APPEAL NO. 92652

This appeal arises under the Texas Workers' Compensation Act of 1989 (1989 Act), TEX. REV. CIV. STAT. ANN. arts. 8308-1.01 through 11.01 (Vernon Supp 1992). On October 23, 1992, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. She decided that while the appellant, claimant herein, had not been injured in the course and scope of employment, the carrier had lost the ability to dispute compensability because it failed, without good cause, to contest it within 60 days under Article 8308-5.21; therefore medical benefits are due and payable, but since claimant did not show that he had disability, no temporary income benefits are due at this time. Claimant appealed the hearing officer's conclusion that he was not in the course and scope of employment when injured. However, this conclusion is moot under present circumstances because of the unappealed conclusion that the carrier lost its ability to contest compensability. Claimant also appealed the conclusion that he had no disability. As indicated, the carrier did not appeal the conclusion that it had lost its ability to contest compensability and that medical benefits are due.

DECISION

Finding that the decision and order of the hearing officer are supported by sufficient evidence of record, we affirm.

Claimant had worked for employer since being hired in (city), Texas, in July 1990, when he asserted that he was injured on (date of injury), while on a trip to (state). The employer is in the business of responding to claims of overspray damage in order to minimize the resulting damage--in this case there was about two weeks of work in (state) for a team to clean paint spray from cars parked in a parking lot next to a large painting job. Normally, nearby crews handle the work. The claimant was assigned at the time to work on the east coast. At times crews from the midwest respond to the west coast, but crews from the east coast do not go to (state). Carrier claimed at hearing that the "dual purpose" provision controlled because employer allowed claimant to go to this job because he had family in (state); thereby accommodating him. Article 8308-1.03(12)(B) of the 1989 Act, provides in pertinent part that:

> (12)"Course and scope of employment" means an activity of any kind or character that has to do with and originates in the work, business, trade, or profession of the employer and that is performed by an employee while engaged in or about the furtherance of the affairs or business of the employer. The term includes activities conducted on the premises of the employer or at other locations. The term does not include . . .
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> (B)travel by the employee in the furtherance of the affairs or business of his employer if such travel is also in furtherance of personal or private affairs of the employee unless:

(i)the trip to the place of occurrence of the injury would have been made even had there been no personal or private affairs of the employee to be furthered by the trip; and

(ii)the trip would not have been made had there been no affairs or business of the employer to be furthered by the trip.

The evidence was controverted as to how much of the claimant's flight was paid by the employer and by the claimant--carrier said claimant paid it all through a reimbursement arrangement and claimant said he paid one-half. When claimant arrived in (state), the shuttle bus he rode to the hotel was rear-ended giving rise to this claim for back injury. These facts are provided as background only since the issue as to course and scope is moot because the controlling determination that the carrier lost its ability to contest compensability was against carrier and it did not appeal that determination.

At the hearing there were two issues: was the (date of injury) injury in the course and scope of employment and did the carrier meet the requirements for disputing compensability? The first was decided against the claimant, but it was negated by the decision against the carrier on the second. At the hearing, evidence as to the extent of injury, periods of medical care, claimant's continued work without absence, and method of severance of the relationship between claimant and employer were addressed. Neither party on appeal states that the issue of disability was not litigated even though it was not specifically stated to be an issue at the hearing or that the hearing officer should not have addressed it in a conclusion of law. The only issue on appeal is whether the hearing officer is supported by sufficient evidence in concluding that claimant has no disability.

Claimant travelled to (state) on a Sunday, the day of the accident. On Monday he worked, as he did on Tuesday. While we have no medical records of his first visit to a doctor, no one questions that he saw a doctor during the first week he was in (state). Claimant states he first saw a doctor on Tuesday, May 14th. An unsigned medical certificate from a local medical group in (state) is dated May 16th, says claimant has been under care since May 14th, indicates claimant has a "myofascial strain," and is able to return to work. Claimant said he worked continuously from that point to the time he was fired after being arrested while traveling from one location to another (testimony referred to both September and October 1991 as the time of termination). Claimant said that he had to keep working because he could not afford to stop. (In a statement claimant gave in December 1991, he acknowledged that he had a prior claim in 1989 for a lumbar strain.) He testified that he saw a doctor as work permitted in different areas of the country his work took him. He said he did work a short period for a temporary employment service after leaving this employer but this second employer let him go because his time off for medical care was a hindrance. He says that he cannot work because of the pain. A claim was filed after claimant was fired.

RM was the person claimant reported to when he got to (state). RM testified that he

saw claimant playing basketball on May 14th and 15th and claimant was told he should get a doctor's release so he could go back to work. Claimant said that PB, a senior official in the company, told him that if he wanted to get back to work he needed to get a doctor's release, but claimant did not dispute the testimony about playing basketball at that time. Nor did claimant dispute RM who testified that claimant took no time off from work until he was fired. Claimant did not stop working because of the injury. He lost his job for an unrelated reason.

Claimant saw Dr. H on February 3, 1992 for an examination at the request of the carrier. Dr. H refers to claimant's history of having seen doctors in (city) and (city), (state). He mentions a period probably beginning in June 1992, after claimant left (city), until November 1992, in which claimant did not see a doctor. In November he began seeing a doctor in (city), Texas. Dr. H's examination found an "excellent range of back mobility," "slight tenderness" in the cervical area, and that no muscle groups were demonstrably weak. An MRI of the neck was normal and an MRI of the low back showed "minimal degenerative changes" but "no herniated disc producing nerve root encroachment." Dr. H said "I feel that his continuing discomfort is the result of muscle tightness which is not directly related to the episode last May." He did not recommend further studies.

Claimant attached to his appeal certain medical records which he did not offer at the hearing. All records except three notes dated October 16, 1992 and November 30, 1992, which say claimant cannot work, predate the hearing and could have been offered at that time. The Appeals Panel has repeatedly held that it will only review the record, the appeal and the response as is stated in Article 8308-6.42 of the 1989 Act. Documents that could have been offered at the hearing will not be considered for the first time on appeal. The hearing officer is the fact finder. *See* Texas Workers' Compensation Commission Appeal No. 91132, dated February 14, 1992. We point out that the question of whether disability exists under the 1989 Act is subject to reexamination for different time periods and claimant could possibly use the documents prepared after the hearing to address whether he has disability subsequent to the hearing.

Disability is generally a fact issue for the hearing officer to determine. She is the sole judge of the weight and credibility of the evidence. *See* Article 8308-6.34(e) of the 1989 Act. While medical evidence is helpful, it is not essential to a finding of disability except in limited cases (this case would not be one of those limited cases). *See* Texas Workers' Compensation Commission Appeal No. 92167, dated June 11, 1992. The evidence that claimant worked for over four months after the injury without missing any time, the medical evidence of no abnormality from injury, and the claimant's own testimony that the pain was about the same while he worked as compared to when he no longer worked, provided a sufficient basis for reaching the conclusion that claimant had no disability.

The decision and order are sufficiently supported by evidence of record and are affirmed.

Joe Sebesta
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Thomas A. Knapp
Appeals Judge