APPEAL NO. 000504

This appeal arises pursuant to the Texas Workers= Compensation Act, TEX. LAB. CODE ANN. ' 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on February 8, 2000. The issues at the CCH were whether the respondent/cross-appellant (claimant) sustained an injury while in the course and scope of employment on _____, and whether the claimant had disability. The hearing officer determined that the claimant sustained a compensable injury on _____, and that she had disability from August 30, 1999, to September 1, 1999. The appellant/cross-respondent (carrier) appeals, contending that the claimant did not sustain a compensable injury and, therefore, did not have disability. The claimant appeals the short period of disability found by the hearing officer, contending that her disability is continuing. The carrier responds to the claimant=s appeal, but the claimant does not respond to the carrier=s appeal.

DECISION

Affirmed in part, remanded in part.

All dates are 1999 unless otherwise stated. The claimant went to work for the employer, (employer), shortly after August 2nd as a van driver, delivering automotive parts while working the night shift. She stated that she pulled into a convenience store on the night of _____, a Friday, when her van seemed to be running rough, and found that one tire had separated from the belts. She said that she called her supervisor, Ms. S, and had a number of phone conversations that night. There was confusion in getting a wrecker out to change the tire and so, the claimant said, she enlisted the help of a clerk at the convenience store. She said she hurt her back as she was picking up a tire. She felt pulling in her shoulder and back and said that she told Ms. S about this at least twice that night. She said that Ms. S nevertheless advised her to take the truck to (City O) but she declined because even the spare tire was bad. The claimant drove into her hometown of (City L). The claimant and Ms. S both said that the claimant was to report to the central headquarters in (City D) on Saturday morning, but that she did not.

The claimant said she called Saturday to say she had not left City L but was put on hold for 20 minutes and eventually hung up. The claimant called her employer on Monday morning to say she still felt back pain and would be seeing her family doctor, Dr. H. The claimant said that her doctor gave her a light-duty release effective on Wednesday. She reported back to work for two more days and then accepted the employer's offer to go see its doctor at (company doctor's clinic). She was seen by Dr. A, who advised that she should not get in and out of a truck. At this point, according to Ms. S and the general manager, Mr. SR, the claimant was offered an office position. (However, there was no issue concerning whether a bona fide job offer had been made such that the offered wages could be attributed to the claimant.)

There was no direct testimony from the claimant about when or if she was off work after this. She did testify that she had not been fully released. Ms. S first testified that she did not

know if the claimant has been terminated, then said the claimant had not. Mr. SR said that the claimant was still an employee.

Ms. S disputed that the claimant told her that she was hurt on _____ during any of the phone calls. She said that the claimant indicated she was going to pay two men to change the tire for her. Ms. S said that she was first aware of the contended injury when the claimant called in on Monday.

Mr. SR said that the light-duty job assigned to the claimant when she returned was to ride with another driver, a job not needed but created in order to accommodate the claimant and to keep her working. Mr. SR said that he did not believe the employer paid for the claimant's family doctor's treatment, but that it paid the company doctor's clinic. He said that the employer would not pay for treatment of nonwork-related injuries. Mr. SR said that the office job was offered because Dr. A had referred the claimant to a specialist and it was apparent that the injury was more involved than the employer originally thought.

Ms. S said that the employer offered pizza parties if a month went by without injuries. A memo was issued by the employer two weeks after the claimant's injury, which also coincided with the insurance policy year, advising of the importance of minimizing the opportunity for injuries due to their cost and proposing the "pizza" safety promotion.

The medical records indicate that the claimant was treated on September 3rd by Dr. A for lumbar difficulties. She exhibited three out of five positive Waddell=s signs. He took her off work "today" and his further comments appear to say "+ then limited." On September 8th, she was treated by another doctor at the company doctor's clinic; he noted that she had a lumbar spine injury but also symptom magnification with four out of five positive Waddell=s signs. An activity status report issued by the clinic that day sets out restrictions (including inability to drive the company vehicle) and lists an anticipated date of maximum medical improvement (MMI) of September 27th.

On September 10th, arm and leg numbness is noted and an EMG suggested. There were no radicular complaints. She subsequently returned to Dr. H, who took her off work effective September 13th and September 22nd. While there is no MRI report in evidence, a reference to it states that it was reported to be normal. A referral doctor, Dr. R, diagnosed the claimant primarily with cervical, thoracic, and bilateral lumbar strain.

