

APPEAL NO. 92285

On April 3, 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, (hearing officer), respondent herein, had disability after June 20, 1991, and that appellant, the employer's workers' compensation insurance carrier, is liable for income benefits as required by the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq.* (Vernon Supp. 1992) (1989 Act).

Appellant contends that the hearing officer's decision is so against the great weight and preponderance of the evidence as to be manifestly unjust, and requests that we reverse and render, or in the alternative, reverse and remand for further consideration and development of the evidence. Respondent asserts that the decision is supported by the evidence, and requests that we affirm the decision.

DECISION

After reviewing the hearing record, the request for review, and the response, we affirm the decision of the hearing officer.

The parties stipulated that respondent sustained a compensable injury on (date of injury), and that he had not reached maximum medical improvement (MMI) as of June 20, 1991. The two issues at the hearing were: (1) whether respondent had disability after June 20, 1991, and (2) which doctor is respondent's "initial choice of treating doctor." Since the parties do not complain of the hearing officer's determination not to decide the second issue, we do not address that issue on appeal. There did not appear to be any dispute that respondent had disability from the date of his injury to June 20, 1991. Apparently, June 20, 1991, is the date appellant suspended payment of temporary income benefits (TIBS) based on a doctor's release of respondent to return to work, which release is discussed in the body of this decision. Appellant asserts that the hearing officer's finding that respondent's injury of (date of injury), caused him to be unable to obtain and retain employment after June 20, 1991, and the hearing officer's conclusion that respondent had disability and is eligible for TIBS after June 20, 1991, are against the great weight and preponderance of the evidence.

Respondent is about 29 years old, speaks very limited English, has a sixth grade education, and has worked off and on as a welder for the employer since about 1980. While welding at work on (date of injury), respondent fell off the top of a truck 15 feet to the floor causing a head injury. He was immediately taken by helicopter to (Hospital) where (Dr. F) diagnosed a large right temporoparietal epidermal hematoma and the same day performed surgery consisting of a right frontotemporal craniotomy, evacuation of epidermal hematoma, and placement of right frontal ventriculostomy. When respondent was discharged from the hospital and transferred to the (Hospital), (Rehabilitation), on January 16, 1991, (Dr. F) reported that respondent had no major complications from his injury, but would need extensive head injury rehabilitation to be able to enter the work force. After his transfer, respondent was found to have diminished hearing in his right ear caused by clotted blood

debris in the ear which was cleaned out. On January 23rd respondent was reported to be medically stable without medical complications and progressing with his therapy. (Dr. K), who was referred by (Dr. F), noted that respondent had impaired high level balance and coordination. Respondent was discharged from the (Center) on January 25th and placed in an out-patient program at the hospital's rehabilitation institute. His progress was tracked by a registered nurse working for Intracorp, which is a rehabilitation service.

February 1991 progress reports noted that there was some question as to whether respondent would be able to return to his job as a welder, that he had a post-traumatic information processing deficit which was exacerbated by double vision secondary to convergence difficulty, and that he was not aware of his own family (wife and two children). On March 15, 1991, (Dr. F) recommended that respondent return to work once he is cleared by rehabilitation. On April 9, 1991, (Dr. K) stated that as of April 10, 1991, respondent "is medically released to return to his previous job under the following restrictions: (1) no climbing until six months post injury (7/7/91), and (2) begin work on a part-time basis at four hours per day and to increase work hours as tolerated." The nurse tracking respondent's progress noted in a report dated April 15, 1991, that respondent reported to part-time work at his employer's on April 11, 1991, that respondent felt he was not ready for work because of dizziness and headaches, and that respondent's supervisor expressed concerns about respondent's headaches. On May 3, 1991, the nurse noted that respondent had completed three weeks of working part-time at four hours a day, that he continued to complain of headaches and dizziness and of the noise level at work aggravating his headaches, that he expressed concern about attempting to return to work full-time due to his condition, and that he wanted to see another doctor.

On May 8th, respondent was taken to the emergency room of the rehabilitation institute by a friend who had found him laying on the floor of his apartment. Respondent testified that he had passed out. The same day, respondent complained to (Dr. K) about headaches and dizziness, and (Dr. K) noted that a CAT scan of the head was normal and referred respondent to (Dr. C), an ENT specialist, for reevaluation for possible post-traumatic labyrinthitis. An electronystagmography performed on May 10, 1991, indicated unilateral weakness in respondent's left ear, which indicated a mild deficit in balance. Apparently, respondent stayed off work for several weeks following the May 8th incident.

On May 30, 1991, (Dr. K), reported that he had consulted with (Dr. C) and that based on (Dr. C's) recommendations and the overall medical status, he recommended that respondent: "(1) return to work June 3, 1991, (2) complete eight hour work days with a.m., p.m., and lunch breaks, and (3) remain restricted from climbing until 6 months post injury (7/17/91)." It is this release to return to work on which appellant primarily relies to support its contention that disability ceased on June 20th. A progress report noted that respondent had not returned to work as of June 12, 1991. However, testimony at the hearing indicated that respondent eventually returned to work in June 1991, worked about four or five hours a day, worked on June 20th, and that his last day at work was July 3, 1991.

