APPEAL NO. 92299

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 June 11, 1992, a contested case hearing was held. The hearing officer determined that the respondent, RV, due to an undisputed compensable head injury sustained _____ while employed by (employer), had resumed disability on September 27, 1991, when he was taken off work again by his treating doctor. The respondent had been off work from September 7 through 12, 1991, went back to work on September 13th, and then left work again on September 27, 1991. At the time of the hearing, respondent had gone back to work as of February 4, 1992, apparently after examination by medical examination order of the Texas Workers' Compensation Commission (Commission). Temporary income benefits were paid to him by interlocutory order of the Commission for the periods September 7-12, September 27 through November 9, 1991, and November 12 through February 4, 1992.

The appellant has appealed certain findings of fact and conclusions of law of the hearing officer. Appellant asserts that there is no evidence to indicate that respondent was sent to (Clinic) by his employer; that there is no evidence that the doctor seen at this clinic was an employer-selected doctor, not respondent's choice of doctor; that there is no evidence to support a finding that one Dr. Mc was respondent's initial choice of treating doctor. Conclusions of Law which are disputed are those determining that respondent's disability resumed on September 27, 1991, and continued on October 25, 1991, because Dr. Mc had primary responsibility for respondent's health care, and the conclusion that the respondent is entitled to temporary income benefits for the period of disability. The appellant does not, however, appeal the Conclusion of Law that the respondent had disability from his head injury for the periods from September 7 through 12, 1991, and September 27, 1991 through February 4th, 1992. Appellant prays that the decision be reversed, or reversed and remanded. Respondent replies in support of the hearing officer's decision.

DECISION

After reviewing the record of the case, we affirm the determination of the hearing officer.

The respondent was injured when a dolly handle hit his right temple while in the course and scope of his employment. This occurred on _____. That same day, the respondent sought medical treatment from a clinic that he stated was referred by the employer, the Clinic, where he saw one Dr. H. Respondent stated that Dr. H told him he could go back to work the next day; however, he still felt pain and dizziness and did not return until September 13, 1991. According to Dr. H's subsequent medical report filed with the Commission, he saw respondent only on the date of his injury. Respondent stated that he worked for approximately 10 days, but continued to feel ill. He then sought non-emergency treatment from Dr. Mc, an industrial medicine doctor, who was not referred to

him by the appellant or the employer. Dr. Mc took him off work effective September 27th.

Dr. Mc referred respondent to a neurologist, Dr. S, who indicated on a follow-up examination October 25, 1991, that respondent was likely suffering from post-concussion syndrome, and stated that, due to lack of objective evidence supporting subjective complaints, he was ready for work. However, Dr. Mc apparently disagreed with this assessment. A succinct letter dated January 21, 1992 from Dr. Mc indicates that it is his opinion that respondent has been continuously unable to work since the date of his accident. Respondent stated that Dr. Mc himself did not administer tests, although he examined respondent. To briefly recap medical records reflecting test results, CT scan of the brain, a skull series, and a cervical spine series were normal. Respondent had no history of high blood pressure, although Dr. S notes that Dr. H may have prescribed high blood pressure medication for respondent.

Respondent stated that, against the advice of Dr. Mc, he attempted to return to work on November 9th. He testified that he thought he worked 10 days. Respondent said that he attempted to return after Thanksgiving and was advised by the employer that he could not work while taking prescribed pain medication. The appellant did not offer evidence to refute this, and does not appeal the hearing officer's finding of fact to this effect.

