

APPEAL NO. 92698

On December 3, 1992, a contested case hearing was held in (city), Texas, with (hearing officer) presiding as hearing officer. The hearing officer determined that the appellant, claimant herein, did not sustain disability as a result of his injury of (date of injury), which would entitle claimant to temporary income benefits under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq.* (Vernon Supp. 1991) (1989 Act).

Claimant contends the decision is contrary to the weight of the evidence, alleges impropriety on the part of the hearing officer and alleges the hearing officer misapplied the facts and law as to claimant's receipt of unemployment benefits and a subsequent car accident. Respondent, carrier herein, files a response and requests that we affirm the decision of the hearing officer.

DECISION

The decision of the hearing officer is affirmed.

The issues framed at the benefit review conference and subsequently announced and agreed upon by the parties were:

- a. whether the Claimant's current back problems are related to his injury of (date of injury), or a subsequent motor vehicle accident; and,
- b. whether the Claimant sustained disability related to his injury of (date of injury), and, if so, what temporary income benefits are due.

According to the testimony and the findings of the hearing officer, claimant worked for (employer) employer, as an air conditioner repairman. On (date of injury), while at work, claimant stepped backward, fell over a pallet onto his back and tailbone. He felt considerable pain and was transported to the hospital by EMS. After receiving pain medications and being x-rayed, claimant was released. The hearing officer's statement of evidence fairly and accurately sets forth the facts in this case and we adopt the facts as recited for purposes of this decision.

For purposes of sequencing, we note that the day following the (date of injury) accident, claimant saw (Dr. T) (also spelled [Dr. T] in some places in the record), who diagnosed a bruised tailbone and lower back sprain, prescribed treatment of heat, massage and ibuprofen. (Dr. T) treated claimant with whirlpool treatment through July 26, 1991 when claimant was returned to full duty.

(Dr. S) performed a CT scan on claimant's lower lumbar spine, sacrum and coccyx on August 6, 1991 with essentially negative findings.

Because of claimant's complaints, (Dr. T), in consultation with claimant, referred claimant to (Dr. Ta) for a second opinion. (Dr. Ta) completed a TWCC-69 (Report of Medical Evaluation) which shows maximum medical improvement of 8/6/91 and zero impairment.

Claimant had returned to full duty, without limitation, after July 26, 1991, and performed all his duties without complaint. On September 13, 1991 claimant hit some pipe with his leg, but sustained only a minor injury, missing work only that afternoon and returning to work after the weekend. Claimant continued regular work until October 9, 1991 when his position was eliminated. Claimant declined another position, at a lower pay, with employer because the offered position was in utilities and not in claimant's professional field. The claimant applied for, and began receiving, unemployment insurance payments of \$232.00 per week on about October 13, 1991 and continued until October 1992.

On November 13, 1991 claimant was a passenger in a station wagon when the vehicle claimant was riding in was struck on the right rear side by a GMC suburban. The car in which claimant was riding was declared a total loss. Claimant received medical treatment for injuries, including two weeks of chiropractic treatment for which the doctor charged \$3000.00. Claimant retained an attorney who sent claimant to (Dr. B) and (Dr. D), for evaluation and treatment for injuries sustained in the auto accident. Claimant maintains all injuries involving the auto accident were resolved and sometime in November 1992 settled the auto accident case for about \$20,000.00.

There is a dispute when claimant began seeing (Dr. Y). Claimant testified it was before the November 13th auto accident but the hearing officer is apparently skeptical because he states:

The medical history taken by (Dr. Y) is suspect because it has a number of factual inaccuracies and misstatements in it. The only documents offered were dated from January of 1992 or later. There were no contemporaneous medical documents offered by the Claimant for the period when he was undergoing treatment for his automobile accident.

(Dr. Y) apparently sent Claimant's medical records and x-rays to (state) to be interpreted by (Dr. M), D.C. radiologist. The doctor's report dated January 13, 1992 found some abnormalities.

Claimant saw (Dr. H), who did a CT scan of the lumbar spine, on June 18, 1992 finding it essentially normal. Claimant saw (Dr. B), because of the auto accident, on (date), and reported claimant as stating he had been doing well and was basically stable prior to the automobile accident. (Dr. B) attributes claimant's low back pain syndrome, lumbar radiculopathy and other problems to the auto accident.

The hearing officer states "[t]he Claimant lacked credibility in general and specific matters of testimony." The claimant unabashedly asserts he is entitled to temporary

income benefits due to disability from (date of injury), notwithstanding that he worked on his job at full pay until he was laid off on October 9, 1991, and thereafter began drawing \$232.00 a week unemployment compensation for a year based on the medical reports of (Drs. T and Ta) releasing claimant back to full duty. The hearing officer found that the medical evidence failed to connect the injury of (date of injury), in any way with any current real or imagined injuries and concluded that claimant has not sustained disability as a result of his (date of injury) injury after claimant returned to work on July 26, 1991.