The claimant was given a form to sign by her employer that stated that she was to call in every three days unless hospitalized and also informed her, among other things, that failure of her doctor's office to contact the employer to confirm coverage of treatment or services under workers= compensation could result in the claimant being responsible for medical bills. (This latter provision is incorrect.)

The Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) filed by the carrier on September 21st, cited as the basis for dispute: "The claimant's injury did not arise out of or in the course and scope of employment for the employer; therefore, pursuant to TEX. LAB. CODE ANN. 406.031 [Tex. W.C. Comm:n, 28 TEX. ADMIN. CODE ' 406.031], the carrier denies the claimant has a work-related injury and denies compensability." A fair reading of this, without a full and complete explanation as applicable administrative rules require, is that the carrier disputed either that the activity in which the claimant was engaged was within the course and scope of employment or that her injury did not occur on the job.

A recorded statement from the convenience store clerk, Mr. C, who helped the claimant, is in evidence; it was taken on January 17, 2000. Mr. C stated that he saw the claimant trying to fix the tire, then she came in and asked him to fix it. He assisted her, and they had some difficulty jacking up the van. Mr. C said that the claimant picked up the tire they had taken off and put it in the van, then mentioned to him that she had hurt her back. Mr. SR and Ms. S said that neither of them interviewed Mr. C prior to the date that the carrier filed its TWCC-21.

A statement from Ms. H, an acquaintance of the claimant, said that the claimant did not, on an unspecified date, appear to be hurt. It was Ms. H's opinion that a person who had a ruptured disc would not be able to walk or get around for several months.

The hearing officer found that the claimant sustained a back injury; this is plainly and sufficiently supported by the evidence, including not only the testimony of the claimant but the statement of Mr. C. There are medical records detailing an injury notwithstanding symptom magnification. The decision of the hearing officer will be set aside only if the evidence supporting the hearing officer's determination is so weak or against the overwhelming weight of the evidence as to be clearly wrong or manifestly unjust. Atlantic Mutual Insurance Company v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.). We cannot agree that this is the case regarding the occurrence of an injury.

The period of time that the hearing officer found to constitute disability was limited to August 30th through September 1st. However, the undisputed evidence was that the claimant did not report to scheduled work on August 28th, as well as the subsequent Monday and Tuesday.

As to why the hearing officer did not find a period of disability past September 2nd, the discussion in the decision notes that the claimant "would be able to return to work after 2 days off, with no noted restrictions." This is contrary to the evidence that Mr. SR caused the claimant to be put on light-duty work and riding with another driver, based upon his understanding that she was released to light duty. Mr. SR likewise testified that he understood that the company doctor's clinic was going to further restrict the claimant (and, in fact, did) to the point where Mr. SR offered office duty.

The hearing officer, however, noted only that the claimant was seen on September 3rd by the company doctor who noted symptom magnification. He goes on to say: "Since the evidence of this injury is entirely subjective, any off-work slips or work restrictions placed on the Claimant after that time are suspect at best." He further notes that she worked for two days without "noticeable difficulty" and does not comment that she was on employer-assigned light duty at this time.

We believe that the period of disability found by the hearing officer is against the great weight and preponderance of the evidence and his own finding that the claimant, in fact, had an injury. Temporary income benefits are due when an injured worker has not reached MMI and has disability. Section 408.101(a). Section 401.011(16) defines "disability" as: "the inability because of a compensable injury to obtain and retain employment at wages equivalent to the pre-injury wage." A light-duty release is evidence that indicates that the effects of an injury may impact the ability to work. We note that the light-duty releases were issued notwithstanding the observation of symptom magnification during the claimant's first two examinations by the company doctor's clinic. Whether a bona fide job offer was made in accordance with Section 408.103(e) was not in issue and, in any case, is a separate issue from that of disability.

While we do not disagree that the hearing officer could believe that the claimant's injury was less serious than she contended, it appears that disability actually began August 28th and went some point past September 1st; we reverse and remand for further development and consideration of the evidence on disability as defined by the 1989 Act.

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:

Gary L. Kilgore
Appeals Judge

Dorian E. Ramirez
Appeals Judge