APPEAL NO. 93945

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001, *et seq*. (1989 Act) (formerly V.A.C.S., Article 8308-1.01, *et seq*.). On September 22, 1993, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. The issue determined at the contested case hearing was whether claimant, SS, who is the appellant, had disability as a result of her repetitive trauma injury sustained (date of injury), while she worked in the course and scope of her employment with the self-insured governmental entity listed above, which shall be referred to both as "employer" and "carrier" hereinafter. The hearing officer determined that the claimant did not have disability from her injury from March 31, 1993, through the date of the contested case hearing.

The claimant has appealed, arguing that the hearing officer's determinations are against the evidence given in the case, and that claimant had proved she had disability which at least resumed as of April 28, 1993. The carrier responds by asking that the decision be affirmed.

DECISION

We affirm the hearing officer's decision.

The claimant sustained an undisputed carpal tunnel syndrome to her right hand and extremity which she realized was related to work on (date of injury). Claimant had worked for 10 years for the employer, performing data entry work of which approximately 85% was typing on a computer.

The claimant was treated by (Dr. M). Claimant had physical therapy and was off work. Dr. M thereafter released her to light duty work effective December 7, 1992. Claimant was restricted from doing repetitive hand motion, and Dr. M indicated that she would be re-evaluated in two weeks with possible full release at that time. Claimant returned to work in a capacity which involved doing some of her old job, and an equal amount of "code" work, which involved going through a book and occasionally making notes. The claimant's immediate supervisor, (Ms. R), testified that the claimant did such "mixed" work for two weeks (in accordance with the employer's reading of the doctor's release), and then claimant returned to her ordinary duties full time. Ms. R testified that Dr. M issued another release on December 20, 1992, which stated that claimant was to do no more than four hours of repetitive hand motion per day. (A light duty release was also executed January 14, 1993.) Although claimant herself interpreted this to mean she was not to work more than four hours a day, she was told by her employer that they wished for her to work eight hours a day and the job she thereafter performed was to do her regular work for four hours, and then spend the rest of the day coding, putting together reports, and other "light duty" tasks.

Both claimant and Ms. R stated that claimant did not complain that she could not do the work assigned to her, and claimant herself testified that she did not complain because she thought she was capable of doing the work. The record includes a certificate of return

to work signed February 26, 1993, by Dr. M, which lists no restrictions.

The claimant was involved in a car accident on January 7, 1993, when the car in which she was sitting was rear-ended. The accident was not related to her employment. As a result, her neck and back were injured. Claimant stated unequivocally that this collision did not in any way aggravate or re-injure her hands and arms.

The claimant stated that she was counselled formally about her absenteeism. She stated that she was absent due to problems with her back and her hand. Ms. R stated that these were two excuses given, but that claimant also was absent due to recited problems with illness of other family members. Ms. R stated that the employer's policies with respect to excessive absenteeism did not distinguish between excused and unexcused days off. Claimant's time card for January, February and March 1993 indicated that for nearly every week during that time claimant missed at least a day of work, accounted for as leave without pay, unexcused, or vacation time.

Claimant stated that she was again counselled on March 20, 1993, about absenteeism and decided to resign as she felt termination was imminent. She did agree that she was not told she would be terminated if she did not resign. Ms. R testified that although uncorrected absenteeism could lead to termination, that claimant was not told she would be terminated on the 20th, and that she offered to resign. Claimant wrote out a letter which was in turn typed up by supervisor Ms. M, which she signed. Claimant stated that her reason for resignation was: "I have recently been diagnosed with an injured lumbar disc that requires me to attend intensive therapy. I have missed an excessive amount of work because of this and I feel it is best for me to resign."

The resignation was effective March 31, 1993. Claimant stated that she had not looked for work between March 31st and the date of the hearing. She stated that she was scheduled the day after the contested case hearing for carpal tunnel surgery on her right hand. Claimant indicated that she would like to return to her employer, and Ms. R indicated that claimant had been a good worker and was eligible for rehire.

