APPEAL NO. 92708

This appeal arises under the Texas Workers' Compensation Act (1989 Act), TEX. REV. CIV. STAT. ANN. arts. 8308-1.01 *et seq*. (Vernon Supp. 1993). A contested case hearing was held in (city), Texas, on November 2 and 19, 1992, to determine a single issue: whether the claimant had disability from August 20, 1992 to the present as a result of his injury on (date of injury) while working for employer. The hearing officer, (hearing officer), issued a decision that the claimant, who is the appellant in this action, did not have disability from (date of injury) through the date of the close of the hearing (November 19, 1992), but he ordered that the claimant was not entitled to temporary income benefits (TIBS) from August 20, 1992 through November 19, 1992.

In his request for review, the claimant contends that the hearing officer's findings of fact that claimant's inability to obtain and retain employment at wages equivalent to his preinjury wage because of something other than the compensable injury are the result of misapplication of the law and are insufficient as a matter of law, as well as not supported by sufficient credible evidence. For the same reasons, he argues, these findings of fact do not support the conclusion of law that the claimant did not have disability on the dates recited. Claimant also says the decision is outside the jurisdiction of the hearing officer.

The carrier's response certifies it was served on the appellant/claimant by certified mail on January 19, 1993. It was hand-delivered to the Commission on the same day. The record shows that the hearing officer's decision was distributed on December 8, 1992 and that the claimant's request for review was postmarked December 24th. The 1989 Act provides that the respondent party shall file a written response with the Appeals Panel not later than the 15th day after the date on which the request for appeal is served. Article 8308-6.41(a). Rules of the Commission, Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 102.5(h) (Rule 102.5(h)), provide that the Commission shall deem the received date to be five days after the date mailed. In absence of any evidence to the contrary, carrier's response was due January 13, 1993. Carrier's response thus is not timely and will not be considered.

DECISION

Upon review of the record in this case, we affirm the hearing officer's decision and order, as reformed.

The claimant, who was employed by (employer) beginning in (month) of (year), testified that he was injured on (date of injury) when employer's warehouse door closed on his head, back, and shoulders. The next day he went to see (Dr. A), and he testified that at the time of the hearing he was continuing to be treated by that doctor. However, he said that he did not receive any medical treatment from November 1991 until March 1992 because he was frequently away from home due to another job with (H), a company that cleaned up train derailments. His work there involved hooking up slings, hooks, or booms to trains or engines that had derailed. He later stated that he worked for (H) during

November and a few days in December, 1991.

Claimant was terminated by employer on (date of injury). Beginning October 7, 1991, claimant began working for (Mr. H), supervising the move of Mr. H's trailer business and also as a laborer. Beginning January 1, 1992, claimant and Mr. H became partners in a trailer repair business. Mr. H testified that during the time he worked with claimant, he had physical limitations from his earlier injury and, for example, could not lift heavy items, although he said claimant lifted desks and some equipment. He also said that claimant could only work half days because he was undergoing physical therapy, and that he was aware of claimant's work for (H). On August 19, 1992 claimant and Mr. H disbanded their partnership through mutual agreement because claimant's doctor, (Dr. C), had taken him off work on that date.

Claimant testified that he was not injured in any way while working for Mr. H or for (H). He stated that his current condition was "fair," and that he continued to have headaches and weakness in his upper body and sometimes pain in his lower back and legs.

(Mr. W), who is employer's owner and also claimant's brother-in-law, testified that he terminated the claimant on (date of injury) because he was a slow worker and generally was not working out. He said after claimant was fired, he informed Mr. W that he had suffered an injury while on the job. Mr. W also acknowledged animosity between himself and claimant and between their families. Nevertheless, the evidence shows the carrier accepted liability for the claim and had paid claimant TIBS from (date) through at least December 31, 1991, pursuant to a benefit review conference agreement.

Medical reports in evidence show that Dr. A originally diagnosed cervical and thoracic sprain-strain, but released claimant to return to full time work on (date). Later, on an unspecified date, Dr. A referred claimant to (Dr. Co), due to lack of response and continued brachial nerve impairment. On August 19, 1992, Dr. Co took claimant off work due to his diagnosis of contusion, thoracic spine. (It is not clear whether Dr. Co took claimant off work indefinitely; his authorization indicates claimant's return to work date is unknown, but it also says under the "Comments" section, "4-6 weeks--off work." A September 2, 1992 authorization form from Dr. A also recommended claimant be excused from work until "further notice" effective August 19th.

