APPEAL NO. 93143

This appeal arises under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. arts. 8308-1.01-11.10 (Vernon Supp. 1993) (1989 Act). A contested case hearing was held on January 7, 1993, in (city), Texas, (hearing officer) presiding. The appellant (hereinafter carrier) appeals the hearing officer's determination that the respondent's (hereinafter claimant) (date of injury) injury caused her to be unable to obtain and retain employment at wages she earned prior to April 28th, after May 16, 1991.

The carrier disputes numerous of the hearing officer's findings of fact, contending that the evidence of record demonstrates otherwise. The carrier also contends that the claimant failed to meet her burden of proof to show by competent medical evidence that the (date of injury) work-related injury was a producing cause of her disability; it also claims the hearing officer erred in placing a burden of persuasion on the carrier that does not exist at law with regard to a sole cause defense. The claimant basically argues that the hearing officer's decision is supportable and should be affirmed.

DECISION

Because we find the hearing officer erred in concluding that the carrier had a burden of proof on the issue of sole cause as regards the claimant's alleged disability, and because we are unable to discern whether this error caused the hearing officer to err in determining that claimant had proved by a preponderance of the evidence that she had disability from May 16, 1991, we reverse and remand.

The claimant, who was employed by (employer), injured her back on (date of injury) when she picked up a 44-pound bag of product and moved it to a mixer. She said she felt a pull in her lower back, and she told an operator what had happened. She was sent to Dr. M of employer's industrial medicine clinic, who examined her back, diagnosed lower back strain, and prescribed pain medication. He also recommended she be given light duty work with the restrictions of "no lifting and no climbing (office type work)." From April 28th through May 16th, the claimant said she performed light duty work; this consisted of her working her regular job and regular shifts (day, evening, and graveyard), with another employee doing the lifting and other heavy work she could not perform because of her restrictions. On May 16th, after completing her shift at 7 a.m., she went to see Dr. M, who released her to full duty with no restrictions on a trial basis. She said she told him at that time that her back still hurt and she did not believe she could return to full duty. The claimant said she thereafter took the work release to her supervisor, KD, but told him she did not believe she would be able to do the work. Mr. D testified that when she brought him the release he asked how she was doing, and that she replied she was still a little sore; he said he suggested that she try to go back to work and that he would work with her if she had problems.

The same day, while returning from work after the graveyard shift, she was in an automobile accident. She said that the damage to her car was minor, but that she went to

an emergency room later that evening because her neck was hurting; she said her back pain was the same as before the accident. X-rays of her neck were taken at the emergency room and no fractures were found, but she was prescribed medication, issued a cervical collar, taken off work through May 20th, and advised to consult Dr. M or another physician. On May 21st she went to see Dr. O, whom she had seen in the past. His notes of that date show claimant was complaining of neck and lower back pain, and that she said she had initially hurt her lower back at work. Dr. O treated her for acute lumbar strain and ordered an MRI which disclosed a probable disc herniation at L5-S1. He did not recommend surgery, but prescribed physical therapy which the claimant attended from the end of May until July 1991. The physical therapy discharge summary of July 8th said the claimant reported her back was "not bothering her too much and is now tolerable."

Dr. O July 12, 1991 "to whom it may concern" letter summarized her treatment and said that, while her neck pain disappeared shortly thereafter, "there remains up to the present time some low back pains similar to the pains before the accident." He also said, "[i]t is my opinion that the initial injury was worse that (sic) originally thought. The car accident complicated the situation but I really doubt if this caused the slight disc protrusion. As far as work is concerned it is doubtful that she will be able to resume her regular job. She will be limited on lifting bending and pulling." Dr. O wrote on July 19th that the claimant tried to return to light duty work pursuant to his recommendation, but was told by her employer that no light duty work was available.

