

APPEAL NO. 991791

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 (Injury 1); an injury on (Injury 2); and whether he had disability from either injury. Two separate decisions were written, although only one CCH was held. The Appeals Panel reversed and remanded in Texas Workers' Compensation Commission Appeal No. 990931, decided June 17, 1999, pointing out various inconsistencies between the fact findings and conclusions of law within and between the two decisions, and suggested that for purposes of the issues reported, the injuries should be combined into one decision. The determination in favor of the occurrence of injuries was not appealed.

The hearing officer combined her two decisions into one decision on remand, with no additional hearing having been held. She declined, as suggested by the Appeals Panel in its remand, to assess a single period of disability, citing a concern with ultimately determining the date of statutory maximum medical improvement (MMI) for each injury (matters not yet in issue between the parties). She found disability from a neck injury for the period from July 28 through Injury 3, the date she determined that the cervical injury had "resolved," and for a shoulder injury from September 18 through 30, 1998, and then again from October 18 through November 18, 1998, indicating that she was conforming this finding to the wording of the issue. No periods of concurrent disability due to the effects of both injuries were found.

The claimant has appealed, arguing that the evidence proved he had disability from June 24, 1998, through the date of the CCH. He argues that disability was not ended by his treating doctor on November 19, 1998, asserting that this was just a prospective date. He argues that he had more than a cervical sprain. The respondent (carrier) responds that since the finding that claimant had a cervical strain was unappealed and the claimant was not treated for a strain, but for radiculopathy, the hearing officer's determination that disability for the neck ceased on Injury 3, is correct, as are her findings for the shoulder disability.

DECISION

Affirmed in part, reversed and rendered in part.

We will repeat the facts here. The claimant was a commercial truck driver for (employer). He said that as he was driving his truck on Injury 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. On Injury 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 tentative and then working diagnoses for both neck and shoulder appear to be "sprain." 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 Department of Transportation (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 Injury 3. The doctor who signed the modified-duty release was Dr. E, who also revoked the DOT certification "due to recent change in physical condition." Dr. E's 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 on Injury 3. He was restricted to 10 to 20 pounds lifting and proscribed from driving. The health clinic was treating both the shoulder and the neck injuries. The license had not been reinstated at the time of the CCH, but claimant 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 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 was 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 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. Marked tenderness and muscle spasm in the neck was noted. 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 be 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 weight and motion restrictions of 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. Naprosyn prescriptions were renewed. Somewhat inexplicably, 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. In his brief on remand, the claimant argued that there was little argument that disability began on July 28, 1998, but that the matter of controversy involved the date it ended.

The hearing officer notes in her decision on remand that the suggestion of the Appeals Panel to assess a single disability period "may be correct in determining temporary income benefits [TIBS], it could pose problems for determining the statutory [MMI] date." Of course, the issue in this hearing was entitlement to TIBS. If ascertaining the date of MMI becomes an issue in the future, the inception of disability for either injury could be ascertained at that time. We shall nevertheless review the separation of the two injuries by the hearing officer as shedding light on the continued existence of "gaps" in claimant's periods of disability. As to the period of time that she attributed disability to the shoulder injury, we can see that from the hearing officer's viewpoint, she has given the claimant a large portion of what he has requested, given the confines of the wording of the issue (except as to the date she found that disability ended).

For whatever reason, the issue as worded for the shoulder injury disability was phrased in terms of the time period from September 18 through September 30, 1998, and from October 18 through the "present." Although the shoulder was injured on Injury 2, no earlier periods were included in the issue. We can surmise, from the evidence in the record (testimony and the log kept by claimant about his light duty and off work days), that the dates that are not included in the issue correlate to dates when the claimant worked light duty or when he said he took vacation time to seek another opinion on his shoulder in early September. However, disability is defined as the inability to obtain and retain employment equivalent to the preinjury average weekly wage. Section 401.011(16). As recited in the hearing officer's original decision for the shoulder injury, the claimant testified to lower wages during the period of light-duty work. When represented parties agree to wording issues a certain way, it is not incumbent upon the trier of fact to recast the issues into what

he or she feels is the matter that should be before the tribunal. See Texas Workers' Compensation Commission Appeal No. 92071, decided April 10, 1992.

The claimant argues that Dr. S was giving a prospective release date in November 1998 for the claimant's shoulder and that it was in some fashion not a true release. The claimant was free to present additional medical evidence concerning the existence of an inability to work after that date. The hearing officer evidently disbelieved his testimony and did not consider the lack of a driver's license dispositive.

Of greater concern, as indicated in our previous decision, is the evidence concerning the cervical injury and any disability from that injury as having ended on Injury 3. Claimant was not given a full release on Injury 3, but a modified one; whether the condition is called a strain or radiculopathy becomes somewhat tangential. As we noted in our previous decision, the claimant continued to be treated actively for neck pain, which was manifested with muscle spasm and pain, throughout the period of time that he had surgery on his shoulder and was in recovery therefrom. Dr. S noted the cervical problem along with the shoulder injury in his reports. A note from Dr. A noted that on October 21, 1998, the claimant was having persistent neck pain. No evidence was introduced to show that what was called radiculopathy was inconsistent with the existence of a strain/sprain.

The Appeals Panel, early on, held that where a medical release is given that is conditional, and there is not a return to full-duty status, disability by definition continues unless the claimant obtains and retains employment equivalent to his preinjury average weekly wage. Texas Workers' Compensation Commission Appeal No. 91045, decided November 21, 1991. Disability cannot be said to end when a restricted release is given. Texas Workers' Compensation Commission Appeal No. 941092, decided September 28, 1994; Texas Workers' Compensation Commission Appeal No. 941566, decided January 4, 1995. Although the claimant's shoulder and surgery therefore may have at some point "trumped" the effect of the cervical injury, there is no evidence to support the hearing officer's factual determination that his cervical strain was "resolved" on Injury 3, and the great weight and preponderance of the evidence shows that the effects of and pain from the cervical injury persisted at least through late October 1998, when claimant was issued a release to full duty effective November 19, 1998.

Accordingly, we reverse the determination that disability ended for the cervical injury on Injury 3, and render a new decision finding that disability began July 28, 1998, and continued to November 18, 1998. As we noted in our original decision, and will repeat here, there was no evidence beyond testimony of the continued effects of either injury past that date, and the hearing officer evidently chose to disbelieve the testimony of the claimant, as she was entitled to do. And, as further noted in our decision, and repeated here, the determination that the earliest date of disability was July 28, 1998, is supported by the record, and is affirmed. TIBS are ordered to be paid in accordance with the 1989 Act and this decision, with the wages earned by the claimant during light duty taken into account, provided that "double" TIBS payments cannot be made as if the other injury did not exist.

Susan M. Kelley
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Alan C. Ernst
Appeals Judge