APPEAL NO. 94136

This case is returned following our reversal and remand as decided in Texas Workers' Compensation Commission Appeal No. 93677, decided September 21, 1993. Pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act), an abbreviated proceeding on remand was held on January 10, 1994, in (city), Texas, by the hearing officer, (hearing officer), wherein he considered responses to his request that the parties submit evidence in writing on the issue on remand--to determine if and when respondent's (claimant) disability began. No objections, requests for continuance or other complaints were lodged to the procedures employed on remand and the matter will not be addressed on appeal although the appellant (carrier), for the first time on appeal, states in its response that "because of the time constraints imposed by the hearing officer's scheduling letter following the remand, the carrier did not have an opportunity to offer additional comment after receiving the claimant's submission [of additional evidence]." It is axiomatic that procedures should provide an opportunity for parties to respond to submission of additional evidence of the opposing party. The hearing officer, in his Decision and Order on remand adhered to all the findings and conclusions of his original Decision and Order except for Finding of Fact No. 10 which he changed to find that the claimant's disability began on December 11, 1992, instead of January 6, 1993. The carrier appeals urging the hearing officer committed errors of fact and law in determining that disability began even before the claimant had reported her injury. Claimant's response asks that the Decision and Order on remand be affirmed.

DECISION

While the Appeals Panel as a reviewing or appellate level body might reasonably draw different inferences from the evidence than did the fact finder case law provides that such is not a sound legal basis to disturb a decision (Salazar v. Hill, 551 S.W.2d 518 (Tex. Civ. App.-Corpus Christi 1977, writ ref'd n.r.e.)); accordingly, we affirm.

This case on remand brings to mind the adage "bad facts make bad law." The case was remanded for further consideration and development of the evidence on the issue concerning if and when disability began. Not in issue were the determinations that a compensable injury occurred and that the claimant had good cause for not timely reporting it based upon not realizing it was serious. The further development of evidence on the remanded issue was, at best, very limited and provided a somewhat less than optimal basis for making a well reasoned decision.

Very briefly, the claimant sustained a back strain on (date of injury), lifting some boxes. She continued working until she was terminated for cause unrelated to the injury on December 11, 1992. Because of the holidays and the employer's place of business being closed during the two-week holiday period, she did not report her injury until January 6, 1993, although she said her back condition was getting progressively worse. In any event, she apparently sought unemployment insurance, attended job fairs, and, at least at some period around the time of her termination, indicated she had some other part-time or secondary employment. After reporting her injury, and it being suggested she see a doctor,

she saw a (Dr. L) on January 26, 1993. He diagnosed thoracolumbar strain and recommended physical therapy. She subsequently went to a chiropractor, (Dr. T), in April and was diagnosed with "irritated lumbar plexus, lumbar facet syndrome, a lumbar fixation, and a pelvic tilt, as well as a fixation of the cervical and thoracic spine." In a letter of May 26, 1993, Dr. T stated:

> Due to her injuries sustained on (date) (subject of a separate claim) and (date of injury) [claimant] has not been able to work or enjoy leisure activities that she participated in before she was injured.

On June 11, 1993, Dr. T. concluded that the claimant "suffered from chronic severe upper back, as well as lower back and leg pain which have made it impossible for her to be gainfully employed in almost any position because the length of time she needs to spend at a full time job would aggravate her condition."

We reversed and remanded the finding of the hearing officer that the claimant had disability beginning January 6, 1993, determining there was an insufficient evidentiary basis for such finding. In response to the hearing officer's request for the parties to submit evidence in writing on the remanded issue, the carrier elected not to submit any additional evidence but referenced the evidence introduced at the original hearing. On the issue on remand, the claimant submitted an additional conclusory statement from Dr. T dated December 15, 1993, which provided:

> In reviewing the medical records of [claimant], I have determined that her disability started on December 11, 1992.
>
> In earlier letters that I wrote on May 26, 1993, and June 11, 1993, her specific injuries were detailed. These injuries have affected her ability to work, and again the date of December 11, 1992, was the start of this disability.

In replying to the hearing officer's request for written evidence, the claimant also stated that she felt her disability began on December 11, 1992. In her earlier testimony, she stated that her back really began bothering her after the termination date, sometime "during Christmas holidays." Regarding her looking for employment, the claimant indicated that she had put down her work limitations--inability to stand or sit for long periods of time--but was still not working.

While there were certainly inconsistencies and conflicts in the evidence, it is clear that this is a matter for the hearing officer, as the fact finder, to resolve. Burelsmith v. Liberty Mutual Insurance Co., 568 S.W.2d 695 (Tex. Civ. App.-Amarillo 1978, no writ); Garza v. Commercial Insurance Co. of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). Recognizing that Dr. T states his opinion on the starting date of disability, it still becomes difficult to reconcile the claimant's stated feeling that her disability began the day of her termination with the other evidence touching on when she could no

longer, because of a compensable injury, obtain and retain employment at wages equivalent to her pre-injury wage (Section 401.011(16)) and her testimony at the original hearing. However, we are not willing to unequivocally state that the hearing officer's determination is so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); In re King's Estate, 244 S.W.2d 660 (Tex. 1951); Employers Casualty Co. v. Hutchinson, 814 S.W.2d 539 (Tex. App.-Austin 1991, no writ); Texas Workers' Compensation Commission Appeal No. 92232, decided July 20, 1992. We have consistently stated we will not substitute our judgment for that of the hearing officer where there is evidence to support his determinations. Texas Workers' Compensation Commission Appeal No. 931148, decided February 2, 1994; Texas Workers' Compensation Commission Appeal No. 94044, decided February 1, 1994; Texas Workers' Compensation Commission Appeal No. 93767, decided October 8, 1993. Accordingly, the Decision and Order are affirmed.

Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Susan M. Kelley
Appeals Judge