

APPEAL NO. 001439

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 originally held on February 8, 2000. The Appeals Panel, in Texas Workers' Compensation Commission Appeal No. 000504, decided April 28, 2000, remanded the case back to the hearing officer. On remand, no further hearing was deemed necessary and none was held.

The hearing officer determined that the appellant (claimant) had disability from August 28, 1999, to September 1, 1999. This was the original decision that had been determined by the Appeals Panel to be against the great weight and preponderance of the evidence. The hearing officer points out how he believes the Appeals Panel misunderstood the evidence. It is clear from the hearing officer's decision that he believed the claimant's contentions of injury to be largely subjective.

The claimant has appealed and discusses the evidence in detail, noting that some of the hearing officer's statements are not borne out by the transcript and that the hearing officer has wholly ignored the records of the company doctor which diagnosed a lumbar strain and put the claimant on restricted duty. Detailed testimony and evidence from the record is argued. The respondent (carrier) responds that the decision should be affirmed.

DECISION

Reversed and rendered.

In pertinent part in our previous decision, we stated:

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 on 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.

The hearing officer decided to forgo the suggested "further development" of the evidence and merely recast his original decision in terms of what he believed to have been a misunderstanding of the facts by the Appeals Panel. Although the hearing officer changed the date that disability began, the same decision on the end of disability was rendered with no additional evidence having been taken. We cannot agree that the essential facts were misunderstood. The undisputed record shows that the claimant was put on light duty by her employer "after" the last date of disability found by the hearing officer (August 31) even if not the next day after, pursuant to restrictions issued by the employer's company doctor.

We will highlight the evidence with respect to the claimant's time off and return to work. Our previous statement of the facts in Appeal No. 000504, *supra*, is incorporated herein by reference. Here are the facts concerning the claimant's work status as derived from another review of the evidence and the transcript in this case:

The claimant said she hurt her back changing a tire on the night of _____ (all dates are in 1999 unless otherwise stated). As noted by the hearing officer, the claimant was scheduled to work on August 28 but did not report for work. The claimant called in to work on Monday, August 30; reported her injury; and said that she would go to her own family doctor, Dr. H, rather than the company doctor whose services were offered. The claimant said she declined the company doctor because she was at her home in East Texas, while the company doctor was in North Texas.

Dr. H wrote out a certificate to return to work on September 1. The claimant said that she came back to work on September 1 and 2, with help loading her truck, but had increasing pain so that by Friday, September 3, she called the employer and asked to see the company doctor, Dr. A. As noted in the previous decision, Dr. A found that the claimant was having symptom magnification, but he also diagnosed a lumbar strain and she was released to light duty effective the next day. Dr. A's report indicates that he prescribed a number of medications.

Mr. S noted in a chronology and testified that he met with the claimant after her visit and said that she would be working (in a "make work" position to accommodate her light-duty restriction) as a driver with another night driver. Mr. S set the beginning date of this job as September 8.

The claimant visited the company doctor on September 8, 9, and 10. Each time, she was given restrictions on lifting and other uses of her body. She was initially restricted from driving the company vehicle on September 8, although this is not repeated in the September 10 restrictions. The continuing diagnosis was lumbar strain. Mr. S's notes record that the claimant also had therapy appointments during these days and did not work on the 8th but did work on the 9th, 10th, and 11th.

On the 10th, Mr. S said that it was discussed with the claimant that her light-duty work would be office work beginning September 13. His notes indicate that he understood that she had not yet been released back to driving. On September 13, claimant called the employer and said her family doctor in the town where she lived had taken her off work for two weeks.

Mr. S said that claimant worked on October 1st and 2nd with no problems. Upon further questioning, he agreed this was not based upon any personal observation because he worked a different time, but on the fact that no supervisor reports were relayed to him that there were any problems.

The claimant resumed treatment with Dr. H on September 13 and was taken off work for two weeks. A cryptic prescription slip from Dr. H is also in evidence which states "[s]he needs to be off effective 9-22-99." Other medical records in evidence relating to subsequent treatment include a report from Dr. T, to whom claimant was referred by her attorney in December 1999. He referred the claimant to Dr. R, whose report, dated December 27, 1999, noted that claimant had an October 4 MRI which was normal. Dr. R diagnosed a cervical and upper thoracic sprain and bilateral lumbar sprain. He noted that claimant had a mild degenerative disease of the lumbar area.

Mr. S testified that it was not the employer who disputed the claim but the carrier, and said that he was neutral on the matters concerning the injury. Mr. S affirmed that the employer paid for the services of the company doctor and would not have paid had the injury not been work related.

Once more, we reiterate our opinion that the determination that disability ended on August 31 is against the great weight and preponderance of the evidence and, given the hearing officer's assertion on remand that the claimant only had "subjective" complaints, against his own finding of fact that she sustained "an injury" on _____. While we do not agree that the claimant had an injury of such severity it would have caused disability continuing to the date of the CCH, the hearing officer has merely bolstered his original decision rather than reviewed the record to ascertain a reasonable period of disability.

Because the Appeals Panel cannot remand a second time, Section 410.203(c), we must render a decision. The diagnosis of lumbar strain has caused both the employer's doctor and the claimant's original treating doctor to put her under restrictions. In his first decision's discussion, the hearing officer noted that the evidence was credible that the claimant sustained a low back injury. The claimant's testimony did not link the additional diagnoses set out in the December 1999 records of Dr. T and Dr. R to her tire-changing injury. There is an unexplained gap in the medical records for three months. As we noted in our original decision, the claimant's testimony on the issue of disability was essentially undeveloped. The MRI done in October 1999 was normal.

Accordingly, we render the decision that the claimant had disability from August 28 through September 26, 1999 (the last day of the specific period of time she was taken off work by Dr. H as set out in the record). We cannot agree with the claimant's argument that Dr. H's September 22, 1999, prescription slip is an open-ended, off-work declaration for

what appears to be a simple lumbar strain. Temporary income benefits should be paid with the computation adjusted for any earnings after the injury.

Susan M. Kelley
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Tommy W. Lueders
Appeals Judge