APPEAL NO. 990931 AND APPEAL NO. 990932

This appeal is considered in accordance with the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On April 5, 1999, a contested case hearing (CCH) was held. There were claims for two injuries that were adjudicated. The issues concerned whether the appellant, (claimant), sustained an injury on (date of injury for docket no. 1); an injury on (date of injury for docket no. 2); and whether he had disability from either injury. Two separate decisions were written, although only one CCH was held.

The hearing officer found favorably for the claimant on the injury issues. She determined that the claimant injured his neck on (date of injury for docket no. 1), and had disability therefrom for the period from July 28 through September 3, 1998. She found that claimant injured his shoulder on (date of injury for docket no. 2), and had disability from this injury for the period from September 18 through September 30, 1998, and again from October 18 through November 18, 1998. However, she found as fact in this same decision that the claimant's shoulder injury caused the inability to obtain and retain employment equivalent to his preinjury wages from July 28 through November 18, 1998.

There was no appeal of either decision as to the occurrence of a compensable injury to the neck or shoulder. The claimant has appealed the findings on disability, arguing that disability continued from June 24, 1998, to the present, and, although claimant may have been released to full duty for this shoulder injury on November 18, 1998, the effects of his cervical injury continued thereafter. The claimant argues that the findings of the hearing officer on disability are erroneous. The respondent (carrier) responds that the decision is correct and the claimant, in trying to attribute disability to both injuries, cannot "have his cake and eat it." The carrier argues that the claimant cannot have "double" temporary income benefits (TIBS).

DECISION

Reversed and remanded.

The claimant was a commercial truck driver for (employer). He said that as he was driving his truck on (date of injury for docket no. 1), the truck hit a "dip" in the road, his seat belt "locked up," and he was thrown against the unyielding belt in such a way that his neck and left shoulder were strained where the belt came across his body. One (date of injury for docket no. 2), he said he was unloading his truck and felt a pop in his left shoulder. The claimant testified that he continued to work until July 27, 1998, doing his regular job, believing that his pain would resolve, but it got worse.

He sought medical treatment on this day from (health clinic), who treated him for the next four weeks, for a total of four visits. The health clinic is described in the medical

evidence as the employer's doctor. He said that he was told he had rheumatoid arthritis and a herniated cervical disc, but no diagnosis was made for his shoulder. The claimant also testified that he was told at his second visit that the carrier was denying workers' compensation coverage so he claimed the medical treatment through his regular insurance. The claimant said that the health clinic put him on light duty, which meant that his employer would assign him to logging trucks in and out, but he was not permitted to drive. He said his usual weekly wage was around $850.00, but that he was paid $400.00 on light duty (and apparently worked part time), which was increased in September to $500.00 a week. According to a log that the claimant kept and that was put into evidence by the carrier, the claimant was put on light duty effective July 28, 1998, and thereafter either was working light duty (off and on), was at doctor's appointments, or was at home. The last date on the log was November 30, 1998. Claimant said he was told that he would be terminated after October 1998, but was then permitted to take leave under the "Family Leave Act." He had not returned to work since that time.

The claimant said that on his last visit to the health clinic, his DOT commercial license was medically revoked. The records from the health clinic showed that this occurred on August 20, 1998, and he was scheduled for a follow-up examination on September 3, 1998. The license had not been reinstated, but he said he had not applied for reinstatement because he did not have a full medical release as yet. Claimant did not return to the health clinic but decided to seek treatment elsewhere. The health clinic's last return-to-work activity sheet from this final visit stated that claimant's date to return to full duty was unknown and that he was released only to modified duty. The health clinic was treating both the shoulder and the neck injuries.

The claimant said he had taken vacation time for a week in September to seek another medical opinion in another city. The claimant began treating with (Dr. S) and initially went to him for both his neck and shoulder problems. The medical records show that claimant was seen by Dr. S on August 13, 1998, and thought to have a possible rotator cuff tear and cervical radiculopathy. Dr. S referred the claimant for an MRI of his shoulder, and to (Dr. A) for evaluation and treatment of his neck problems, due to Dr. A's expertise in this area. Dr. A scheduled a rotator cuff tear surgery for September 18, 1998. Dr. A first saw claimant for his neck on September 14, 1998, and found from objective testing that the claimant had multiple degenerative changes with facet hypertrophy at two levels, and disc space narrowing at two other levels. His diagnosis was spondylotic radiculopathy. He recommended therapy, to include cervical traction, and a follow-up in four weeks. The claimant had his shoulder surgery and was likewise prescribed therapy for this. Dr. S released the claimant to light duty effective September 29, 1998, at claimant's request.