In 1976 the claimant had undergone surgery to remove a brain cyst. She testified that on Labor Day of 1991 she began to have bad headaches like she had had previously. On September 13, 1991 she saw Dr. E, who had treated her before; an MRI performed a few days later disclosed a 5cm cystic mass. Dr. E initially decided to treat the claimant with drugs, and recommended she be hospitalized for the first four days of a two week course of treatment. The record shows she was admitted to the UT Medical Branch Hospital (hospital) on September 19th and discharged on the 23rd. A CT scan was performed on October 30th, and a second MRI on November 20th. Because her condition had not changed, she underwent a craniotomy on December 17, 1991 and was discharged from the hospital on December 21st.

At the carrier's request, the claimant was seen by Dr. P, a neurosurgeon, on December 6, 1991 for examination of her back. In a letter to Dr. M, Dr. P noted the MRI scan showing a right L5-S1 HNP, but stated that he told the claimant her "first order of business was to get her craniotomy done and get over that." He also recommended a myelogram which was performed, along with a CT scan, apparently some time in March 1992. Follow up notes from Dr. P on March 23rd report the opinion of a Dr. H, who reviewed the myelogram and CT scan results, that the claimant had a probable ruptured disk on the right at L5-S1 or L5-6, "depending on terminology." On March 26th Dr. P wrote the carrier to acknowledge the disk rupture and said "I have not the foggiest of an idea when this disc

ruptured. All I know is that she told me that her back started hurting after an on-the-job injury."

The claimant testified that she told Dr. E about her back, but that he wanted her to wait to have a myelogram until after her surgery. Documents from hospital at the time of her admission on September 19th state that she was off work due to a back injury, and a December 16th hospital admission document lists "lower back pain" as an "other illness or condition." She stated that Dr. E told her she could work from the time her cyst was diagnosed until the time of her surgery, and that he would have allowed her to do any type of work; however, she said she could only do light duty work because of her back. At the time of her surgery in December 1991 she said she could not work at all. She was discharged from the hospital on orders of "no strenuous activity," and she remained under Dr. Es care until he released her on July 10, 1992, following a July 1st MRI showing collapse of the cyst. The claimant stated at the hearing that she could have returned to light duty work after her surgery, because of her back problem.

May 16, 1991 was the last date the claimant worked for employer. She said she was willing to work light duty, but she was told that no such work was available. She ultimately was terminated by the employer in July of 1992 because she had lost her seniority due to employer's policy allowing one year off for personal illness. Although the employer allowed two years off for job-related illnesses, Mr. D said he had concluded the claimant's injuries after May 15, 1991 were due to the auto accident and not to the April 28th lifting incident. He acknowledged, however, that when he spoke to the claimant following the auto accident, on June 18, 1991, she told him her back problems were the result of the original injury. Mr. D also testified that he would have accommodated her needs for light duty work if necessitated by a job-related injury, but not because of a non-work related injury.

The claimant said she did not look for other work before July 1992 because she was still employed by employer. She acknowledged she had not looked for other work since the time she was terminated. She said the types of jobs she had held before this job required lifting and stooping, which she did not believe she could do.

The hearing officer made findings of fact, *inter alia*, to the effect that the claimant believed she could only perform light duty work after being released by Dr. M on May 16th; that she did not work for employer after that date because it had no light duty work available for her consistent with her physical limitations; that her May 16th automobile accident was not the sole cause of her back pain after that date or the sole cause of the ruptured disk diagnosed following an MRI on May 31st; that her cranial surgery in December 1991 was not the sole cause of her incapacity from December 1991 through March 1992; and that her (date of injury) injury caused the claimant to be unable to obtain and retain employment at wages she earned prior to that date, from May 16, 1991 to the present. He concluded that because the claimant has shown by a preponderance of evidence that her compensable

injury caused her to be unable to obtain and retain employment at pre-injury wages, she has shown she has disability within the meaning of the statute, Article 8308-1.03(16), and is eligible for temporary income benefits (TIBs). He also made conclusions of law that because the carrier failed to show that either the claimant's automobile accident or her cranial surgery was the sole cause of her incapacity at any time, the carrier may not avoid liability on a sole cause defense under the principles stated in Texas Employers Insurance Association v. Page, 553 S.W.2d 98 (Tex. 1977).

