APPEAL NO. 92539

On September 9, 1992, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. The hearing officer determined that the claimant, (claimant), who is the respondent, had disability from January 15, 1992 through the date of the hearing, as a result of a compensable injury he sustained on (date of injury), while acting in the course and scope of his employment with (employer), as disability is defined in the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.03(16) (Vernon's Supp. 1992) (1989 Act). The hearing officer also found that a verbal offer of employment was made by the employer but retracted after input from the claimant's doctor, and concluded that the employer had not made a bona fide job offer in accordance with Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 129.5 (Rule 129.5). The carrier has appealed, on grounds of insufficient or no evidence, the findings of fact and conclusions of law relating to the period of disability and lack of bona fide job offer, as well as alleged procedural errors by the hearing officer. No response has been filed.

DECISION

After reviewing the record, we affirm the determination of the hearing officer; however, we correct the typographical error in Finding of Fact #2 regarding the year of the injury, so that the date of injury reads (date of injury), rather than (date).

The claimant worked for employer on a highway construction project. He injured his arm on (date of injury), as he pulled a cable. That night, he couldn't stand the pain in his hand and made a report to the employer the next day about his injury. Initially, the claimant went to (Dr. H), referred by the employer, and was treated by him through September 3, 1991. Dr. H's records state a diagnosis of lateral epicondylitis. On August 6, 1991, Dr. H signed a slip indicating that claimant was able to resume regular duties. However, on September 3, 1991, Dr. H characterized claimant's work status as "light duty" and a follow-up appointment was scheduled for October 15, 1991. The claimant continued to work, and receive treatment for pain.

The claimant said that his supervisor told him he was complaining too much about his hand and could be fired, so claimant stopped going to Dr. H. However, he went to a doctor of his own choice, (Dr. B), starting November 1991. The claimant stated that injuries to his shoulder have been discovered and attributed by the doctors to the (date of injury) injury.

On October 3, 1991, the claimant filed a claim for compensation with the Texas Workers' Compensation Commission (Commission), in order to ensure medical treatment and to protect his rights in the future if needed. The claimant was laid off from his job shortly before Christmas, 1991. Claimant testified that he was not offered a supervisory job at this time. He did not dispute that the project was nearly finished at this point, and that other employees were laid off along with him. On December 17, 1991, the claimant applied to the Texas Employment Commission (TEC) for unemployment benefits. He did not recall

discussing his injury with the TEC counsellor. Claimant said he did not realize at that time that he was hurt as bad as he turned out to be; he therefore certified himself to TEC as available for work and in fact searched for employment. The claimant continued treatment with Dr. B and was also examined by (Dr. E) (March 9, 1992) and. (Dr. L) (March 31, 1992) on referral. Although Dr. E determined that claimant was not in acute distress, he noted significant, bona fide right shoulder and ulnar nerve ailments.

In late March, the claimant was contacted by (Mr. M) on behalf of the employer. Mr. M offered him an opportunity to return to work on upcoming jobs, and asked him if he were still having problems with his hand. Claimant said that he was, and Mr. M asked permission to review his medical records. Claimant stated that on or about March 25, 1992, Mr. M withdrew the job offer, telling him that the medical records indicated he "was disabled" and there was no way the employer would let him return with hurt hands. The claimant stated that this was the first he realized he was "disabled." He stated that around this time, the TEC contacted him about applying for extended unemployment benefits. The claimant stated that he went to his doctor's office around April 5, 1992, to get a letter for TEC showing that he was not able to work. Claimant said that he did not apply for the extended unemployment benefits because he did not wish to lie to the government about his ability to work. He contacted the carrier by letter about obtaining workers' compensation income benefits, asking that they be paid from April 5, 1992.

A benefit review conference was held June 8, 1992. The claimant acknowledged that no written agreement was entered into at that time. However, he stated that he was asked to see a doctor of the carrier's choice, and that he was told that this doctor's opinion would resolve whether he could get benefits. A medical examination order was issued upon request of the carrier for the claimant to see (P). Claimant said that he was thereafter examined by Dr. P, of Hand Associates of South Texas. The initial office visit with Dr. P was July 28, 1992, and a letter report of that visit indicates finding symptoms suggestive of carpel tunnel syndrome. A report from Dr. P after an August 21, 1992 office visit records impressions of subacromial spur diagnosed by MRI scan and examination, and ulnar cubital tunnel on right side. Dr. P recommends surgery.

