 129.5 as to physical requirements, accommodations, or limitations does not apply. In addition, the testimony of the appellant showed that there was no misunderstanding that he was to return to work. In answer to questions from his counsel appellant testified:

Q When Dr (T) returned you to work, did you go back to work?
A Yes, I did.

Q Okay. Who'd you report to?
A (RM), personnel manager.

Q Did you understand that you were returning to work full duty?
A Well, that's what he had on the slip, return back to work full duty.

Q Did you give that to Mr. (RM)?
A Yes, I did.

Q Okay. What kind of job did you -- did they have you do?
A They did not have me doing full duty work, my regular job.

A formal "offer" was not required in this instance. When appellant did not work after November 15, 1991, the day that Dr. N said he was unable to work, the hearing officer could believe that he had disability or he could believe that appellant refused to do the work provided him. This finding, similar to Finding of Fact No. 3, is not essential to the resolution of the central issue of whether disability exists in this case, but the evidence is sufficient to support it.

Appellant objects to Finding of Fact No. 7, which combines appellant's physical capability to work with employer's readiness for him to return to work. It uses the language of the statute in saying that he was not unable to obtain and retain work because of the subject injury. This finding is sufficiently supported by the evidence attributable to Dr. T,

RM for employer, appellant himself, and the videos. The hearing officer, as trier of fact, could believe part of the testimony of appellant but not believe him in regard to the amount of pain, and its restriction upon his movements, he suffered as of November 11, 1991. Ashcraft v. United Supermarkets, Inc., 758 S.W.2d 375 (Tex. App.-Amarillo 1988, writ denied).

Appellant believes that Finding of Fact No. 9 is incorrect because he believes that Dr. N became his treating doctor on November 15, 1991. This finding is not necessary to the decision because the hearing officer could weigh Dr. N's opinion as to disability whether he was the treating doctor or not. While the record does not reveal notification of a change of treating doctor by appellant as specified in Rule 126.7, the record does show that Dr. N filed an initial medical report in December 1991 like the one filed by Dr. S and similar to the reports filed by Dr. T. This finding is not so against the great weight and preponderance of the evidence as to be wrong or manifestly unjust. U.S. Fire Ins. Co. v. Alvarez, 657 S.W.2d 463 (Tex. App.-San Antonio 1983, no writ).

Conclusion of Law Nos. 1 through 4 are sufficiently supported by the evidence and the necessary findings and these conclusions sufficiently support the decision. Conclusion of Law No. 5, similar to Finding of Fact No. 9, is not necessary to the decision. The "Statement of Evidence" of the hearing officer is said to be inconsistent with the decision. That statement does not unfairly represent the evidence and there is no requirement that all the evidence be related therein. Article 8308-6.34(g) of the 1989 Act.

Appellant has attached to his appeal a letter he wrote dated December 11, 1991. That document was not used in reaching this decision on appeal. The appeals panel only considers the record developed at the hearing and the request for review and response. *See* Texas Workers' Compensation Commission Appeal No. 91015 (Docket No. redacted) decided September 18, 1991.

The evidence sufficiently supports the findings and conclusions upon which the decision is based and it is affirmed.

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Joe Sebesta
Appeals Judge

CONCUR:

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Stark O. Sanders, Jr.

Chief Appeals Judge

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Philip F. O'Neill
Appeals Judge