APPEAL NO. 92625

On October 6, 1992, a contested case hearing was held in (city), Texas, with (hearing officer) presiding as the hearing officer. The hearing officer determined that the appellant, claimant herein, did not have a disability as of May 18, 1992 and denied her benefits under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art 8308-1.01 *et seq*. (Vernon Supp. 1992) (1989 Act). Claimant appealed, contending she had not reached maximum medical improvement (MMI), that she was unable to work because she had been terminated and she had a disability, as defined by the Act. Respondent, carrier herein, timely filed a response requesting we uphold the hearing officer's decision.

DECISION

The decision of the hearing officer is affirmed.

Claimant was employed as a test car driver for (employer), the employer, on (date of injury) when the vehicle she was driving was struck by another vehicle from behind. Claimant was seen in the emergency room of (hospital) on (date of injury) by (Dr. TH). Dr. TH prescribed a soft collar, bed rest for 24 hours and no work for two days. It was Dr. TH's opinion at that time that claimant could return to work on December 20, 1991.

Claimant saw (Dr. PS) on January 6, 1992, and Dr. PS became the primary treating physician. By report dated February 20, 1992, Dr. PS stated claimant may participate in a "desk-type job without . . . bending stooping . . ." etc., and if no such modified duty was available, claimant should remain off work. On February 26, 1992 claimant had a lumbar spine CT scan showing a "[n]ormal lumbar spine CT."

Claimant was seen by (Dr. RJ) at carrier's request on April 8, 1992. Dr. RJ found only subjective tenderness and stated there was "no reason why [claimant] cannot return to her regular work on a fulltime basis. However, I would not permit this until she is cleared by [Dr. PS]." Dr. RJ thought Dr. PS would release claimant after she finished physical therapy at the end of April.

Claimant's Exhibit No. 3 is a three page medical report from Dr. PS. The first page indicates claimant is released to return to work as of May 18, 1992. The doctor notes that claimant continues to have stiffness, tenderness and pain. The second page is undated and refers to an MRI and claimant's desire to go ahead with surgery. The third page is dated 6-22-92 and is a follow-up visit indicating the claimant continues to have pain and some stiffness.

On June 13, 1992 an MRI of the cervical spine was done at the request of Dr. PS. The impression was "[h]erniated disc to the midline and to the right at the C5-6 level."

At some point, Dr. PS referred claimant to (Dr. BH). Dr. BH in turn referred claimant to (Dr. PD), a neurologist. Dr. PD did "NCV's and "EMG's" and found "NCV's showed no

signs of entrapment or neuropathy. In a report to Dr. BH dated August 17, 1992, Dr. PD stated "EMG's were unremarkable for denervation and/or nerve root irritation. Clinical correlation is recommended . . ." . Dr. BH saw claimant on a follow-up visit on August 24, 1992, reviewed the MRI report and indicated that Dr. PD did an EMS "and nerve conduction velocity studies." Dr. BH opined claimant had "failed conservative treatment" and had "symptoms consistent with a C6 radiculopathy."

Claimant continues to complain of pain, states she has not worked since the accident other than three days after the accident, cannot lift or move anything, cannot do housework, and cannot drive her car. Claimant is not taking any medication other than Tylenol for pain. Claimant stated at the contested case hearing (CCH) she is unable to work.

The issue framed at the CCH was the same as the issue unresolved at the benefit review conference and was:

Does the claimant have disability after May 18, 1992?

The hearing officer found:

Findings of Fact

4. That on May 18, 1992, Claimant was returned to full duty by her doctor without any restrictions and there has been no change up to and including the date of the Contested Case Hearing on October 6, 1992.

5. That as of May 18, 1992, Claimant has been able to perform the duties which she performed for her employer, (employer).

and concluded:

Conclusions of Law

3. That as of May 18, 1992, Claimant does not have a disability.

4. That Claimant is not entitled to temporary income benefits as of May 18, 1992, and until such time as she may have further disability as a result of her injury of (date of injury).

Claimant appealed Findings of Fact Nos. 4 and 5 and Conclusion of Law No. 4. Claimant contends that Finding of Fact No. 4 is in error because Dr. PS, the treating doctor, had not stated claimant had "reached Maximum Medical Improvement" and that claimant was still under a doctor's "care for further treatment."

Disability is defined in Article 8308-1.03(16) as "the inability to obtain and retain employment at wages equivalent to the preinjury wage because of a compensable injury."

