APPEAL NO. 94215

Pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act), a contested case hearing was held in (city), Texas, on January 4, 1994, with the record closing on January 17, 1994, (hearing officer) presiding as hearing officer. She determined that the respondent (claimant) sustained a compensable back injury in the course and scope of his employment on (date of injury), that he timely reported the injury to his employer, and that he had disability from September 30, 1992, until he returned to work in September or October 1993. Appellant (carrier), arguing that the great weight and preponderance of the evidence is contrary to the hearing officer's determinations, urges that the hearing officer erred in concluding that claimant sustained a period of disability from September 30, 1992, until he returned to work in September or October 1993, in finding that claimant was entitled to temporary income benefits while drawing unemployment benefits, and in not determining a date certain for concluding temporary income benefits. The claimant urges that there is sufficient evidence to support the hearing officer and asks that the decision be affirmed.

DECISION

Finding the great weight and preponderance of the evidence does not support the hearing officer's determination of the period of disability, the decision and order are reversed and the case is remanded for further consideration and development of evidence, as deemed appropriate, on this issue.

Since only matters relating to the issue of disability are raised on appeal, the issues of a compensable injury having been sustained and timely notice having been given are not addressed. Succinctly, the claimant testified that although he had been having back pain from his work for a period of time, on (date of injury), he felt an intense pain like he never felt before as he was performing his duties of washing automobile parts and lifting them. He told his supervisor about his back pain and that he was unable to work. He was sent home (he worked a night shift) and told to go to the company nurse the following morning. He did so but only told the nurse that his back was sore and he went back to work. The nurse indicated that she thought the supervisor indicated he would look for some light duty for the claimant. He checked with the nurse on two other occasions and according to her, indicated he was feeling better and did not need further treatment. There is no indication that he was placed on any light duty and he continued to work until September 30th when he was dismissed in a reduction in force. He said he did not say anything about his back because he needed to work and was afraid he would be fired. If he had not been dismissed on September 30th, he indicated he would still have kept working. He looked for work after September 30th and was given a physical in November for another position with the employer involving heavy lifting but did not pass the physical and was recommended for a work hardening program. He was a member of a soccer team and continued playing soccer following (date of injury). Also, he filed for and obtained unemployment benefits from early October 1992 until early May 1993. He did not disclose any injury on the unemployment application "because they would cut benefits."

In February 1993, he saw a doctor, was referred to another and was ultimately diagnosed with "subligamentous disc herniation at L5-S1 with discogenci back pain." He was taken off work by the doctor from "2-8-93" to some time after he began working again in August or September 1993 after treatment that included physical therapy. A recommended discogram was never performed although the referral doctor indicated that if the results were positive, the claimant would be considered for surgical intervention. A report dated October 29, 1993, from a carrier's doctor who examined the claimant and his medical records indicated in part:

IMPRESSION:This man's case, at this point in time, appears to be that of subjective complaints of relative minor backache. He does not appear to be in severe pain nor complain of severe pain. Clinical examination of this man is objectively totally normal. There are no neurological findings of significance, the straight leg raising tests negative and his back examination is basically unremarkable.

I have reviewed this man's lumbar MRI. As opposed to what [claimant's doctor] states in his letter there is no herniated disc present. There is minimal, if any, bulge present at L5-S1. There is definitely no herniated disc present and there is no sign of a surgical problem in the low back or thoracic spine area.

The claimant testified that he worked in August 1993; however, at another point indicated that he only started working in September or October 1993. He apparently worked part time for a while before he started full-time employment although his doctor still had him in a off-duty status.

Statements introduced by the carrier from three other workers indicated that they did not notice any signs that the claimant had a back injury, did not hear him complain of any problem with his back, did not notice him limping or refusing to do any work while he worked for the employer.

The findings of the hearing officer concerning the period(s) of disability do not support her conclusion that the claimant suffered disability from September 30, 1992, until September or October 1993. In this regard, the claimant testified that but for the dismissal caused by a reduction in force, he would still have been working. He indicated that he looked for other employment and did not state or indicate that he was not able to work after September 30, 1992. For that matter, he testified as follows in answer to a question during the hearing:

Q.And since your -- this February 8th, 1993 appointment with [treating doctor], you have represented to us that you have been unable to work?

A.No. To tell you the truth, I have been trying to find a job; but I haven't been able to get one.

The evidence does not sufficiently establish that the claimant had disability immediately following the September 30th reduction in force as disability is defined in the 1989 Act. Section 401.011(16). While it has been held that the testimony of a claimant alone can establish disability, Gee v. Liberty Mutual Fire Insurance Co., 765 S.W.2d 394 (Tex. 1989), that was not the situation here. And, the evidence contrary to a determination of disability during the period from September 30, 1992, until the claimant was rejected for a job or the doctor's release from work in February 1993, is the great weight and preponderance of the evidence in the contested case hearing record. *See* Lopez v. Hernandez, 595 S.W.2d 180, 183 (Tex. Civ. App.-Corpus Christi 1980, no writ). Although claimant's attorney belittles this point in his response to carrier's appeal, we are also concerned with the issue raised on appeal concerning the ending of any disability as being sometime in "September or October, 1993." Where an end to disability can be identified, it should be specified. The claimant has the burden to establish any periods of disability including the beginning and duration of such periods. *See* Texas Workers' Compensation Commission Appeal No. 931102, decided January 13, 1994; Texas Workers' Compensation Commission Appeal No. 93953, decided December 7, 1993. The periods of time when a claimant worked and his wages during such periods should be relatively easy to establish and would remove the uncertainty of when the disability, if any, ended as reflected in this case. This should be a matter further developed on remand, or, as the claimant's attorney suggests, subject to a possible agreement by the parties.

Regarding the carrier's assertion that receipt of unemployment benefits, in essence, precludes the receipt of worker's compensation benefits and that the 1989 Act's failure to address such a "double recovery" is merely legislative oversight, we do not find this to be meritorious. Although the 1989 Act does not address the matter of "double recovery," the unemployment legislation does preclude or authorize recoupment for such double recovery. *See* Texas Workers' Compensation Commission Appeal No. 91132, decided February 14, 1992.

For the reasons set forth above, the decision and order are reversed and the case remanded on the issue of the period(s) of any disability. 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.

Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Alan C. Ernst
Appeals Judge