On March 31, 1993, claimant saw (Dr. Z). He documented the observed problems with claimant's pain and numbness in her right extremity. Dr. Z's primary diagnosis was "extensor tendon synovitis secondary to overuse syndrome." By May 12, 1993, Dr. Z appeared to agree that claimant's symptoms were consistent with carpal tunnel syndrome. Claimant was also treated during the time after her injury by (Dr. S), a hand surgeon, who stated in a May 18, 1993, letter that claimant should avoid use of vibratory or percussive tools or instruments and any activity requiring excessive repetitive digital wrist motion. (Dr. S appears to have been initially involved in December 1992 by the carrier for performance of an independent medical examination.) An MRI of the left wrist performed July 27, 1993, found no evidence of carpal tunnel syndrome in that hand.

Claimant argues that the hearing officer should have stated that claimant was excused from work due to bilateral carpal tunnel syndrome. There is no evidence to support this. Medical records indicate at best that claimant began to complain of increasing

left wrist pain months after leaving work. While Dr. Z expressed concern that carpal tunnel might be developing in claimant's left extremity, the MRI in July 1993 found no evidence of carpal tunnel in the left hand.

Claimant also argues that she had resumed her normal duties by the time of her resignation, contrary to the hearing officer's determination that she was on light duty at the time of her resignation, but this point of error is not unequivocally supported by the record. Further, although claimant testified that she was doing her regular job, Ms. R's testimony indicated that claimant's duties (after a period of doing her regular job) were scaled back to a mixture of her old tasks and some light duty tasks, pursuant to Dr. M's recommendations. In any case, whether claimant worked full or light duty on March 31, 1993, the hearing officer evidently believed that the reason she left (and stayed away from) employment equivalent to her pre-injury wage was not because of her carpal tunnel syndrome, but because of her voluntary resignation due to her back.

Disability that qualifies an injured worker for payment of temporary income benefits is defined not just in terms of the existence of a physical condition but whether, because of that physical condition, the employee has the "inability . . . to obtain and retain employment at wages equivalent to the preinjury wage." TEX. LAB. CODE § 401.011(16). The hearing officer evidently believed that claimant's primary reason for unemployment was not her carpal tunnel syndrome, but the fact that she resigned as a result of back problems not related to her compensable injury. *See* Texas Workers' Compensation Commission Appeal No. 91098, decided January 15, 1992. She had demonstrated for months that she was actually able to obtain, and retain, gainful employment notwithstanding her carpal tunnel syndrome injury. She did not actually look for other employment after her resignation so whether carpal tunnel would have precluded another job would be at best speculative. Ms. R indicated that but for claimant's absenteeism, her work was good.

The hearing officer is the sole judge of the relevance, the materiality, weight, and credibility of the evidence presented at the hearing. Section 410.165(a). The decision should not be set aside because different inferences and conclusions may be drawn upon review, even when the record contains evidence that would lend itself to different inferences. Garza v. Commercial Insurance Co. of Newark, N.J., 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). The decision of the hearing officer will be set aside only if the evidence supporting the hearing officer's determination is so weak or against the overwhelming weight of the evidence as to be clearly wrong or manifestly unjust. Atlantic Mutual Insurance Co. v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.). We affirm his decision, finding sufficient support in the evidence for his findings and conclusions. Recognizing that claimant testified she was scheduled for surgery, we note that the hearing officer's decision does not rule out the resumption of disability at some future time, or due to the effects of medical treatment for her work-related injury. An injured worker can move in and out of disability, and eligibility for temporary income benefits, up until maximum medical improvement is reached. *See* Texas Workers' Compensation Commission Appeal No. 92299, decided August 10, 1992.

We do note, however, that claimant has correctly pointed out a typographical error in

Conclusion of Law No. 2, which states that the date of injury was (date), rather than (year) (as referred to in the rest of the decision). We therefore correct Conclusion of Law No. 2 to read: "Claimant did not have disability due to her right hand injury of (date of injury), between March 31, 1993, and the date of this Benefit Contested Case Hearing."

Susan M. Kelley
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Robert W. Potts
Appeals Judge