Disability is not the same as MMI, which is defined in Article 8308-1.03(32) as "the earlier of (A) the point after which further material recovery from or lasting improvement to an injury can no longer reasonably anticipated, based on reasonable medical probability; or (B) the expiration of 104 weeks from the date income benefits begin to accrue." Applying these definitions, it is possible for individuals to have not reached MMI, because they are still recovering from the compensable injury, but still not have disability because they are able to obtain and retain employment at the preinjury wage. This is apparently the situation in the instant case. There was no testimony or evidence that MMI had been reached and the hearing officer properly did not make a finding on MMI. What the hearing officer did was find, in Findings of Fact No. 4 and 5, and Conclusion of Law No. 3, that the claimant was able to obtain and retain employment at wages equivalent to the preinjury wage and was not prevented therefrom because of claimant's (date of injury) accident.[1] This distinction between disability, as defined by the Act, and MMI was addressed in Texas Workers' Compensation Commission Appeal No. 91014, decided September 20, 1991, and Texas Workers' Compensation Commission Appeal No. 91060, decided December 12, 1992. In Appeal No. 91060, *supra*, we held ". . . the main source of the confusion centers around the terms `return to work', `disability' and `maximum medical improvement'. We have previously held that they are not the same." Citing Texas Workers' Compensation Commission Appeal No. 91014, *supra*. We held a full, unrestricted release to duty does not equate to MMI. The hearing officer, although not spelling out the definition of disability, properly did not equate disability with MMI.

Claimant's next contention is that Finding of Fact No. 5 is in error because claimant "was informed that [she] had been terminated" and therefore she "no longer had a position to return to." Although there was some testimony about claimant's possible termination, the hearing officer did not discuss this in his statement of evidence and made no findings regarding any termination. The carrier in its response states ". . . there was no evidence . . that [claimant] had been terminated . . ." It was the uncontradicted evidence that claimant had not sought any employment, with either the preinjury employer or any other employer. In Texas Workers' Compensation Commission Appeal No. 92557, decided December 7, 1992, we held that to meet the definition of disability the employee must be unable to obtain/retain employment, at the preinjury wage due to a compensable injury, with any employer, not just the preinjury employer. Even if we were to agree with claimant that she had been terminated, and this is contrary to the evidence, claimant would still not necessarily have disability.

Finally, claimant alleges that she should be entitled to temporary income benefits (TIBS) "as of May 18, 1992, until such time that I reached Maximum Medical Improvement or until I have fully recovered from my injury and become employable once again." TIBS are payable under Article 8308-4.23(a) to "[a]n employee who has disability . . ." As discussed previously, disability is defined as the inability to obtain/retain employment at

[1]It is possible that disability may recur in a particular situation and may give rise to reinstitution of temporary income benefits. *See* Texas Workers' Compensation Commission Appeal No. 92318, decided February 1992, and Texas Workers' Compensation Commission Appeal No. 91122, decided September 4, 1992.

preinjury wages because of a compensable injury. The hearing officer specifically found, and is supported in the evidence, that claimant does not have disability and it therefore follows that claimant is not entitled to TIBS.

The claimant has the burden to prove, through a preponderance of the evidence, that she was unable to obtain or retain employment due to the accident on (date of injury). *See* Reed v. Aetna Casualty and Surety Company, 535 S.W.2d 377 (Tex. Civ. App.-Beaumont 1976, writ ref'd n.r.e.). The claimant certainly presented evidence to that effect by her own testimony and through certain of the medical evidence. The carrier also presented medical evidence from Dr. PS, the treating physician, and Dr. RJ which released claimant to full duty as of May 18, 1992. Dr. PS recognized that claimant still had some complaints, tenderness and stiffness but apparently felt claimant was physically capable of conducting normal nonrestricted work duties. Dr. PD found no explanation for claimant's subjective complaints and recommended "clinical correlation." The hearing officer is the sole judge of the relevance and materiality of the evidence offered and of the weight and credibility to be given to the evidence. *See* Article 8308-6.34(e). We will not reverse the hearing officer unless his determination is so weak or his findings so against the great weight and preponderance of the evidence as to be manifestly wrong or unjust. *See* In re King's Estate, 150 Tex. 622, 244 S.W.2d 660 (1951) and Texas Workers' Compensation Commission Appeal No. 92447, decided October 5, 1992.

In the instant case, the hearing officer's findings, conclusions and decision are supported by the medical evidence from Dr. PS, Dr. RJ and Dr. PD. We will not substitute our judgment for that of the hearing officer, as the trier of fact, when the challenged findings are not against the great weight and preponderance of the evidence. We do not so find.

The decision of the hearing officer is affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Joe Sebesta
Appeals Judge