Pursuant to an October 20, 1992 Commission Medical Examination Order (Form TWCC-22) under Article 8308-4.16, the claimant was examined by carrier's doctor, (Dr. Ci), who was directed to determine whether or not the claimant's current medical complaints were the result of an aggravation or a continuation of the initial injury. In an October 30, 1992 letter Dr. Ci described a basically normal examination of claimant and said he would expect his symptoms to improve after six to eight weeks, with complete recovery. Dr. Ci further said, "[i]n my opinion his present symptoms are entirely functional and I can find no objective abnormalities . . . he is able to return to any type of work without limitation. It is further my opinion that he has no permanent impairment as a result of this injury and has

reached [MMI]." Dr. Ci further stated that no further treatment or diagnostic tests were required, and in his opinion the claimant should have reached MMI about January 1, 1992. Dr. Ci also completed a Report of Medical Evaluation to this effect.

Referring to the American Medical Association's Guides to the Evaluation of Permanent Impairment, 3d Edition, 2d Printing, claimant's attorney asked claimant whether Dr. Ci had, in examining him, performed certain tests contained therein. Claimant replied that he had not.

The hearing officer made pertinent findings of fact as follows:

Findings of Fact

4.Any lost time from work by [claimant] from August 20, 1992, through the date this benefit Contested Case Hearing closed on November 19, 1992, was the result of something other than an injury occurring while [claimant] was working for [employer].

5.The inability of [claimant] to obtain and retain employment at wages equivalent to the preinjury wage from August 20, 1992, through the date of this Benefit Contested Case Hearing closed on November 19, 1992, was the result of something other than an injury occurring while [claimant] was working for [employer].

The hearing officer also made the following conclusion of law:

Conclusion of Law

2.From August 20, 1992, through the date of this Benefit Contested Case Hearing closed on November 19, 1992, [claimant] did not have disability.

The hearing officer's decision and order were stated as follows:

DECISION

I find that [claimant] did not have disability from (date of injury), through the date of this Benefit Contested Case Hearing closed on November 19, 1992.

ORDER

IT IS HEREBY ORDERED that [claimant] is not entitled to Temporary Income Benefits under the Texas Workers' Compensation Act from August 20, 1992, through the date of this Benefit Contested Case Hearing closed on November

19, 1992.

Claimant argues on appeal that the language of Findings of Fact Nos. 4 and 5--that claimant's disability was due to "something other than" his injury--are vague and conclusory and give no indication of what the other cause was or what evidence supports the findings. He further argues that the findings are not supported by sufficient evidence, and that the record in fact shows that two doctors (Drs. A and Co) relate claimant's current incapacity to the original injury and that nothing in the record shows there was another cause for his incapacity. Dr. Ci's narrative, he argues, is questionable because the evidence shows that doctor certified MMI without doing the appropriate tests. Finally, claimant argues, after the compensability of an injury is established the carrier must prove that another reason is the sole cause of any incapacity suffered by the claimant. For all the same reasons, claimant challenges Conclusion of Law No. 2.

Because of the statutory definition of "disability," the issue in this case could be restated as whether the claimant was unable, from August 20 to November 19, 1992, to obtain and retain employment at wages equivalent to his preinjury wage because of his compensable injury of (date of injury). *See* Article 8308-1.03(16). As this panel has stated previously, determining the end of disability within the meaning of the 1989 Act can be a difficult and imprecise matter, especially where the employee, for whatever reason, is no longer in the employment of the preinjury employer. Texas Workers' Compensation Commission Appeal No. 91045, decided November 21, 1991. In reaching this determination, Article 8308-4.23 does not limit the evidence that may be considered concerning the question of disability. Texas Workers' Compensation Commission Appeal No. 92209, decided July 13, 1992. This includes all medical reports in evidence, regardless of whether the opinions were rendered by a treating doctor or not. *See* Texas Workers' Compensation Commission Appeal No. 92206, decided July 6, 1992 (wherein we said a nontreating doctor's evaluation report returning a claimant to work "was certainly evidence on the matter that could be appropriately considered in determining the factual issue of an end of disability by a return to full work.") The claimant's own testimony also is evidence which may establish disability, even where contradicted by medical evidence. Texas Workers' Compensation Commission Appeal No. 91083, decided January 6, 1992; Houston General Insurance Company v. Pegues, 514 S.W.2d 492 (Tex. Civ. App.-Texarkana 1974, writ ref'd n.r.e.).

