APPEAL NO. 92465

This appeal arises under the Texas Workers' Compensation Act of 1989 (1989 Act), TEX. REV. CIV. STAT. ANN. arts. 1.01 through 11.10 (Vernon Supp 1992). On July 20, 1992, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. She found that claimant, respondent herein, was injured in the course and scope of employment and gave timely notice of the injury. She awarded temporary income benefits (TIBS). Appellant asserts that the evidence is insufficient to show that a compensable injury occurred. It adds that disability was not an issue and that there is no evidence to support that TIBS are currently due.

DECISION

Finding that the evidence sufficiently supports the hearing officer in regard to her determination as to injury and timely notice, we affirm on those issues. We modify the determination that TIBS are due through the date of decision and into the future.

Respondent had worked at a printing company as a second pressman for approximately three months on (date of injury), when he states that he hurt his back. He testified that a catwalk borders a large press and was built at two levels--approximately two feet and four feet from the floor. He states that he was on the upper, four foot level and was descending to the floor when he hurt his knee. Between the floor and the four foot level are two steps, which if equal, would each drop approximately 16 inches. In stepping from the bottom step to the floor, respondent felt "pressure like a pop . . . in my back." He continued to work and said that he told the pressman he worked under. There was some evidence that the pressman was not a supervisor, but another employee, J.G., who was clearly a supervisor, said in a statement dated August 1, 1991, that respondent told him of the accident within the required time period. That evidence developed as follows:

Q.How did you hear that he had injured his back?

A.Through other employees well actually I did hear from him but it was like a week or so after the acc, after the fact.

This statement, with the succeeding detail by J.G. that respondent said he slipped on the catwalk, provides sufficient evidence to support the hearing officer's finding that notice was timely given to respondent's supervisor, J. G.

The hearing officer does not make a finding that respondent injured his back at work, but she does find that he "felt pressure like a pop in his back" at work on (date of injury). However, she made a conclusion of law that he injured his back at work. As appellant states, respondent's testimony is not always clear and dates of injury he may have given to others vary. Still, the date most consistently given is (date of injury) and most other dates vary only within a day or two. He specifically recalled that the day of the week was a Thursday because of his sequence of work days and that day matches the date of (date of injury).

On March 25, 1991, when respondent told T. C., who he called the "owner or head boss," of his injury, he was sent to a clinic. According to the respondent, the clinic did not find anything, but he was then sent to Dr. L.L., an orthopedic surgeon. Respondent provided no medical records or any other evidence than his testimony. Records of the clinic, Dr. L.L., an MRI, and a chiropractor who respondent saw in late January 1991 were introduced by the appellant. The clinic record of March 25th is largely illegible but appears to record a muscle and tendon strain and clearly states "referred to orthopedic surg." Dr. L.L. has only one statement, a letter dated March 27, 1991, and four work status forms with certain blanks checked. Dr. L.L. refers in his statement to a date of injury of (date of injury) and gives a history of respondent misstepping as he came off the catwalk at work. His statement also says that he took respondent off work on March 27 because of his pain; his impression was a herniated disc. The MRI of April 3, 1991, was read as showing a significant disc protrusion at L4-5 with significant compression of the thecal sac. The chiropractic record of January 25, 1991, shows decreasing back pain with numbness and tingling in the right hand. It appears to note that symptoms began 10 days before. The first work status form ascribed to Dr. L.L. is dated March 27th, the same day as his statement; it checks "off work, return to office," adds in writing, "until further notice," and is effective March 27th. The next form is also dated March 27th, checks "regular duty" and is effective March 28th. Next, a form dated May 7, 1991, checks regular duty, and is effective May 8, 1991. Finally, a form dated May 14, 1991, checks "off work, return to office," and is effective May 14, 1991.

The respondent in his testimony was consistent in saying that he did not slip, he just stepped down from an abnormally high step. He denied that he had the problem at the time he saw the chiropractor in January, saying that someone else said it felt good to have a chiropractic treatment so he tried it. Neither party introduced medical evidence regarding the probability that a step down could herniate a disc. The respondent said that he put off telling the head boss until approximately March 25th because he was afraid for his job. He did not say why, when the pain got worse, he put off going to a doctor until telling the head boss. The hearing officer, as sole judge of the weight and credibility of the evidence can choose to believe the respondent's testimony of the incident even though she is not bound to believe him as an interested party. *See* Presley v. Royal Indem. Ins. Co., 557 S.W.2d 611 (Tex. Civ. App.-Texarkana 1977, no writ). Issues of injury and disability may be established by testimony of the claimant alone. *See* Houston Gen. Ins. Co. v. Pegues, 514 S.W.2d 492 (Tex. Civ. App.-Texarkana 1974, writ ref'd n.r.e.). The hearing officer had sufficient evidence before her upon which to determine that the injury was incurred in course and scope of employment.