On October 19, 1998, Dr. S completed a release for claimant to "regular duties" effective November 19, 1998. He apparently did so after he examined claimant's shoulder on October 19, 1998, and found normal range of motion and more or less equal strength to the opposite shoulder, despite the fact that he did not take therapy "since his insurance

company would not allow it." Dr. S noted that the claimant would not feel safe to drive an 18-wheeler for another month. The next day, Dr. S filled out the same form, releasing claimant to light duty effective that day, and regular duty effective November 19, 1998. The restrictions set forth were all for the weight and motion restrictions on the left arm. On October 21, 1998, claimant was seen by Dr. A for a neck follow-up. Dr. A noted that claimant was under treatment by Dr. S for his shoulder. He found claimant had persistent neck pain on the left side and that physical therapy for his neck was denied. Claimant was in moderate distress on that day. Dr. A stated that claimant should be seen in four weeks and cervical traction was again recommended. There were no more records from Dr. A put into evidence.

Dr. S wrote on December 22, 1998, that either the seat belt or unloading the truck could have injured his shoulder. The claimant testified that the effects of his neck injury continued to the date of the CCH. While some evidence was developed that he had right shoulder and possible neck problems several years earlier, the hearing officer evidently did not agree that these were a factor in the matters before her.

The disparate fact findings and legal conclusions in the two separate decisions may be accounted for because the hearing officer attempted to attribute distinct periods of disability to each injury. This was unnecessary in this case. There was only one employer and one carrier against whom liability could be asserted. It is clear that the effect of the two injuries ran concurrently for a time insofar as claimant was put on modified duty. The hearing officer was not compelled because there were two claims to treat each as if the other never existed for purposes of disability. Moreover, we are unable to tell from the brief recitations of evidence in each decision why the hearing officer chose the several different periods of intermittent disability that she did.

To begin with, the finding of fact which appears to be partially supported by the record is the finding (in the shoulder decision) that claimant had the inability to obtain and retain employment equivalent to his preinjury wage for the period from July 28, 1998, and continuing in an unbroken stretch of time at least through November 18, 1998. While there was no support for the claimant's assertion on appeal that his disability began on June 24th (as opposed to July 28th), it is clear (and essentially undisputed) that the claimant was under active medical treatment beginning on July 27th for both his neck and shoulder and lasting throughout this time period. It was undisputed that he worked intermittent modified duty through sometime in October. It was undisputed that Dr. S treated the claimant's shoulder and Dr. A treated the claimant's neck. Dr. S's release to modified and then full duty appears based solely upon his examination of claimant's left shoulder. There is no evidence that is apparent to us to support ending disability entirely for the neck injury on September 3, 1998, nor for the intermittent periods of disability for the shoulder that were found by the hearing officer. It appears that the ending of disability entirely on November 18, 1998, resulted from a combination of a full release given by the doctor treating the shoulder (Dr. S) with having found no disability at all for the neck beyond September 3,

1998, which, as we stated, is not supported by the record. We do not agree with the carrier that the claimant seeks two TIBS payments; rather, he seeks an adjudication of the period of disability which may be attributed to both, or either, injuries. Any concern that two TIBS payments could be forthcoming in the case of overlapping disability can be forestalled by the issuance of a single decision , albeit with both docket numbers, and a single order. We note that we have consistently stated that a claimant's testimony alone may be sufficient to establish that an injury has caused disability. Gee v. Liberty Mutual Fire Insurance Company, 765 S.W.2d 394 (Tex. 1989).

We reverse and remand for further development and consideration, in one decision that includes both docket numbers, of the period of disability for which the carrier for both compensable injuries is liable. 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.

Susan M. Kelley
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Alan C. Ernst
Appeals Judge