APPEAL NO. 92567

A contested case hearing was held in (city), Texas, on September 29, 1992, (hearing officer) presiding, to determine whether respondent (claimant) had reached maximum medical improvement (MMI), and if so, the date MMI was reached; and to determine claimant's period of disability. The hearing officer determined that claimant reached MMI on July 27, 1992, and that her period of disability, based on her (date of injury) compensable injury, extended from April 21 through July 27, 1992. Carrier's request for review asserts that the hearing officer's determination of claimant's period of disability is erroneous and requests that we find claimant had no period of disability because she voluntarily quit her job on April 21st over a scheduling conflict. Claimant filed no response.

DECISION

Finding the evidence sufficient to support the hearing officer's determination of claimant's period of disability, we affirm.

There was no dispute that Claimant sustained a compensable injury to her back on (date of injury), apparently from the lifting, bending, pushing, and pulling required in her job as a food service manager for (employer). According to the medical records of (Dr. L), claimant first visited him on March 26, 1992, and gave a history of intermittent episodes of lumbar strain for two and one-half years with recurrence on (date of injury). In later giving her history to the designated doctor, (Dr. W), claimant apparently referred to (Dr. L) as "the company doctor." (Dr. L) impression was lumbarsacral strain with radiation and "possible disc." He released claimant to return to work with specified restrictions. Claimant said she was given light duty and continued to work at the same wages for a few more weeks. (Dr. L) impression on April 8th was that the lumbarsacral strain was resolved. (Dr. L) signed a Report of Medical Evaluation (TWCC-69) which stated that claimant reached MMI on April 8th with a whole body impairment rating of zero percent. (Dr. L) also signed an employer's form on April 8th stating claimant's lumbar strain was resolved and that she could return to work with no restrictions. Claimant disagreed with (Dr. L) assessment. She testified that on March 31st she was so sore she could hardly walk and could not do certain prescribed exercises. She said she told two of employer's managers that (Dr. L) was a "quack," and she disputed his qualifications to certify to her having reached MMI. She said she was off work for three weeks, was not then in severe pain but felt she would be if she returned to the floor. She stated that "at this time" she reinjured herself and asked to be seen by an orthopedic specialist.

On April 30th, she was seen by (Dr. S), an orthopedic surgeon claimant apparently selected. Spinal x-rays revealed a narrowing at L5/S1. An MRI, lumbar myelogram, and post-myelogram CT scan obtained on May 20th showed a mild bulging of the annulus at L4-5, but were otherwise unremarkable. On May 28th (Dr. S) stated that claimant was not released to return to work until further notice. (Dr. S) impression on June 1st was "(date of injury) on the job injury with thoracolumbar pain with radiation to the lower extremities . . . ," and he recommended non-surgical treatment. According to (Dr. S) records, claimant told

(Dr. S) she quit her job on April 21st because her job was very physical and required a lot of standing, lifting, bending, pushing and pulling which she just could not handle because of her back pain.

On June 24th, the carrier requested that claimant be examined by a doctor it selected. Carrier correspondence in evidence states that claimant agreed with carrier to be examined by (Dr. O). On July 6th she was evaluated at the (city) Impairment and Disability Evaluation Center at the request of (Dr. O). Claimant made an appointment to be seen by (Dr. O) on August 6th, and the carrier advised her that since she had agreed to see (Dr. O), carrier would "agree to abide by his findings and recommendations." According to a TWCC-69 signed by (Dr. O), accompanied by an August 28th letter report, claimant reached MMI on April 8, 1992 with a whole body impairment rating of five percent.

The evidence also shows that on July 27th claimant was examined by (Dr. W). According to carrier's July 21st letter to (Dr. W), a benefit review conference was held on July 20th. The report of that BRC is not in evidence. However, it appears that the decision of the Texas Workers' Compensation Commission (Commission) to select a designated doctor ((Dr. W)) may have been made at that conference, possibly because of claimant's disagreement with (Dr. L) certification of MMI as of April 8th with no impairment. For completeness of the record and to aid in our reconstruction of the chronology of events, it would have been helpful to have had this BRC report in evidence. According to the August 19th benefit review conference report, which is in evidence, (Dr. W) was the doctor designated by the Commission. The benefit review officer stated that claimant and carrier "entered into an agreement" that (Dr. W) would determine disability and MMI. At no time in the hearing did claimant contend that (Dr. W) was not a designated doctor under either of Articles 8308-4.25 or 4.26, although she did deny asking to see (Dr. W) at the first BRC or at any time. On cross-examination claimant admitted that (Dr. W) was the doctor designated by the Commission to examine her and that he had her medical records. In his report of July 27th, (Dr. W) impressions included (1) mild ligamentous irritation of the right sacroiliac joint and (2) postural low back pain. He stated that claimant had reached MMI on July 27th with a zero percent impairment rating. Claimant conceded such were (Dr. W) determinations. In (Dr. W) opinion, claimant "has indeed achieved [MMI] especially in view of the fact that the therapy, which she is receiving, has not seemed to change her condition over the past six months." He viewed the minor disc bulge at L4-5 as having no relationship to claimant's subjective complaints and as reflective of mild degenerative changes rather than of injury. He also found no organic basis for assigning any impairment rating and said she could return to work without restrictions. On August 5th, carrier sent (Dr. W) report to (Dr. S), as claimant's treating physician, and advised him that claimant also had an appointment to be seen on August 6th by (Dr. O). Claimant testified she totally disagrees with (Dr. W) opinions and stated she "was physically brutalized by (Dr. W)."