In order for a claimant to prove disability, he or she must establish by a preponderance of the evidence that a compensable injury was the cause of his or her inability to obtain or retain employment at the equivalent of preinjury wages. By definition, then, there must exist a compensable injury. The hearing officer found that the condition diagnosed after the claimant's May 16th auto accident was the result of her April 28th injury. The hearing officer's determination regarding the compensable injury was supported by sufficient evidence of record, including claimant's consistent testimony about her condition and Dr. O's opinion that the auto accident in all likelihood did not cause the bulging disk. With regard to the carrier's argument that the hearing officer's findings of fact do not accurately recite the evidence, the fact that the hearing officer might have arrived at other inferences and conclusions does not justify the setting aside of his determination of those facts he concluded to be the most reasonable. Holly Sugar Company v. Aguirre, 487 S.W.2d 421 (Tex. Civ. App.-Amarillo 1972, writ ref'd n.r.e.).

Turning to the main issue in this case, disability (or lack thereof) is a fact question which may be established by lay witnesses including a claimant; objective medical evidence is not essential to a determination. Texas Workers' Compensation Commission Appeal No. 92167, decided June 11, 1992. Indeed, this panel has ruled the 1989 Act 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. However, the burden of proving disability always rests with the claimant. Texas Workers' Compensation Commission Appeal No. 92322, decided August 14, 1992.

In this case both the claimant and the carrier offered evidence bearing on the question of whether the claimant's inability to obtain and retain employment at the equivalent of preinjury wages was due to her compensable injury or to some other reason. That the carrier presented medical evidence, and cross-examined claimant, on the effects of her automobile accident and her brain surgery, however, does not equate to a sole cause defense but rather presents an additional set of facts to be considered by the hearing officer in determining the issue of disability. This panel has previously considered cases in which it was alleged that a subsequent event, and not the compensable injury, was the reason for the claimant's disability. *See*, e.g., Texas Workers' Compensation Commission Appeal No. 91098, decided January 15, 1992 (claimant's disability held to be due to voluntarily quitting his job); Texas Workers' Compensation Commission Appeal No. 92674, decided January

29, 1993 (upholding hearing officer's determination that claimant's inability to obtain or retain the equivalent of preinjury wages was due to incarceration and not to the compensable injury).

The hearing officer's Conclusions of Law Nos. 6 and 7 stating that the "carrier failed to show" that claimant's disability was solely caused by either the automobile accident or the brain surgery appears to have improperly shifted to the carrier a burden of proof that was the claimant's, where the carrier had not raised a sole cause defense which, if established, can defeat a finding of compensable injury. Texas Employers Insurance Association v. Page, *supra*. Because we are not able to determine whether these conclusions caused error in the hearing officer's conclusion of law that the claimant proved, by a preponderance of the evidence, that she had disability, we reverse and remand for further consideration.

We would also note that the hearing officer in the two above-referenced conclusions of law used the term "incapacity," a pre-1989 Act term of art under which an injured worker was compensated for a loss of earning capacity due to an injury. This concept differs from the economic concept of "disability," as defined in the 1989 Act, which compares an employee's preinjury wages and post-injury earnings. Where disability under the 1989 Act is an issue, we believe that use of the term "incapacity" can be somewhat confusing and probably should be avoided.

The decision and order of the hearing officer is reversed and remanded for further consideration in accordance with this decision. A final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Texas Workers' Compensation Commission's division of hearings, pursuant to Article 8308-6.41. *See* Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

Lynda H. Nesenholtz
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

DISSENTING OPINION:

I dissent. I would disregard findings made on points not raised--sole cause defense--as unnecessary to the decision. After so doing, the decision could be affirmed on the basis of Finding of Fact No. 19 that stated the (date of injury) injury caused disability. *See* Texas Workers' Compensation Commission Appeal No. 91002, decided August 7, 1991.

Joe Sebesta
Appeals Judge