APPEAL NO. 92265

On April 27, 1992, a contested case hearing was held in (city), Texas, with (hearing officer) presiding as the hearing officer. The hearing officer determined that the claimant's disability from his injury ceased on (date of injury), and ordered the carrier to stop payment of temporary income benefits (TIBS). The claimant, (claimant), appellant herein, filed an appeal contesting the hearing officer's decision. Respondent, the employer's workers' compensation insurance carrier, filed a response asserting that the appeal was not timely filed and that the decision is supported by the evidence.

DECISION

Appellant's request for review of the hearing officer's decision was not timely filed. Consequently, the decision of the hearing officer is final. After reviewing all of the evidence of record, we conclude that had the appeal been timely, we would have affirmed the decision of the hearing officer since the decision is supported by sufficient evidence and is not so against the great weight and preponderance of the evidence as to be manifestly wrong or unjust.

The letter from the Texas Workers' Compensation Commission's (Commission) Division of Hearings & Review transmitting the hearing officer's decision to the parties is dated May 14, 1992, and Commission records show the decision was mailed to the parties on May 15, 1992. We note that appellant's address as shown on the transmittal letter is the same as the return address shown on the envelope in which appellant's request for review was mailed. Pursuant to Article 8308-6.41(a), a party that desires to appeal the decision of the hearing officer must file a written appeal with the appeals panel not later than the 15th day after the date on which the decision is received. Tex. Workers' Comp. Comm'n, 28 TEX. ADMIN. CODE Sec. 143.3(c) provides for a presumption of timely filing if the request for review is mailed on or before the 15th day after the date of receipt of the decision, and the request is received by the Commission not later than the 20th day after the date of receipt of the decision. At the hearing the hearing officer advised the parties of the time period for filing an appeal. The Commission's transmittal letter indicates that a fact sheet explaining what to do to file an appeal was sent to appellant with the decision. Although appellant states that he is requesting review of the decision within 15 days after receipt of the decision, he does not state the date he received the decision. Pursuant to Tex. Workers' Comp. Comm'n, 28 TEX. ADMIN. CODE Sec. 102.5(h), appellant is deemed to have received the decision on Wednesday, May 20, 1992, which is five days after the date the decision was mailed. We note that respondent states that it received the decision on May 19, 1992. Appellant was required to file his appeal by Thursday, June 4, 1992, which was the date 15 days after the deemed date of receipt. The envelope transmitting the request for review is postmarked June 17, 1992, and the Commission received the request on June 19, 1992. We conclude that appellant's request for review was not timely filed in accordance with Article 8308-6.41(a) and Rule 143.3. In the absence of a timely appeal, the decision of the hearing officer became final by operation of law. Article 8308-6.34(h); Rule 142.16(f); Texas Workers' Compensation Commission Appeal No. 92080

(Docket No. redacted) decided April 14, 1992.

Although the hearing officer's decision is final by operation of law, we have reviewed the hearing record. The issue at the hearing was whether appellant had continuing disability from a back injury sustained in a work-related accident on March 5, 1991 (the hearing officer's recitation of a March 3rd injury is incorrect according to documents in evidence). Respondent sought an order suspending TIBS as of (date of injury). Apparently, appellant had been paid TIBS from March 6, 1991 through the date of the hearing, with the exception of one week in September 1991. Appellant was present at the hearing but did not offer any testimony or documentary evidence, although he was given the opportunity to do so. The hearing officer introduced into evidence medical records relating to appellant's claim that were in the Commission's claim file. Respondent's case consisted of the testimony of two investigators, the investigators' reports, several videotapes taken by the investigators, and a letter from (Dr. M), who began treating appellant in September 1991.

The medical records showed that appellant was treated by (Dr. R), for complaints of back pain from March 5 to July 30, 1991. (Dr. R) diagnosed a strain and recommended that appellant stay off work and undertake physical therapy and exercise. A magnetic resonance imaging of appellant's lumbar spine taken in April 1991 revealed central disc protrusions at L2-3 and L3-4. On July 30, 1991, (Dr. R) released appellant for light duty work for two weeks and for full duty work thereafter. Appellant failed to keep a follow-up appointment with (Dr. R) in September 1991, and was last seen by (Dr. R) on July 30, 1991. Appellant began treatment under (Dr. M) in September 1991 for complaints of back pain. In October 1991 (Dr. M) noted that a CAT scan and discography suggested a disc herniation at "4-5 interspace." (Dr. M) diagnosed a herniated disc and recommended that appellant undergo a lumbar laminectomy. Although expressing doubts as to the need for surgery, (Dr. Me), the doctor selected by respondent to give a second opinion on appellant's surgery, apparently concurred with (Dr. M's) recommendation for back surgery. In a note dated October 10, 1991, (Dr. M) advised that he had placed appellant on off work status since his first visit on September 18, 1991.

Around the beginning of October 1991, respondent hired two investigators, Toy Eaton and Marshall Ward, to videotape appellant's activities. On (date of injury), they videotaped appellant working on a car for approximately four hours. The car was a large four door model the front end of which was raised off the ground in appellant's yard by a large commercial type jack. The videotape showed appellant repeatedly bending over the engine compartment while working on the car (he stood on what appeared to be an upturned bucket to do this); repeatedly bending over to pick up and put down tools; carrying large tools; picking up, carrying, and placing a radiator into the engine compartment; stooping and crawling under the car; and rocking the car off of the jack by the use of his legs and back after he had lowered the car to the ground. In accomplishing this last activity, appellant turned his back to the front of the car, squatted, placed his hands under the front bumper, and lifted up while pushing or rocking the car back. The whole car moved backwards. He did this activity twice. Appellant did not appear to have any problem with his back or show

any signs of back discomfort or back pain while working on his car.