Claimant filed a two page appeal challenging the hearing officer's decision, apparently on sufficiency of the evidence, alleging impropriety on the part of the hearing officer and apparently invoking some Texas Workers' Compensation Commission (Commission) rules. We have attempted to categorize the various issues raised in order to address them as like groupings.

The claimant alleges various improprieties, one being that during a recess the hearing officer and carrier's counsel closed the door and conferred privately. Carrier's counsel vehemently denies this event or any improper communication between counsel and the hearing officer. The record, both transcript and tape, is silent in this regard, however, we note that claimant was assisted by an ombudsman. Neither the claimant nor ombudsman raised any objection regarding this matter at the hearing. We consider ex parte communications in violation of Article 8308-6.34(i) as a very serious matter, however, there is no basis on which we can conclude that the substance of the case was discussed outside the presence of the claimant. The decision of the hearing officer is based wholly on matters in the record.

Claimant also alleges he was harassed by carrier's counsel who talked loud and kept asking the same questions. Review of the tape recording of the proceedings fails to disclose any raised voices and as the hearing officer noted, the reason for repeating questions was legitimate cross-examination to compel the claimant to answer questions that he had refused to answer, by saying he did not understand the question. Claimant's contentions are without merit.

Claimant, in general, challenges the hearing officer's decision, all the doctor's reports, other than ones by (Dr. Y), the hearing officer's interpretation of (Dr. Y's) report and testimony and that the hearing officer failed to give proper weight to (Dr. S's) report, the CT scan done by (Dr. H), and the x-ray evaluation done by (Dr. M). We note 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). The hearing officer clearly found the claimant and (Dr. Y) lacked credibility, and that claimant "evaded answering questions and pretended not to hear or understand them." We will reverse the hearing officer, based on insufficiency of the evidence, only if the evidence is so weak or so against the overwhelming weight of the evidence as to be clearly wrong or manifestly unjust. We do not so find that to be the case here.

Claimant argues Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 142.13 (Rules

142.13, 142.3, 142.3(a) (1) and (2), and 142.4) were "validated." Rule 142.13 deals with discovery, Rule 142.3(a) (1) and (2) deal with ex parte communications and Rule 142.4 deals with delivery of copies to all parties. Discovery and delivery were accomplished and we discern no error or alleged error in this regard. As to the allegation regarding Rule 142.3 on ex parte communication, we have previously addressed that issue.

Finally, we find some of claimant's claims invalid given the economic-based definition of "disability" in the 1989 Act. Claimant claims temporary income benefits for the period after his (date of injury) accident while he was still working at his full preinjury wage. Article 8308-4.23 provides temporary income benefits are payable to an employee who has a disability which 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. By definition, claimant is not entitled to compensation from (date of injury) until October 9, 1991, when claimant was laid off, because he had employment at his preinjury wage. Claimant also asserts he was entitled to receive unemployment insurance payments because (Dr. T) and (Dr. Ta) had returned him to full duty, but then turns around and contests those same doctor's findings saying he was not well enough to work. We are cognizant of the language in Texas Workers' Compensation Commission Appeal No. 92198, decided July 3, 1992 and Appeal No. 92539, decided November 25, 1992 citing Aetna Casualty & Surety Company v. Moore, 386 S.W.2d 639 (Tex. Civ. App.-Beaumont 1964, writ ref'd n.r.e.) wherein the court held a workers' compensation claimant was not judicially estopped to deny his unsworn statements to the Texas Employment Commission that he was available to work, able to work and willing to work. However, we note that the court in American Employers Insurance Company v. Climer, 220 S.W.2d 697 (Tex. Civ. App.-Dallas 1949, no writ) held that statements made to the Texas Employment Commission were properly admitted in evidence for impeachment purposes, for such value as the trier of fact might see fit to give such evidence. In the instant case the hearing officer, in assessing credibility, could consider the fact that claimant drew one year of unemployment compensation based on the treating doctor's opinions, but later disavowed those same opinions in claiming disability. The hearing officer's decision regarding claimant's lack of disability is supported by sufficient probative evidence.

We find claimant's allegations to be totally without merit. The hearing officer's decision is affirmed.

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Thomas A. Knapp  
Appeals Judge

CONCUR:

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Robert W. Potts  
Appeals Judge

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Susan M. Kelley  
Appeals Judge