APPEAL NO. 93193

Pursuant to the Texas Workers' Compensation Act, TEX. REX. CIV. STAT. ANN. art. 8308-1.01 *et seq*. (Vernon Supp. 1993) (1989 Act), a contested case hearing was held on February 9, 1993, at (city), Texas, (hearing officer) presiding as hearing officer. He determined that the appellant (claimant) did not have disability from May 1, 1992, to September 20, 1992, and that claimant had not established by a preponderance of the evidence that the average weekly wage (AWW) used to determine his compensation rate did not include all pertinent earnings. Claimant does not agree with the decision of the hearing officer and requests a new hearing urging that the evidence establishes that he had disability during the period in question and that additional wages earned from the employer and paid by separate check were not included in his wage base. Respondent argues that there is more than enough evidence in the record to support the hearing officer's decision that the claimant did not have disability from May 1, 1992, to September 20, 1992, and that the claimant failed to prove by a preponderance of evidence that the wage base used to determine temporary income benefits (TIBs) did not include all pertinent earnings. Carrier asks that the decision be affirmed.

DECISION

Determining there is sufficient evidence to support the decision of the hearing officer regarding the issue of disability, we affirm that part of his decision. We reverse and remand on the issue involving AWW.

The claimant was injured when he fell from a ladder while in the course and scope of his employment on (date of injury). According to his notice of injury, his left ankle, pelvis, hip, spine, right hand, toe, and stomach were affected. He saw a number of doctors and benefits under the 1989 Act were initiated. He complained of back pain and a CT scan and MRI performed on "8/28/91" and "9/9/91" showed "associated bulging or early herniation disc described at the level L4/L5 with nerve root impingement on the left side" and "herniated disc secondary due to spondylosis described at L4/L5." A carrier requested doctor saw the claimant and in a report dated October 15, 1991 indicated that the claimant had been evaluated by several doctors, that EMGs were probably normal and that MRI and CT scans suggest a bulging lumbar disc. This doctor indicated that the claimant did not want to have a myelogram and stated he felt it reasonable to allow the claimant to return to his normal activities. Claimant's second choice of treating doctor, (Dr. K), a neurologist, who started treating him in early December 1991, stated in a letter dated May 1, 1991, as follows:

> I last saw [claimant] on 1/31/92. At that time, I explained to him that his neurological examination was normal and that I saw no reason why he should not return to work.
>
> The patient complained of pain, and I advised him to have a myelogram followed by a CT scan if he felt that his pain was severe enough to justify these studies.

To date, however, the patient has not returned to see me and I do not know what his present condition is.

The claimant later underwent a myelogram and CT scan which, according to Dr. K, were negative. A statement of Dr. K dated September 21, 1992, which accompanied a Report of Medical Evaluation (TWCC-69), certifying that claimant reached maximum medical improvement on September 21, 1992, provides as follows:

This patient was seen by me from 12/4/91 through 8/28/92. He underwent all available diagnostic tests.

Up to the present time, no pathology has been found. I talked to [claimant] on his visit of 8/28/91, explaining that I could find no organic reason why he should not go back to work.

It is very difficult for a doctor to place restrictions and set a disability on a patient when there is no organicity to explain his complaint. The type of trauma that [claimant] had would not explain the prolongation of his symptoms without neurological involvement.

If the patient would have had something that was missed during the first months after his injury, that pathology, if present, would at this time be producing organic symptoms.

When complaint of pain is prolonged and the doctor fails to find pathology, a psychological evaluation is advisable. I have recommended that the patient have an independent neurosurgical evaluation as well as a psychological evaluation. Other than this I do not have anything else to add. TWCC 69 is attached.

Claimant testified that he is still in pain and that he does not feel he can return to work. He stated that during the period of May 1, 1992 to September 20, 1992, he could not work and that during that time he "relaxed" and continued to take lots of pills. He also testified that he still had problems with his stomach and that he also had cardiac problems which he described as his heart being "swollen."