Respondent sent the videotape of (date of injury), to (Dr. M). After reviewing it, (Dr. M) stated in a letter dated January 8, 1992, that "[i]t would appear that his [appellant's] activities indicate that he does not need back surgery to be functional and return to work." (Dr. M) did note, however, that his statement did not mean that appellant was not having back discomfort while doing the activities which were videotaped because he said there seemed to be some "minor" amount of "guarding" when appellant did the "strenuous lifting activity" at the end of the tape (rocking the car off of the jack). He also said that it was possible that the videotaped activities were causing appellant's "trouble" rather than the alleged lifting accident at work, but clarified that that did not mean it was "medically probable."

In Finding of Fact No. 4, the hearing officer described the activities of appellant shown in the videotape of (date of injury), and in Finding of Fact No. 5 he found that "[c]laimant's activities were inconsistent with back problems and clearly demonstrated that claimant is physically able to work." In Conclusion of Law No. 2 the hearing officer concluded that "[c]laimant's disability terminated on (date of injury), when he demonstrated that he is capable of gainful employment."

"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). An employee who has disability and who has not attained maximum medical improvement (MMI) is entitled to TIBS. Article 8308-4.23(a). TIBS continue until the employee has reached MMI. Article 8308-4.23(b). However, because Article 8308-4.23(a) requires both disability and the nonattainment of MMI for entitlement to TIBS, disability must exist in order for a claimant to be entitled to TIBS even in the absence of attainment of MMI. *See* Texas Workers' Compensation Commission Appeal No. 91045 (Docket No. redacted) decided November 21, 1991. The hearing officer weighs all of the evidence in determining disability. *See* Texas Workers' Compensation Commission Appeal No. 92259 (Docket No. redacted) decided July 31, 1992. In reviewing the findings of the hearing officer we recognize that he is the trier of fact and that he is the sole judge of the weight and credibility to be given the evidence. Article 8308-6.34(e). In this case, the (date of injury) videotape supplied compelling evidence of respondent's physical abilities, and (Dr. M's) comments upon reviewing the videotape, especially in regard to appellant's ability to return to work without surgery, were also supportive of the hearing officer's determination that appellant's disability ceased on (date of injury). As previously noted, appellant neither testified nor offered any other evidence at the hearing. Having reviewed the record, we conclude that the hearing officer's decision is supported by sufficient evidence, and that it is not so against the great weight and preponderance of the evidence as to be manifestly wrong or unjust. *See* In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). *See also* Texas Workers' Compensation Commission Appeal No. 92146 (Docket No. redacted) decided May 27, 1992.

Appellant complains of the hearing officer's failure to grant a continuance. In our

review of the record, we do not find that appellant specifically asked for a continuance or for more time to prepare his case. He did indicate that he was uncomfortable proceeding without an attorney, that he didn't want to proceed without an attorney, and that he had had trouble obtaining an attorney to represent him. Appellant did not affirmatively state that he would continue to look for an attorney if the hearing were postponed. The hearing officer noted that the hearing had been continued once before for a period of 19 days (the record does not reflect which party requested the continuance but respondent asserts that it was at appellant's request) and asked appellant about his effort to retain an attorney. Appellant said he had contacted only two attorneys who told him "it wouldn't do much good." The hearing officer decided to proceed with the hearing which was being held at respondent's request. Appellant declined to give testimony, offer exhibits, cross-examine respondent's witnesses, or give any statement concerning the issue at the hearing, although the hearing officer repeatedly gave him the opportunity to do so. Appellant said that prior to the hearing he had received and viewed the videotapes introduced by respondent at the hearing, and the videotapes were admitted into evidence without objection.

If appellant's reluctance to proceed with the hearing without an attorney is viewed as asking for a continuance, we note that the hearing officer's authority to grant a continuance is predicated upon a showing of good cause for the continuance. Article 8308-6.31(c). If a party orally requests a continuance at the hearing, he must show that the continuance will not prejudice the rights of the other party in addition to showing good cause for the continuance. Rule 142.10(c)(3). It has been held that the movant has the burden of proof on a motion for continuance, and that rulings on motions for continuance are within the discretion of the hearing officer and will only be overturned for abuse of discretion. Gibraltar Savings Association v. Franklin Savings Association, 617 S.W.2d 322 (Tex. App.-Austin 1991, writ ref'd n.r.e.). It has also been held that a motion for continuance must allege that the movant has used due diligence stating what diligence was used and the cause of failure if known. Ray v. Ray, 542 S.W.2d 209 (Tex. Civ. App.- Tyler 1976, no writ). Considering appellant's rather limited attempts to retain an attorney and the additional time he had in which to do so, we cannot conclude that the hearing officer abused his discretion in proceeding with the hearing. *See generally* Texas Workers' Compensation Commission Appeal No. 91076 (Docket No. redacted) decided December 31, 1991.

Appellant's request for review is denied based on his failure to timely file his request for review. In the absence of a timely appeal, the decision of the hearing officer has become final by operation of law.

Robert W. Potts
Appeals Judge

CONCUR:

____
Susan M. Kelley
Appeals Judge

____
Lynda H. Nesenholtz
Appeals Judge