It appears from the claimant's testimony that although the hearing officer defined disability for him as that term is used in the Texas Workers' Compensation Act, that he continued to equate "disability" with being told by his doctor that he was unable to return to the type of work he did before. Under cross-examination, when asked several times when he would fix the first date of disability, the claimant either deferred to Dr. B's opinion, or stated that it would be March 25, 1992, when Mr. M first told him he was "disabled", or April 5, 1992, when Dr. B first directly told him he could not work.

A January 15, 1992 medical report filed by Dr. B with the Commission states that "patient is disabled and unable to work at the present time" in the portion of the form where estimated return to work dates are solicited. Dr. B repeated this in a January 27, 1992 report. The diagnoses listed by Dr. B on these reports are cubital tunnel syndrome/ulnar

nerve, herniated nucleus pulposus, and lateral epicondylitis. On January 29, 1992, the adjuster for the carrier wrote to employer and asked for a wage statement for the 13 weeks prior to the date of injury. On February 4, 1992, the carrier disputed that temporary income benefits were due on the ground that there was no compensable lost time of at least seven days duration.

The claimant testified that, except for Dr. H, none of his doctors gave him a release to work, although he stated that Dr. B did not convey the opinion of his "disability" clearly to him in January 1992. The carrier's case consisted of records and medical reports; no live testimony was offered.

I.

ERRONEOUS DATE OF INJURY

The carrier complains that finding of Fact No. 2 lists the date of injury as "(date)." This is obviously a typographical error, and Finding of Fact No. 2 is hereby corrected to show the date of injury as "(date of injury)."

II.

POINTS OF ERROR RE: LACK OF KNOWLEDGE OF CLAIMANT OF INABILITY TO PERFORM WORK UNTIL MARCH 25, 1992; FINDING THAT PERIOD OF DISABILITY BEGAN JANUARY 15, 1992 RATHER THAN APRIL 5, 1992.

The carrier complains that the hearing officer erred by finding that the claimant did not know he was unable to do work until March 25, 1992, and also by finding that disability began January 15, 1992, ignoring the claimant's admission that disability began April 5, 1992. The hearing officer is, under the 1989 Act, the sole judge of the weight, materiality, relevance, and credibility of the evidence. Art. 8308-6.34(e). We will not set aside the hearing officer's determination because different conclusions and inferences could be drawn on review, even if the record contains evidence of inconsistent inferences. Garza v. Commercial Insurance Co. of Newark, N.J., 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). Here, the hearing officer could well have believed that there was a failure in communication between Dr. B and claimant about the impact of his injuries on his ability to work. The hearing officer could have believed that the behavior of the claimant was consistent with, rather than contrary to, his lack of understanding of the severity of injury. Although the carrier argues that Dr. H gave claimant a full release, in fact Dr. H's last release was for light duty, indicating that the claimant's injury impacted his work performance. The January letter from the adjuster seeking a wage statement indicates that the carrier appreciated the impact of Dr. B's assessment.

We find no error in the hearing officer's finding that disability began January 15, 1992, based upon the subsequent medical report of Dr. B, even though this appears to go beyond

the period originally requested by the claimant. Disability means "the inability to obtain and retain employment at wages equivalent to the pre-injury wage because of a compensable injury." Art. 8308-1.03(16). It need not immediately follow an injury to be compensable.[1] Ordinarily, the existence of disability is a question for the finder of fact, and may be resolved inferentially. Director, State Employees Workers' Compensation Division v. Wade, 788 S.W.2d 131 (Tex. App.-Beaumont 1990, writ dism'd).

Although we have held that lay testimony may be believed over contrary medical evidence on the issue of disability[2], the converse is also true: a hearing officer may give more weight to medical evidence, including the lack of a release to work from the most recent treating physician, over the subjective assessment of the claimant of his ability to work.

The evidence indicates, and the claimant did not dispute, that he was laid off before Christmas 1991 primarily for reasons not related to his injury, and the hearing officer apparently chose to believe that the lack of work at this point was due to the layoff. However, January 15 marks the point at which there is evidence indicating that claimant's injury was a producing cause of the claimant's inability to find work. The hearing officer could have believed that because the claimant sought employment, but found none, and because his previous employer withdrew an offer of employment based on claimant's medical status, prospective employers might have had a similar reaction. The claimant continued to receive medical treatment from January through March 1992, and experience pain. All these facts support the hearing officer's decision.