On July 31, 1991, respondent was examined by (Dr. Ka), for complaints of dizziness, headaches, vomiting, vertigo, and weakness in lower and upper extremities. Examinations were unremarkable. This doctor stated that respondent suffers from post-traumatic headache and dizziness related to the head trauma, and that respondent needed a magnetic resonance imaging of his brain. On August 7, 1991, Drs. Ka and F wrote that respondent had been evaluated for the accident of (date of injury), and that both doctors decided that respondent is "temporarily disabled to work until further notice to ensure proper medical treatment for the injuries sustained due to the accident." These doctors also stated that respondent needs to refrain from his current job activity because of aggravation of his current symptomatology.

On September 18, 1991, respondent was examined by (Dr. F) who advised (Dr. K) that he thought that respondent could return to work if he had satisfied the requirements for work reentry through (Dr. K's) rehabilitation program. On October 1st, (Dr. F) stated that there was some risk to respondent of post-traumatic epilepsy, but that he would leave that issue for (Dr. K's) determination. In a Report of Medical Examination (TWCC-69) received by the Commission in December 1991, (Dr. F) indicated that respondent had not reached MMI, that it was unknown when MMI would be reached, and that respondent could return to work per (Dr. K's) instructions.

On February 20, 1992, (Dr. P) performed a neuropsychological evaluation on respondent pursuant to an agreed medical examination order (respondent agreed to be evaluated by (Dr. P) who was selected by appellant). (Dr. P) reported that, from a neuropsychological standpoint, respondent is not disabled and is able to return to work, but that it is imperative to delineate whatever physical limitations respondent has. (Dr. P) stated that respondent had prominent symptom magnification and suggested that he was malingering. (Dr. P) also stated that it is obvious that respondent has not returned to work primarily because he doesn't want to, not because he can't.

Respondent testified that since he left the hospital he has had dizziness and headaches, gets tired easily, and has had problems with his vision and hearing that he did not have before his accident. He said that these problems affected his ability to return to work and that due to such problems he could not weld. He further testified that welding, the smoke from the welding, the noise at work, and the protective headgear he must wear make his dizziness and headaches worse. He acknowledged that he stopped working part-time work in July 1991 before (Dr. Ka) took him completely off work on August 7th, but explained that his physical problems, which he attributed to his accident, prevented him from both driving to work and doing his welding work. He also said that he has not worked anywhere since he stopped working for the employer. He said he wants to go back to work but that he does not feel strong enough or able to do so, and that his physical activities are limited to sitting and walking in the park.

(Mr. B), a division manager for the employer, testified that when respondent returned to work in April 1991 he worked part-time about four or five hours a day at the same wage

he made when injured, and that respondent was not allowed to do any climbing per the doctor's restrictions. He said that respondent also worked part-time during the period he worked in June and July 1991, and that the employer would have made every effort to keep respondent employed because he had been a good worker. However, he also testified that he had not been aware of the incident on May 8th when respondent passed out at home, and that if a welder was experiencing dizziness it would be a safety problem.

Under the 1989 Act, "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). When reviewing the sufficiency of the evidence to support the hearing officer's findings of fact, we recognize that the hearing officer is the sole judge of the weight and credibility to be given the evidence. Article 8308-6.34(e). Conflicts between the testimony of medical witnesses is a matter to be resolved by the trier of fact. Highlands Underwriters Insurance Company v. Carabajal, 503 S.W.2d 336 (Tex. Civ. App.-Corpus Christi 1973, no writ). In determining the issue of disability, the hearing officer may consider all the evidence bearing on that issue, medical as well as non-medical. Texas Workers' Compensation Commission Appeal No. 92299 (Docket No. redacted) decided August 10, 1992. Disability can be established by a claimant's testimony, even if contradictory of medical testimony, and objective medical findings are not a prerequisite to a determination of disability. Appeal No. 92299, *supra*; Texas Workers' Compensation Commission Appeal No. 91083 (Docket No. redacted) decided January 6, 1992. An unconditional medical release to return to work does not, in and of itself, equate to an end to disability, although it may be evidence that disability has ended. Appeal No.92299, *supra*; Texas Workers' Compensation Commission Appeal No. 91045 (Docket No. redacted) decided November 21, 1991; see *also* Article 8308-4.16(e).

In the instant case there is conflicting medical evidence as to whether respondent is unable to return to work because of his compensable injury. Respondent testified that he is not able to return to work because of the physical problems he says he is experiencing as a result of his compensable injury. His complaints of dizziness, headaches, and vision and hearing problems are well documented in the medical records. Drs. Ka and F agreed that respondent should not return to work and that his work aggravates his problems. Even (Dr. K) in his release to return to work of June 3rd noted that respondent needs breaks at work and that he remained restricted from climbing. While (Dr. P) believes that respondent is a malingerer and should return to work, he still noted that it was imperative to delineate respondent's physical problems, from which it can be inferred that even (Dr. P) does not discount all physical problems that respondent may have incurred as a result of his accident. Having reviewed all the evidence of record, we conclude that the hearing officer's finding and conclusion on respondent's disability are supported by sufficient evidence, and are not so against the great weight and preponderance of the evidence as to be manifestly wrong or unjust. See Appeal No. 92299, *supra*.

The decision of the hearing officer is affirmed.

Robert W. Potts
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Susan M. Kelley
Appeals Judge