This case presents the somewhat unusual fact situation wherein the claimant's doctor initially released him to full time work; he thereafter worked at two jobs during a time that included a period where he received no medical treatment; he returned to medical treatment and was taken off work by his treating doctor and that doctor's referral doctor effective August 19th; and he was examined by an Article 8308-4.16 doctor who opined that the claimant's symptoms should have resolved after six to eight weeks and that he was capable of returning to full duty work. The claimant also contended he continued to have pain although he had not been reinjured at either of his two post-injury jobs.

The hearing officer, as sole trier of fact, was entitled to weigh all this evidence in making a determination of whether claimant's inability to earn the equivalent of preinjury wages was due to his compensable injury. Article 8308-6.34(e). He was entitled, for example, to assign greater weight to the opinion of Dr. Ci and his determination that claimant's symptoms should have resolved earlier, which appears to be consistent with Dr. A's original determination. In this regard, we find that any alleged failure of Dr. Ci to use the procedures and tests contained in the AMA Guides to Permanent Impairment does not render his opinion less credible. First, MMI and impairment were not issues in this case. Second, while the concepts of disability and MMI are somewhat similar in that a claimant is entitled to TIBS only if he has disability and has not reached MMI, the two concepts are different and require different measures of proof. Texas Workers' Compensation Commission Appeal No. 91060, decided December 12, 1991. The hearing officer may also have given less weight to claimant's testimony regarding his current condition, given the testimony of claimant and Mr. H regarding claimant's ability to do other work--including some lifting--after the injury. Despite the fact that disability may recur after a period of no disability, *see* Texas Workers' Compensation Commission Appeal No. 91122, decided February 6, 1992, as noted earlier, the claimant's credibility and the weight to be given his testimony were matters for the hearing officer to resolve.

We find that the hearing officer's Findings of Fact Nos. 4 and 5 are supported by sufficient evidence of record, and are not so against the great weight of the evidence as to be unfair or unjust. In re King's Estate, 244 S.W.2d 660 (1951). Because he was only required to find, in determining the issue of disability, whether the claimant's inability to earn the equivalent of preinjury wages was due to the compensable injury, without specifying the cause of claimant's inability to earn such amounts, we do not find the hearing officer's language on this point to be vague. It is clear, although not precisely stated, that the hearing officer found the inability to obtain and retain employment was not because of a compensable injury. Likewise, we disagree with claimant's contention that the carrier had the burden to prove that another, noninjury related reason was the sole cause for claimant's incapacity. Despite the language of the Article 8308-4.16 order, which refers to subsequent injury, a "sole cause" defense was not raised in this case. As we have previously held, the burden is upon the claimant to show a causal relationship between the claimed injury and the claimed incapacity. Texas Workers' Compensation Commission Appeal No. 91022, decided October 3, 1991.

We agree with claimant, however, that the hearing officer's decision that claimant had no disability beginning (date of injury), was beyond the scope of the issue presented at the hearing. For whatever reason, the issue as referred from the benefit review conference limited the question of disability for the period beginning August 20, 1992. The 1989 Act provides that issues not raised at the benefit review conference may not be considered except by consent of the parties or upon a good cause determination by the Commission. Article 8308-6.31. The record does not show any attempt by either party to change or amend the issue by expanding the period of time considered. In addition, the hearing

officer made no finding of fact or render any conclusion of law which would support this part of his decision. We thus reform the hearing officer's decision to state as follows:

I find that [claimant] did not have disability from August 20, 1992, through the date of the Benefit Contested Case Hearing closed on November 19, 1992.

We affirm the decision and order of the hearing officer, as reformed.

Lynda H. Nesenholtz
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Robert W. Potts
Appeals Judge