

APPEAL NO. 990958

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On March 26, 1999, a hearing was held. She (hearing officer) determined that one of the producing causes of the respondent's (claimant) disability, from September 24, 1998, to the date of the hearing, was claimant's compensable injury of _____. Appellant (carrier) asserts that claimant did not prove that she had disability since the Texas Workers' Compensation Commission determined that disability ended on August 20, 1998, and a second, noncompensable, accident occurred on (subsequent date of injury). Claimant replied that the decision should be affirmed.

DECISION

We affirm.

Claimant was in a compensable motor vehicle accident on _____. This injury was shown by medical records to have been an acute cervical strain and a cranial contusion. On _____, she was also shown, by x-ray, to have a cracked rib; a chest contusion was diagnosed. There was a statement in the record by Dr. S saying that claimant's approximate date of return to work was August 20, 1998. Thereafter, a hearing was held on September 23, 1998, which was said not to have been appealed, with no contradiction by claimant; that decision said that claimant ceased having disability on August 20, 1998; the decision, as stated, resulted from a hearing held on September 23, 1998.

Claimant's medical records showed that she still had tenderness of the left ribs on August 11, 1998. Claimant was a passenger in a car that was sideswiped by a large truck trying to turn a corner on _____. She went to an emergency room where she was said to have neck and shoulder pain; she was placed in a cervical collar. The diagnosis was acute cervical strain and spasm; this note indicated that she was being treated for a prior cervical strain at the time. The (subsequent date of injury), note said nothing of any rib injuries.

On September 11, 1998, Dr. S said that claimant's chest pain was improved, but that she still should not work for two weeks. (Note that this period was covered by the prior decision in September 1998.) On October 1, 1998, claimant was said to have persistent neck pain and chest pain. Beginning on October 2, 1998, claimant was taken off work by Dr. S. On October 3, 1998, claimant again went to an emergency room with chest pain said to occur with inspiration and movement; a cough and fever were noted; claimant was said to have chest pain for three days. On October 14, 1998, a diagnosis of pneumonia was said to have been made "yesterday."

Dr. S continued to see claimant; it was determined that she had lupus and he was concerned that that disease was a factor in claimant's problems. He considered her pain to

be severe in late October. He added in November 1998 that claimant had not recovered from the _____ accident when she had the (subsequent date of injury) accident. Dr. S provided "unable to work" slips through December, January 1999, and into March 1999. He said on March 18, 1999, that claimant's lupus "might have been triggered or reactivated by the motor vehicle accident." He said she was referred to rheumatology for the lupus. He added that it was "hard to distinguish the disease process, but I do believe personally that [claimant's] lupus became more active due to motor vehicle accident." Dr. S, in this letter, said that claimant is still symptomatic from the accident. He had also indicated in this letter that the "second accident caused some added spasm, however no significant change occurred due to the second accident."

Texas Workers' Compensation Commission Appeal No. 960139, decided March 1, 1996, stated, among other things, that a claimant could "go in and out of disability." While a determination as to disability for a period of time that is affirmed or not appealed becomes final, that determination does not prohibit future consideration of a different period of time. The test is still whether the claimant is unable to obtain or retain work at the preinjury wage because of the compensable injury. In this case, the hearing officer was provided Dr. S's opinion indicating that claimant's _____, injury had not resolved. Disability only requires that the compensable injury be some part of the inability to obtain or retain work. Other factors, such as the lupus, may play a part also, as may a subsequent injury. While the carrier indicated that claimant had been shown not to have disability, claimant was found to have pneumonia, more chest pain, and more severe neck pain thereafter. While the hearing officer did not have to credit claimant's statement that she was told she breathed too shallowly because of her cracked rib pain and that contributed to the pneumonia in October 1998, the other evidence, including the diagnosis itself of pneumonia, provided sufficient evidence to support the determination of disability from September 24, 1998, to the date of hearing, March 26, 1999.

Finding that the decision and order are sufficiently supported by the evidence, we affirm. See In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

Joe Sebesta
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Tommy W. Lueders
Appeals Judge