APPEAL NO. 93770

This appeal is brought pursuant to the Texas Workers' Compensation Act of 1989, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On August 3, 1993, a contested case hearing (CCH) was held in (city), Texas, with (hearing officer) presiding as hearing officer. The sole issue at the CCH was whether the appellant (claimant herein) had disability from January 16, 1993, through March 14, 1993, and from May 29, 1993, to date. The hearing officer concluded that the claimant did not have disability during the periods in question. The claimant appeals contending that she has not found employment during the periods in question due to her compensable injury and this proves disability. The respondent (carrier herein) did not file a response.

DECISION

Finding the decision of the hearing officer ambiguous as to the actual injury suffered by the claimant, and being unable to discern the factual basis of the decision, we reverse his decision and remand for further consideration and development of the evidence consistent with this decision.

The facts of this case are virtually undisputed. The claimant was the only witness to testify at the CCH. The claimant testified that she was injured on (date of injury), when she slipped and fell at work. The carrier did not contest the compensability of this injury.

The claimant was originally seen by (Dr. J), M.D., on January 6, 1993 (all dates are 1993 unless otherwise specified), who prescribed pain medication and returned the claimant to work on January 8th. Dr. J's report states that the claimant "fell sideways injuring left side," but his clinical assessment only mentions "soreness over left lateral chest wall." The claimant testified that she continued to work, but due to continued physical problems from her injury decided to see another doctor. She testified that on January 12th, she tried to make an appointment with (Dr. A), D.C., but she was unable to get an appointment until January 18th. The claimant was laid off by the employer on January 15th. The claimant testified that Dr. A placed her on work restrictions, which is confirmed by his narrative reports.

Claimant's restrictions include lifting (not more than 20 lbs.), standing and stooping (only brief intervals), twisting, and temperature (avoid outside cold) restrictions. Dr. A's records also indicate he continued to treat the claimant primarily for low back problems. The claimant testified that she continued to look for other work after her lay-off and informed prospective employers of her restrictions. The claimant said that she was told by prospective employers that they would let her know of their decision but no one called her back or hired her.

On March 11th, Dr. A reduced the restrictions on the claimant, but stated she still had restrictions as to lifting, carrying, pushing, pulling, twisting, kneeling, squatting, crawling and balance. On March 15th the employer called the claimant back to work off lay-off and she continued to work for the employer until she was again laid off on May 28th. The claimant

testified that during this period the employer placed her on lighter duty work than she had done previously. The claimant testified that she continued to look for work after May 28th, but had gotten the same response as when she had sought employment with her earlier restrictions. The claimant testified that she was 35 years old, had a general equivalency diploma, and her work history included working as a waitress, a cook and a secretary. The claimant testified that she had previously worked for the employer during four "campaigns." A campaign in this context apparently means a four to six month period of high activity usually centering around the period from September to January after which the employer lays off a significant portion of its work force. The claimant testified that in past years when she was laid off after a campaign she found other work. She testified that the previous year after the end of the campaign she had worked in a restaurant. The claimant also testified that if she was unable to find any other work during lay-off, she had in the past worked in the sugar beet fields.

Dr. A continued to treat the claimant still primarily for low back problems and, in his report of June 24th, ordered an MRI examination, released her from his care for further evaluation, and indicated that depending upon the results of the MRI a neurosurgical or orthopedic evaluation might be necessary. The carrier filed a Request for Medical Examination Order, dated June 28th, requesting an examination with (Dr. C), an orthopedic surgeon, and stating the nature of the claimant's injury was hip and lower back. This examination was ordered by the Texas Workers' Compensation Commission on July 9th and according to statements of the parties at the hearing was scheduled to take place a few days after the CCH. A July 16th radiological report of lumbar MRI signed by (Dr. W), M.D., stated that the claimant has a "small left paramedian herniation at L4-5." At the time of the hearing it was undisputed that no doctor had certified that the claimant had reached MMI.

The hearing officer's findings include the following:

FINDINGS OF FACT

4.Any lost time from work by [Claimant] from January 16, 1993, through March 14, 1993, and from May 29, 1993, through the date of this Benefit Contested Case Hearing held on August 3, 1993, was the result of something other than the injury to her left hip occurring while [Claimant] was working for the [Employer].

6.The inability of [Claimant] to obtain and retain employment at wages equivalent to the preinjury wages from January 16, 1993, through March 14, 1993, and from May 29, 1993, through the date of this Benefit Contested Case Hearing held on August 3, 1993, was the result of something other than the injury to her left hip occurring while [Claimant] was working for the [Employer].