III.

POINTS OF ERROR RE: BONA FIDE JOB OFFER

The carrier argues that the hearing officer erred by not allowing an additional issue concerning rejection of a bona fide job offer. Although the hearing officer did not create a separate issue concerning rejection of bona fide job offer, the hearing officer stated that she would receive evidence on the issue. This is recited in the hearing decision itself. As it is clear that the hearing officer actually accepted testimony on the issue of bona fide job offer, however the issue may have been cast, we cannot agree that there was error.

The carrier also appeals the conclusion of law that the employer did not tender a bona fide job offer to the claimant. The carrier in its opening statement indicated that it would prove that the claimant was offered, and declined to accept, a higher paid supervisory

[1] Article 8308-4.22(b); also Texas Workers' Compensation Commission Appeal No. 92399, decided September 21, 1992.

[2] Texas Workers' Compensation Commission Appeal No. 92167, decided June 11, 1992.

position. However, the claimant denied this and the carrier offered no other proof of the existence of such an offer. The carrier did not refute the claimant's testimony that a conditional offer of employment made by Mr. M in March was withdrawn by the employer, rather than refused by the claimant. The carrier's point of error is rejected because it failed to prove up a bare prima facie case which would have triggered application of the credit against the temporary income benefit set forth in Art. 8308-4.23(f).

IV.

JUDICIAL NOTICE OF UNEMPLOYMENT COMPENSATION LAWS AND CERTIFICATION BY CLAIMANT OF HIS AVAILABILITY FOR WORK

The carrier complains of the hearing officer's failure to take notice of unspecified portions of the Texas Unemployment Compensation Act and pertinent laws. According to the record, the carrier's attorney made a motion to the hearing officer to take "judicial notice" of TEC laws and regulations generally. The hearing officer said that she was willing to, but did not have them. Assuming that this was a ruling, the carrier's attorney at this point essentially let the matter drop, and did not make an offer to supply pertinent copies of rules or citations to statutes. Although the Texas Rules of Civil Evidence are not strictly binding on the tribunal, we have noted that they offer valuable guidance. Rules 202 and 204 require that persons who ask a court to take notice of law of other states, or of Texas administrative agencies, furnish the court with sufficient information to comply with the request. Thus, it would have been reasonable in this proceeding for the carrier's attorney to furnish the hearing officer with copies of TEC administrative rules that he believed were pertinent.

However, we do not believe that the physical unavailability of the Texas statutes to the field office constitutes a basis for declining to consider them. A hearing officer may reasonably request that copies of applicable statutes be furnished to overcome the lack of access. While in this proceeding the hearing officer may have unfortunately left the impression that she could not look at Texas statutes, there was no ruling to this effect nor did the carrier's attorney offer to provide copies of any specific portion of the law he deemed applicable.

The carrier argues that it was error for the hearing officer to omit findings that the claimant certified himself to the TEC as able to work. The fact that the claimant applied for unemployment benefits and certified he was available for work does not necessarily preclude a finding of disability for that same period. *See* Aetna Casualty & Surety Co. v. Moore, 386 S.W.2d 639 (Tex. Civ. App.-Beaumont 1984, writ ref'd n.r.e.).[3] The 1989

[3]We would note that TEX. REV. CIV. STAT. ANN. art. 5221b-3 (e)(2) provides that a person is disqualified from unemployment benefits for any period for which he is also receiving or has received compensation for certain disability under the Workers' Compensation laws. By the same token, Art. 5221b-9 (r) states that a finding of fact, conclusion of law, judgment or final order regarding a claim for unemployment benefits may not be used as evidence in any other action or proceeding, even one involving the same parties, which would seem to limit the use of TEC claim information in these proceedings.

Workers' Compensation Act does not provide for an offset against income benefits for unemployment compensation. In this case, the claimant could not be impeached by his claim for unemployment because he did not, at the same time, take the opposite position in a workers' compensation proceeding. He declined to apply for further unemployment compensation once he was aware of his doctor's opinion. The hearing officer's omission of findings concerning the receipt of unemployment benefits was not erroneous.

V.