Notwithstanding that (Dr. W), as the designated doctor, determined that claimant reached MMI as of July 27th with no impairment, the carrier, for reasons unexplained on the record, persisted with claimant's examination by (Dr. O), forwarded (Dr. O) report on

September 8th to (Dr. S) for his comment, and by letter of September 9th advised claimant it would commence payment of impairment income benefits based on (Dr. O) assignment of a five percent impairment rating. In an undated TWCC-69, (Dr. S) estimated that claimant would reach MMI on "11-10-92" after completing her pain management and work hardening program. (Dr. S) also said he agreed with (Dr. O) five percent impairment rating.

Claimant introduced a September 11, 1992 report from (Dr. K) with the Southwest Medical Pain Management Program which stated his impression as (1) chronic pain syndrome and (2) secondary depressive disorder, and which recommended claimant participate in a four week program.

Regarding her quitting her job on April 21st, claimant testified, variously, that on that date she could not meet her job requirements and therefore had disability. She also said it was true she quit over a scheduling problem with her supervisor, (Mr. T). He wanted her to work on a Saturday night, apparently that of Easter weekend, and she felt she could not handle it and that he was harassing her. She was scheduled to be off the following Monday. She said she had worked 40 hours the previous week on Monday, Tuesday and Wednesday, and that on Thursday she couldn't get out of bed. She worked on Friday but had physical problems including pain in her tailbone radiating into her right leg, and numbness and weakness. She said she aggravated her injury, the pain got worse, and that she so advised (Ms. B). She also indicated that although she had quit her job, it was not voluntary because not only could she not handle it, but she had been sexually harassed for three years and had spent $6,000.00 on therapy. (Ms. B), employer's personnel manager, testified that when claimant quit, she brought up the problem with (Mr. T) over her working on Saturday night but did not mention that working caused her pain. She also testified that even after claimant quit, (Mr. T) said she could return to work if she would commit to a schedule.

The hearing officer found that claimant was unable to obtain and retain employment at wages equivalent to her preinjury wages from April 21 through July 27, 1992. Based on that finding the hearing officer concluded claimant had disability based on her (date of injury) compensable injury from April 21 through July 27, 1992. He also found that on July 27th claimant reached a point after which further material recovery from her compensable injury could not reasonably be anticipated. Based on that finding, the hearing officer concluded claimant reached MMI on July 27, 1992. In his discussion, the hearing officer stated that claimant's testimony concerning her inability to work because of her back pain was credible and was corroborated to some extent by medical evidence. He further observed that (Dr. W) certification of MMI was not contrary to the great weight of other medical evidence and was entitled to presumptive weight pursuant to Article 8308-4.25(b). Neither party has appealed the MMI and impairment determinations.

We find the evidence sufficient to support the hearing officer's determination that claimant had disability after April 21st. Article 8308-1.03(16) defines disability as "the inability to obtain and retain employment at wages equivalent to the preinjury wage because

of a compensable injury." Whether claimant had disability after April 21st was a fact question for the hearing officer to decide as the trier of fact. Article 8308-6.34(e) vests in the hearing officer the sole responsibility for judging not only the relevance and materiality of the evidence, but also the weight and credibility it is to be given. Not only did claimant testify, in part, that she quit her job because she couldn't handle it, but the medical evidence showed she had a mild bulging at L4-5. Further, (Dr. S) records of April 30th quite specifically recounted her history of quitting because of the physical demands of the job. As the hearing officer observed at the hearing, the issue was whether claimant quit because of her inability to perform her duties, notwithstanding that she might also have had another reason for quitting. With the evidence in this posture, the hearing officer was free to find that claimant had disability after April 21st. The fact that claimant quit her job--as well as her reasons for quitting--was simply evidence to be considered on the issue of disability, along with the other evidence in the record. The hearing officer may believe all, part, or none of the testimony of any one witness, including claimant, and may give credence to testimony even where there are some discrepancies. Taylor v. Lewis, 553. S.W.2d 153 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.). Carrier has pointed us to no authority, nor are we aware of any, for the proposition that an employee with a compensable injury cannot have disability under the 1989 Act after the employee has terminated employment. *Compare* Texas Workers' Compensation Commission Appeal No. 92557, decided December 7, 1992, where an employee who was involuntarily terminated by the employer was nevertheless determined to have disability.

The challenged finding and conclusion are not so against the great weight and preponderance of the evidence as to be manifestly unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986).

Philip F. O'Neill
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Thomas A. Knapp
Appeals Judge