

APPEAL NO. 93680

On June 16, 1993, a contested case hearing was held in (city), Texas, with (hearing officer) presiding as the hearing officer. The hearing was held under the provisions of the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). The issue at the hearing was: what is the extent and duration of the respondent's (claimant's) disability? The hearing officer concluded that the claimant's disability began on November 2, 1992, and continued through November 30, 1992; that disability recurred on December 12, 1992, and continued through March 29, 1993; and that disability recurred again on June 8, 1993, and continued as of the date of the hearing. The hearing officer ordered the appellant (carrier) to pay workers' compensation benefits to the claimant in accordance with his decision and the 1989 Act. The carrier disagrees with the hearing officer's decision and contends that disability ended on December 1, 1992, and that no evidence exists to substantiate any recurrence of disability after that time. The claimant responds that it agrees with all findings of fact and conclusions of law and attaches to the response several pages of medical records that predate the hearing date and which were not offered or made a part of the record at the hearing. The medical records attached to the response will not be considered on appeal as those records are not part of the hearing record. Section 410.203(a)(1).

DECISION

The decision of the hearing officer is affirmed.

The claimant worked for the employer, (employer), as a dishwasher. On (date of injury), he was injured in a traffic accident when returning to his employer's place of business from a catering function in the employer's van. There was no dispute concerning the occurrence of a compensable injury. The claimant testified that he injured his back, neck, head, and legs in the accident. According to an employer report put into evidence by the carrier, the claimant began losing time from work on October 31, 1992. The claimant testified that out of economic necessity he went to work for a lawn mowing company for two days, December 1 and 2, 1992. He said he quit the job because of back pain. Records of the lawn mowing company indicated that the claimant worked five days, December 1, 2, 3, 4, and 11, 1992. A videotape taken on December 1, 1992, shows the claimant pushing a lawn mower for several hours while working for the mowing company. Several photographs taken the same date show the same. In a letter dated January 12, 1993, the president of the lawn mowing company stated that the claimant worked for the company for a couple of days in December 1992 but that the claimant was not now employed by the company.

The claimant has been treated by several chiropractic doctors at the (the Clinic) and was examined by several medical doctors. On November 2, 1992, (Dr. H), diagnosed lumbar strain, lumbar radiculitis, and thoracic strain, and stated that the claimant would not be able to work from November 2, 1992 to November 16, 1992. On November 12, 1992, Dr. H reported that it was "undetermined" when the claimant could return to limited work or full time work. In a series of subsequent reports, Dr. H indicated that the claimant would

not be able to work from November 17, 1992 to February 5, 1993. Each of these reports also indicated that the claimant was to continue regular treatments at the Clinic.

On January 5, 1993, (Dr. T), diagnosed lumbar radicular complaints with normal neurologic examination. An EMG of the lower extremities done on January 5, 1993, was reported as normal. An MRI scan done on January 13, 1993, revealed a herniated disc with degeneration at L4-5. After a physical examination of the claimant, (Dr. B), who practices at the Clinic, reported on January 13, 1993, that the claimant was "temporarily totally disabled from his employment." On February 5, 1993, Dr. B gave the same diagnosis as Dr. H had given on November 2, 1992, and indicated that it was "undetermined" when the claimant could return to limited or full time work. In a report dated March 1, 1993, (Dr. E), who practices at the Clinic, indicated that he had examined the claimant, that the claimant was suffering from "lumbar IVD syndrome," that additional care was indicated, and that the claimant remained "unfit for duty at this time." In a report dated March 11, 1993, Dr. E stated that it was "undetermined" when the claimant could return to limited or full time work. On March 29, 1993, Dr. E reported that he had reexamined the claimant and that the claimant had improved to some degree but continued to have pain as a result of his accident. Dr. E noted that the claimant would be out of the country for about 20 days because of a family emergency. The claimant testified that he went to El Salvador from March 30, 1993 to June 5, 1993, and that while there he visited a chiropractor; however, he presented no medical reports concerning any treatment while he was out of the country. In a report dated April 6, 1993, Dr. E again stated that it was "undetermined" when the claimant could return to limited or full time work, and in another report of the same date, Dr. E stated that the claimant was not able to work from April 6, 1993 to April 20, 1993.

In a report dated June 8, 1993, (Dr. Z), who also practices at the Clinic, indicated that the claimant was not able to work from June 8, 1993 to June 22, 1993. On June 15, 1993, (Dr. HI), an orthopedic surgeon, reported that he had examined the claimant on that date and that he recommended that the claimant continue therapy at the Clinic. The claimant testified that he is still being treated at the Clinic and that he does not think he is able to work. He further testified that aside from the few days he worked for the lawn mowing company in December 1992, he has not worked since the date of his work-related back injury because of that injury.

"Disability" means the inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage. Section 401.011(16). We have held that an employee must have disability and not have reached maximum medical improvement (MMI) in order to be entitled to temporary income benefits (TIBS). Texas Workers' Compensation Commission Appeal No. 91060, decided December 12, 1991. However, we have observed that disability is not necessarily a continuing status only; that is, an employee may have disability initially, followed by a period of no disability, only to have disability recur. See Texas Workers' Compensation Commission Appeal No. 91122,

decided February 6, 1992. We have also observed that the resumption of disability prior to the attainment of MMI will renew entitlement to TIBS. Texas Workers' Compensation Commission Appeal No. 92257, decided August 3, 1992. 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. Section 410.165(a). As the trier of fact the hearing officer is privileged to believe all, part, or none of the testimony of any witness, and resolves conflicts and inconsistencies in the evidence. Burelsmith v. Liberty Mutual Insurance Company, 568 S.W.2d 695 (Tex. Civ. App.-Amarillo 1978, no writ). In its appeal, the carrier contends that there is "no evidence" to support a finding of disability after December 1, 1992. We disagree with the carrier's contention and conclude that the claimant's testimony and the medical reports sufficiently support the hearing officer's finding of disability for the periods of December 12, 1992, through March 29, 1992, and June 8, 1992 through the date of the hearing. Since there has been no appeal of the hearing officer's finding of disability for the period of November 2, 1992, through November 30, 1992, nor an appeal of her failure to find disability for the period of December 1, 1992 through December 11, 1992, and the period of March 30, 1993 through June 7, 1993, we need not make a determination concerning the sufficiency of the evidence to support such finding or lack of finding of disability during those periods.

The decision of the hearing officer is affirmed.

Robert W. Potts
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Susan M. Kelley
Appeals Judge