FAILURE TO GRANT CARRIER'S SECOND MOTION FOR CONTINUANCE

The carrier claims error in denial of a second motion for continuance but does not explain how it was harmed. We note that at the same time the motion was denied, the hearing officer, on her own motion, continued the hearing from September 2 to September 9, 1992, to coincide with the availability of a Spanish language translator, so that the carrier in fact had an additional week to prepare its case.

Carrier's first request for continuance of an August 6, 1992 hearing was granted. In its second continuance, the carrier asserted it needed more time to get medical records in admissible form, and then analyze the responses to interrogatories. The only explanation given for not having records sooner was that the claimant failed to sign a release for medical records. The record shows that the claimant signed a release to carrier's attorney on June 23, 1992.

We also note that the carrier admitted liability for reasonable and necessary health care treatment, Art. 8308-4.61, so it had access to provider records through the rules and fee guidelines of the Commission. *See, for example* Rules 133.100-106; Rules 133.300-303. Further, the Medical Practice Act, TEX. REV. CIV. STAT. ANN. art. 4495b, § 5.08(h)(6) indicates an exception to doctor-patient confidentiality in favor of individuals or corporations involved in the payment of fees for medical services. Dr. P, whose August 21st examination report was one of the records sought by the carrier, was the carrier's own choice of doctor. The hearing officer evidently determined that there was no good cause for the failure of carrier to diligently obtain needed medical records by late August 1992. The hearing officer evidently determined that the answers to the interrogatories were not extensive and could be analyzed within the allotted time. The hearing officer did not abuse her discretion in denying the continuance.

VI.

FAILURE TO ALLOW CROSS-EXAMINATION

The carrier complains that it was prevented from bringing out important information because the hearing officer limited cross-examination. The only portion of the record where it appears that the carrier was cautioned not to question the claimant further had to do with

conversations that the claimant may have had with the Commission ombudsman when he filed his claim in October 1991. The carrier questioned claimant about whether he had been informed of his rights about his entitlement to temporary income benefits. The claimant generally answered that he understood the function of the ombudsman to be to inform persons of their rights. When the carrier's attorney pursued these questions, the hearing officer stated that she did not consider such questions "relevant" to the disability issue, and admonished the carrier's attorney to go forward.

Perhaps such questions are of marginal probative value, but they appear to be "relevant" to establishing a context for the claimant's self-assessment of his ability to obtain and retain employment in light of his compensable injury, for the period from January 15 through April 5, 1992. However, casting the speculative testimony in a light most favorable to carrier, (that the claimant would have testified to a full and complete discussion of all aspects of disability with the ombudsman in October), this would not have mandated a different result. The evidence indicated that the claimant did not have an appreciation or understanding, in January 1992, of the impact of his injury on his ability to work, whether or not he talked with the ombudsman. The hearing officer gave more weight to Dr. B's medical report than to the claimant's subjective lay evaluation of his condition, as she was entitled to do. If there was error, it was not of the type that was reasonably calculated to cause, and probably did cause, rendition of an improper decision. *See* Hernandez v. Hernandez, 611 S.W.2d 732 (Tex. Civ. App.-San Antonio 1981, no writ).

VII.

CLAIMANT AS WITNESS

The carrier says the claimant should not have been allowed to testify because he did not state in the interrogatories that he was a person who had knowledge of relevant facts relating to his claim. The Appeals Panel has already held that a claimant need not be disclosed as a witness or a person having knowledge of relevant facts, and always has the right to testify regarding the claim. Texas Workers' Compensation Commission Appeal No. 91049 (decided November 8, 1991); *also* Appeal No. 91088 (decided January 15, 1992). We note that the claimant is disclosed through the sworn affirmation signed by the claimant on the interrogatories, where he identifies himself as the claimant and asserts knowledge of the matters contained in the answers. *See* Smith v. Southwest Feed Yards, 835 S.W.2d 90 (Tex. 1992).

On the factual determinations and related conclusions of the hearing officer, the decision 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. Atlantic Mutual Insurance Co. v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.). That is not the case here. There being no further errors in matters of law or abuse of discretion, the hearing officer's decision is affirmed.

_____
Susan M. Kelley
Appeals Judge

CONCUR:

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Stark O. Sanders, Jr.
Chief Appeals Judge

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Joe Sebesta
Appeals Judge