Regarding the issue of his AWW, the claimant testified that the forms submitted by the employer, Employer's Wage Statement (TWCC-3) and time cards, did not accurately reflect his pay from the employer. He testified that he worked a normal shift from approximately 8:00 a.m. to 5:00 p.m. but that he then worked other duties for the same employer, some as maintenance and others as security guard, and that he would clock in

on a second time card and would be paid by a separate check which did not include a pay stub. He also presented signed statements from other workers that tend to corroborate his testimony, one from a coworker who stated that he also worked as a maintenance man and was paid by two separate checks, one for the normal work day of 8:00 a.m. to 5:00 p.m. and a second check for the early morning hours and after 5 p.m. hours.

The carrier called the employer's owner who testified that there was a job available for the claimant in May 1992. However, the owner was not able to shed much light on the particular issue involving AWW. His testimony was largely to the effect that he did not remember particular arrangements concerning claimant's work and whether he worked overtime, that he assumed that the payroll clerk submitted the time and payroll records although he did not get involved in payroll too much, and that although he never knew of two time cards, he did not know if it happened or not and that "anything is possible." He indicated he remembered that the claimant volunteered "to do a little night watch" but when asked about the claimant being paid with two different checks stated that "I don't know how it was handled - if there were 2 - I can't remember, I just don't know." He also stated that he assumed the claimant was paid for this other duty but that "it wasn't real clear cut," and although he didn't know, "it was not much or for a long time."

The hearing officer determined that the claimant was medically able to return to work on May 1, 1992, and therefore did not have disability as defined in Article 8308-1.03 (16). We find the evidence sufficient to support his determinations. Clearly, there was medical evidence from the claimant's own treating doctor that sufficiently supports this determination even thought the claimant testified that he did not feel he was capable of returning to work. While the hearing officer could have believed the testimony of the claimant even thought it conflicted with medical evidence, the claimant's testimony did no more than raise a fact issue for the fact finder. Highlands Insurance Company v. Baugh, 605 S.W.2d 314 (Tex. Civ. App.-Eastland 1980, no writ). As the fact finder (Article 8308-6.34(g)), the hearing officer is the sole judge of the relevance and materiality of the evidence and of the weight and credibility to be given the evidence. Article 8308-6.34(e). Only if his finding on this issue were found to be so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust would reversal be appropriate. Texas Workers' Compensation Commission Appeal No. 92232, decided July 20, 1992. We do not find that to be the situation with regard to this issue, and accordingly affirm his decision that the claimant did not suffer disability during the period of May 1, 1992 through September 20, 1992.

We are not able to reach the same result regarding the matter of AWW. While the claimant had the burden to establish his AWW, he was in a limited position to obtain potentially necessary evidence that is normally in the possession of the employer. As we view the evidence under the particular circumstance of this case, the great weight and preponderance of the evidence is contrary to the determination of the hearing officer and

lends support to the claimant's position that not all wages are reflected in the AWW determination. Clearly, the claimant testified unequivocally that he worked more hours than reflected, that he was required to use two different time cards, and that he was paid with two separate checks, one of which did not have a pay stub. As stated above, the claimant's testimony only raises a factual issue for the finder of fact and the claimant, as any witness, may be believed totally, partially, or not at all. Taylor v Lewis, 553 S.W.2d 153 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.). However, in viewing all the evidence of record, claimant's testimony is basically unrebutted and it is supported and corroborated by statements from other witnesses. Indeed, support for his testimony can arguably be found in the carrier's witness's testimony in that it tends to confirms that the claimant did perform work other than his normal job. We do not find very persuasive as rebuttal evidence the employer's owner's testimony that "I don't know" or "I don't remember" or "it is possible" or "I don't know how it was handled." Since this was one of the focal issues in the case, it would seem that someone with some knowledge of or information concerning the pertinent matters involving employer's records, payroll, overtime, time cards, issuance of checks, etc., would have been brought forth, particularly as such information was almost exclusively within the control of the employer or carrier. Also, from the state of the records, we can not determine if the situation here involved a separate, second job or concurrent employment. If such is the case, then our holding in Texas Workers' Compensation Commission Appeal No. 91059, decided December 6, 1991, might be applicable. Consequently, and giving consideration to the provisions of Article 8308-6.34(b), we find it necessary to, and do hereby, reverse the hearing officer's decision on this issue and to remand the case for further consideration, not inconsistent with this opinion, and development of evidence, as deemed appropriate by the hearing officer.

Pending resolution of the remand, 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 from 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 8308-5.41. *See* Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Thomas A. Knapp
Appeals Judge