At the outset, we note that the proceedings, and now this appeal, have focused on an issue over identity of the treating doctor that we believe is expressly addressed by the 1989 Act and the applicable rules of the commission, and which may be of marginal import in determining whether the respondent had disability, as that term is defined in Article 8308-1.03(16). Article 8308-4.62(a), conferring upon the injured employee the right to the initial choice of doctor, also plainly states that a choice of doctor made by the insurance carrier or the employer, or medical treatment provided to an employee in an emergency situation, does not constitute that injured employee's initial choice. Texas W.C. Comm'n, 28 TEX. ADMIN. CODE § 126.7 (Rule 126.7) concerns the injured employee's choice of doctor. Rule 127.6(c) plainly states that the first doctor to administer health care who is not an emergency care doctor, a doctor salaried by the employer, or a doctor selected by the employer or carrier shall be known as the treating doctor. Rule 126.7(d) and (f) further describe the only circumstances under which an emergency care doctor or a doctor selected by an employer can become the treating doctor. A doctor referred by the treating doctor does not become a treating doctor. Article 8308-4.64(a).

The hearing officer found that the employer referred respondent to the clinic, and that Dr. H thus was thus an employer-referred doctor; however, this would not make Dr. H the respondent's initial "choice" of doctor. Although appellant devoted much cross-examination to whether respondent voluntarily saw Dr. H, we would note that it would seem to be the rare situation where an injured person would not "voluntarily" submit to examination by the emergency room doctor assigned to examine him. There is sufficient evidence supporting the hearing officer's finding of fact, and equally sufficient evidence that

would have allowed him to conclude that Dr. H was a doctor rendering emergency care.

The issue is whether respondent had disability as a result of his compensable injury, and all medical, as well as non-medical, evidence may be considered by the trier of fact to determine whether an injured employee has, according to the definition contained in Article 8308-1.03(16), "the inability to obtain and retain employment at wages equivalent to the pre-injury wage because of a compensable injury." In the case at hand, wages were unquestionably lower than preinjury wage for most of the period in question. The only question for the hearing officer to resolve, therefore, was whether this occurred because of the compensable injury. This can be established by a claimant's testimony, even if contradictory of medical testimony. Texas Workers' Compensation Commission Appeal No. 91083, decided January 6, 1992. An unconditional medical release does not, in and of itself, equate to an ending of disability, although it may be evidence that disability may have ended. Texas Workers' Compensation Commission Appeal No. 91045, decided November 21, 1991; *see also* Article 8308-4.16(e). Nor are objective medical findings a prerequisite to a determination of disability. Texas Workers' Compensation Commission Appeal No. 92083, decided April 16, 1992. A trier of fact is not limited only to the opinions of a treating doctor in determining disability, although he may give the treating doctor's opinion more weight. Any conflict among medical witnesses is a matter to be resolved by the trier of fact. Highlands Underwriters Insurance Co. v. Carabajal, 503 S.W.2d 336 (Tex. Civ. App.-Corpus Christi 1973, no writ). Although Conclusions of Law stating that disability resumed or continued (because Dr. Mc is the doctor primarily responsible for respondent's care) are inartfully stated, this appears to be the hearing officer's way of saying that he gave more weight to Dr. Mc's opinion than that of other health care providers. Moreover, the respondent's testimony, as well as the uncontroverted finding that the employer declined to allow respondent to work while on medication, were sufficient to substantiate a conclusion that respondent had disability for the time periods set forth in Conclusion of Law No. 5 (which has not been appealed).

The hearing officer is the sole judge of the relevance and materiality, the weight and credibility, of the evidence offered in a contested case hearing. Article 8308-6.34(e), 1989 Act. In reviewing a point of "no evidence," a reviewing court should consider only the evidence and reasonable inferences therefrom supporting the findings of the trier of fact. Highlands Insurance Co. v. Youngblood, 820 S.W.2d 242 (Tex. App.-Beaumont 1991, writ denied). The decision of the hearing officer will be set aside only if the evidence supporting the hearing officer's determination is so weak or against the overwhelming weight of the evidence as to be clearly wrong or manifestly unjust. Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986).

The determination of the hearing officer is affirmed.

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Susan M. Kelley
Appeals Panel

CONCUR:

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Robert W. Potts
Appeals Panel

_____

Lynda H. Nesenholtz
Appeals Panel