It appears to us that neither the medical evidence nor the testimony of the claimant restricted her injury to her left hip. The only evidence that the injury was so restricted was adduced in questioning by the hearing officer when the claimant agreed in response to a

question that she had injured her left hip during her fall. She did not state that she had injured only her left hip and in fact described her injury earlier in her testimony as being an injury to her whole left side. The medical records clearly show that her treatment for the injury included treatment of her low back as well as her left hip. Further, the carrier in its Request for Medical Examination Order stated the nature of the injury as being "hip and lower back" and said nothing at the hearing inconsistent with this. We are therefore unclear as to whether the hearing officer took into account the entire injury of the claimant in making his determination regarding disability, particularly since the thrust of her problems at this time relate to her back. This alone requires that we remand the case to ascertain whether he considered the totality of the claimant's injury. *See* Texas Workers' Compensation Commission Appeal No. 92350, decided September 8, 1992.

We also have difficulty in discerning the rationale for the hearing officer's decision, if he did consider the claimant's back injury, in finding "something other" than the claimant's injury was the cause of her lost time or disability. In his limited discussion of the evidence and of the testimony, the hearing officer does not indicate what this "something other" might be. While we have and, in the appropriate case will continue, to imply findings to support the decision of a hearing officer, we find it most difficult to imply a rationale for a decision when the hearing officer does not provide us at least some indication of his reasoning.

Looking at the record for evidence to support the decision of the hearing officer, we note that Dr. J originally released the claimant to work without restrictions and the claimant did apparently continue to work for one week under this release. The problem here is that it is apparently undisputed that the claimant saw Dr. J only once and the record does not indicate any dispute to Dr. A becoming her treating doctor and keeping her under work restrictions while he treated her for a number of months. An unconditional medical release to return to work does not necessarily, in and of itself, end disability. Texas Workers' Compensation Commission Appeal No. 91045, decided November 21, 1991. Further, Dr. J's opinion is not clear concerning the injuries at issue when his report indicates that he was looking primarily at the claimant's "left chest" and was apparently unaware from the limited information available to him that the claimant had a herniated disc as indicated by the later MRI. We are concerned as to how the hearing officer apparently relied upon an opinion formed prior to most of the testing and medical development of the case. Given the medical evidence concerning the extent of the injury, the hearing officer would have been well advised to leave the record open to obtain the opinion of the orthopedic surgeon the claimant was scheduled to see in a matter of days after the hearing and thereafter provide the parties with a reasonable opportunity to respond.

At the hearing the carrier urged that the claimant's return to work in March for the employer constituted evidence that she did not suffer disability. The difficulty with this argument is that according to the testimony of the claimant she returned to significantly lighter duty in March which, from her testimony, was not inconsistent with the restrictions under which she had been placed by Dr. A. Nor did the carrier choose to provide any evidence to refute the testimony of the claimant in this regard, or for that matter in any other

regard. We have held that the existence of a release to work with restrictions indicates that the impact of an injury as a factor in disability continues, unless other evidence shows otherwise. *See* Texas Workers' Compensation Commission Appeal No. 92087, decided April 27, 1992. We have also held that an injured employee may have intermittent periods of disability. Texas Workers' Compensation Commission Appeal No. 91122, decided February 11,1992.

The carrier also argued at the CCH that the claimant failed to meet her burden of proof to prove disability. In this regard, there was the claimant's testimony and supporting medical evidence. The claimant testified as to specific places she had sought employment and testified that were it not for her restrictions she could have returned to work in the fields. While she did not present evidence that the specific employers to whom she applied failed to hire her only because of her restrictions, we note there is no requirement for such evidence and that such evidence might well be difficult, if not impossible, to obtain, if for no other reason than potential exposure to some element of liability. Nor did carrier present any countervailing evidence on this point.

From the findings of the hearing officer it appears as though he did not consider the claimant's back injury since he only speaks to an injury to her left hip. Further, we are unable to discern the rationale of the hearing officer for his findings in regard to the claimant's lack of disability if he did consider her back injury. We believe it would be useful to all parties to have the benefit of the examination of Dr. C previously scheduled for just a few days after the hearing. We therefore remand this case for further consideration and development of the evidence.

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 Section 410.202. *See* Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

Gary L. Kilgore
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Philip F. O'Neill
Appeals Judge