The appellant asserts that the hearing officer erred in ruling that respondent is entitled to TIBS. Part of the decision appears to provide that TIBS are due "[c]laimant is entitled to all unpaid, temporary income benefits accrued to the date of this decision in a lump sum with interest."; another part appears to state that TIBS will become due when it says "[c]laimant is entitled to weekly income benefits from the date of this decision as required by the Texas Workers' Compensation Act."

The hearing officer did not list TIBS or disability as an issue at the beginning of the hearing, nor had the benefit review conference report named either as an issue. The hearing officer did elicit testimony from the respondent that he told his doctor that he could go to work. The doctor gave him ibuprofen and allowed him to go to work on May 8th. Respondent said though, that he could not work around the press on medication, so returned without medication only to be told by the administrative head of the employer that the carrier said he could not work. (The appellant indicated that the attempt was made on May 9, 1991.) Respondent, still in response to questions by the hearing officer, said he did not work after March 21st. (At that time respondent was saying that he reported the accident to the head boss and went to the doctor on March 21st, not March 25th as some evidence indicated.) When the hearing officer asked respondent if he was still employed by the employer, he answered, "I don't even think they're in business anymore. I imagine they shut down."

The respondent never testified that he was still in pain or that he could not currently work. He said that he was in pain at the time of the hearing but that was before he was sworn as a witness when a decision was being made as to whether a continuance would be granted; he did not say the pain he was in was from the accident. He never indicated a period of time that the last work status form of Dr. L.L. covered. It was dated May 14, 1991, but unlike a previous form, it did not indicate that it ran "until further notice." Respondent indicated that he no longer saw Dr. L.L. but has been seeing a doctor through the county. No medical records from the current doctor were before the hearing. Respondent did not say who the current doctor was or whether that doctor has taken him off work or told him not to work. In addition, the appellant pointed out that it sent interrogatories to the respondent that were never answered. Appellant has a green card showing delivery with a name that respondent agrees was signed by his sister at his residence. He says he never got the interrogatories.

There is no evidence of current disability. The language in the decision and order could be interpreted in a way that overstates what the evidence will support. Texas Workers' Compensation Commission Appeal No. 91002 (Docket No. redacted) decided August 7, 1991, upheld an award of TIBS when there had been no issue on that point. It described the evidence that supported an award of TIBS. It called attention to the fact that Article 8308-6.34(g) requires the hearing officer to make findings of fact and award benefits. It stated that findings of fact did not have to be made on issues not in dispute. The hearing officer's opinion in that case merely awarded TIBS and ordered that they be paid. No date of accrual or termination was given. The award that TIBS were due was upheld as supported by the evidence. The opinion noted that the parties should be able to determine when the inclusive dates for payment of TIBS occurred, and payments under Article 8308-4.21, 4.22, and 4.23 should be made without further order as they accrue. That opinion also said if agreement as to such dates could not be reached, the issue could be directed to a benefit review conference.

The evidence of record supports so much of the hearing officer's decision regarding TIBS as pertains to the period March 27 to May 14, 1991, when Dr. L.L. gave his last order not to work. While Dr. L.L.'s order back to work effective May 8th could support disability ceasing at that time, respondent stated that when he reported to work under that order, he was told not to work. In the circumstances of this case where the evidence shows that Dr. L.L. is no longer treating respondent, where respondent did not provide the name(s) of doctors he has seen since Dr. L.L. and did not answer interrogatories, and where there was never an issue of disability at the BRC and it was not litigated at the hearing, we will affirm no TIBS for a period beyond the date of the doctor's last order and the respondent's testimony. The parties should be able to arrive at applicable dates for TIBS beyond May 14, 1991, but if they cannot, the issue may be directed to a benefit review conference.

The decision and order as it applies to medical benefits is affirmed as written. The decision and order as to TIBS is modified to clarify that TIBS that are due should be paid, with interest as applicable, in conformance with this opinion, as long as disability exists until maximum medical improvement is reached.

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Joe Sebesta
Appeals Judge

CONCUR:

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Robert W. Potts
Appeals Judge

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Susan M. Kelley
Appeals Judge