

APPEAL NO. 92283

On May 21, 1992, a contested case hearing was held in (city), Texas, with (hearing officer) presiding as hearing officer. He determined that claimant, respondent herein, has disability as a result of a compensable back injury and was entitled to temporary income benefits (TIBS). Appellant challenges the sufficiency of the evidence to support the hearing officer's findings and conclusion that respondent has suffered disability.

DECISION

Determining the findings, conclusion and decision of the hearing officer are supported by sufficient evidence, we affirm.

On (date of injury) respondent injured his back while lifting a 50 lb. bag of onions at work. He notified his employer of the injury before going to the emergency room where he was diagnosed with a lumbar strain and released for full duty beginning (date). As was the standard company practice, claimant was sent to the (Clinic) for evaluation before returning to work. The examining doctor, (Dr. NB), found nothing wrong with the respondent but released him for light duty work only, pursuant to company policy. Respondent, however, did not return to work and instead sought medical attention from his personal physician, (Dr. CL), who took respondent off work. Respondent continued to see Dr. CL who in turn continued to keep respondent off work. Dr. CL ordered an MRI which tested normal. Respondent saw other physicians for evaluation and testing with inconsistent results. Respondent did not return to work until over two months later (and two days before the Benefit Review Conference) to try and perform the light duty work offered. He left after a couple of hours complaining of intense pain and has not returned to work since. Light duty work is still available.

As is his authority to do, the hearing officer found good cause for admitting documentary-medical evidence not previously exchanged pursuant to Commission rules. Art. 8308-6.33(e); Rule 142.13(c)(3). Since the appellant does not object to the hearing officer's finding of good cause, the issue of admissibility will not be reviewed.

The sole issue on review is whether respondent had disability so as to be entitled to TIBS. TIBS are due upon the eighth day of disability following a compensable injury and are paid to a person who has disability, and has not attained maximum medical improvement (MMI). Art. 8308-4.22; 4.23(a). Since there is no evidence to indicate that respondent reached MMI, we look to the matter of disability as defined by Article 8308-1.03(16). See Texas Workers' Compensation Commission Appeal No. 91122 (Docket No. redacted) decided February 2, 1992. The 1989 Act defines "disability" as "the inability to obtain and retain employment at wages equivalent to preinjury wages because of a compensable injury."

The hearing officer is the sole judge of the relevance and materiality of the evidence and of the weight and credibility to be given the evidence presented. Art. 8308-6.34(e).

This pertains to the weight and credibility of expert medical testimony as well. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). There was sufficient medical testimony for the hearing officer to conclude in Finding of Fact No. 7 that respondent's physician took him off work at least until the 19th of March. Although several doctors recommended that respondent return to work, at least on light duty status, some of these recommendations were not for immediate release and in fact kept respondent off for periods of time before the release was to become effective. This evidence of only being released for only light duty work is a factor which can lend support to the hearing officer's finding of disability if the restrictions result in an injured employee not being able to obtain and retain employment equivalent to preinjury wages. See Texas Workers' Compensation Commission Appeal No. 91045 (Docket No. redacted) decided November 21, 1991. It is not significant that light duty has been offered where, as here, the respondent had not been released to perform any work until at least the 19th of March.

We agree that the hearing officer erred in his Finding of Fact No. 6:

That on (date), after working approximately three hours, Claimant believed that he was not capable of performing the work and departed the work place to see his physician.

The evidence clearly indicated that the respondent did not return to work on (date) and did not in fact return to work until the 23rd of March and then only for a couple of hours. The error, however, did not materially affect the decision regarding respondent's disability, as defined by the Act, and is not reversible error. See Texas Workers' Compensation Commission Appeal No. 92034 (Docket No. redacted) decided March 19, 1992.

Although the record contains evidence that could lend itself to different inferences, the hearing officer's determinations should not be set aside simply because different inferences and conclusions may be drawn upon review, . Garza v. Commercial Insurance Co. of Newark, N.J., 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). We cannot agree that the hearing officer's decision was so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. See In re King's Estate, 150 Tex. 662, 224 S.W.2d 660, 661 (1951). See also Texas Workers' Compensation Commission Appeal No. 92083 (Docket No. redacted) decided April 16, 1992. We would clarify, however, that although the hearing officer concluded the effective date of disability was January 8th, TIBS are due in accordance with Article 8308-4.22(c).

The decision is affirmed.

Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Susan M. Kelley
Appeals Judge