APPEAL NO. 92277

This appeal arises under the Texas Workers' Compensation Act of 1989 (1989 Act), TEX. REV. CIV. STAT. ANN. arts. 1.01 through 11.10 (Vernon Supp. 1992). On May 14, 1992, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. She determined that claimant, respondent herein, was not terminated for cause from her limited duty job and that temporary income benefits should be continued as long as disability continues until maximum medical improvement is reached. Appellant asserts that the decision is against the great weight and preponderance of the evidence, that the termination policy of the hospital is clear and was followed, and that the hearing officer's "only role" was to decide if the decision to terminate was correct based on the information provided to the hospital at that time.

DECISION

Finding that the decision is supported by sufficient evidence of record, we affirm.

Respondent has worked at the hospital for approximately three and one-half years. She is a nurse's assistant who injured her back on (date of injury). That injury was stipulated to be a compensable back injury. She had been paid temporary income benefits for the injury; the issues now at hearing are whether temporary income benefits are due after November 17, 1991, and whether respondent's high blood pressure is an occupational disease. Respondent was fired on November 18, 1991.

Article 8308-4.23(a) of the 1989 Act provides that an employee who has disability and who has not attained maximum medical improvement is entitled to temporary income benefits. The appeals panel in Texas Workers' Compensation Commission Appeal No. 91045 (Docket No. redacted) decided November 21, 1991, held that a conditional medical release (limited duty) did not end disability unless the employee was thereafter able to obtain and retain work paying a wage equal to the preinjury one. Article 8308-1.03(16) of the 1989 Act defines disability as the "inability to obtain and retain employment at wages equivalent to the preinjury wage because of a compensable injury." In Texas Workers' Compensation Commission Appeal No. 91027 (Docket No. redacted) decided October 24, 1991, a nurse's aide was on limited duty after a compensable injury when terminated for cause on May 21st. In that case, her temporary income benefits were stopped when she was terminated for cause until she was seen in an emergency room on August 12th of the same year for symptoms growing out of the compensable injury and was not released to return to work.

In the case now being reviewed, appellant attempted to show that respondent could not work because she was fired, not because of disability. In that event, temporary income benefits would stop until disability (defined as an inability to obtain and retain work at preinjury wages because of the compensable injury) returned.

On November 6, 7, and 8, 1991, respondent was not at work and was under a doctor's care on those days. The medical reason for this absence was central to the case as it

developed at the hearing and was reported through the findings made by the hearing officer. At the time of the absence respondent had been warned by her supervising nurse for falsifying a record. Respondent also had prior absences under an involved hospital policy that counted even "authorized" absences against an employee. As a result, at the time of the November 1991 medical absence, respondent was subject to being fired for her next transgression under the hospital termination policy. An absence for sickness diagnosed as the flu would suffice for termination under the policy as it related to respondent at the time. On the other hand, absences that were based on medical care relating to a workers' compensation injury were not counted in the termination policy and such an absence would not have resulted in respondent's firing. Respondent's supervising nurse, (KW), agreed that if the November 1991 absence were based on treatment for a workers' compensation injury, respondent would not have been fired on November 18, 1991.

Extensive testimony was elicited from KW concerning falsification of a patient's record by respondent through entry of a temperature taken at one time as having been taken at another time. This falsification of a patient's record by respondent, along with the sequence of counting absences and thereafter counseling the errant employee, was thoroughly developed. In addition, (RS), manager of employee relations, testified at length as to the way violations of hospital policy were handled. Among other points he made, in regard to the 16 pages of hospital guidance admitted in evidence, was that the word "recommended" in regard to firing or other action to be taken for particular conduct actually meant that such action was mandatory. He added, however, that he reviewed a termination action to make sure it was fair. He reviewed this case, and at first could not remember whether he did so before or after the firing. He added that if he reviewed it after the firing and something were wrong with it, the employee would be reinstated. He then recalled that he reviewed this action before it was final.

Respondent had been placed on light duty on October 18, 1991, with a lifting limitation. Since no light duty was available on the patient ward where she normally worked, she was assigned to work in medical records in a different building, taking orders on a day by day basis from (Mr. T). KW did not assign tasks to her. KW primarily reviewed the attendance figures that Mr. T would furnish her every two weeks for pay and administrative action, although she probably did talk to Mr. T on occasion about respondent. Respondent testified that she called in prior to work on November 6th, on November 7th, and on November 8th to report her absence to Mr. T, who she considered to be her supervisor. She also got a statement from her doctor. She stated that she went to the doctor then because her legs were swollen and her back was hurting.

KW testified that she understood when she heard of the absence that it was because respondent had the flu. She said once that she gathered such fact from Mr. T and the "exhibit." One exhibit was a short form with blanks which appeared substantially as follows:

Date 11-07-91

To Whom It May Concern

This is to certify that ___R___

___W_____ has been ill and under

my professional care. This patient has

been unable to work, but should be able

to resume duties on ___11-11-07___(sic)

(signed by [Dr P])

KW later said she got the information as to "flu" from Mr. T or respondent and said that she normally verified why an absence occurred. KW added that respondent told her she was not at work because of the flu, but said also that respondent did not say it was for some other reason. KW also said she did not see a medical excuse of Dr. P. (The record contains another exhibit of Dr. P; that exhibit is a short typewritten letter dated March 9, 1992, which says that respondent was treated on November 7, 1991, and her diagnosis was "edema lower extremities, pain in the lumbar area.) She added that she was not told of the medical excuse by Mr. T, and Mr. T did not tell her that respondent called in every day of her absence. A review of exhibits in evidence reveals the word "flu" on only page five of carrier exhibit C, a log-type form devoted to respondent alone, which has "date" blanks and "reason" blanks, with "flu" written beside an entry of "11/6/7/8/91". KW testified that she was the only one who made entries in such personnel records. There is no writing attributed to a doctor, to Mr. T, or to respondent that uses the word "flu."

Respondent also testified that after the termination she did not believe she could function as a nurse's assistant, but nevertheless applied for jobs elsewhere. She informed potential employers that she had had a back injury and no one ever called her back to offer a job. One told her that she could not be hired as a nurse with a back problem. She says she is not physically able to return to work, and no doctor has released her to return to work. Two doctors' statements, (Dr. C) dated March 6, 1992, and (Dr. R) dated February 19, 1992, say that she has not been released to go back to work.

Appellant asserts that the hearing officer should only consider the information provided to the hospital at the time of the termination in determining whether the termination was for good cause. He does not qualify the word "hospital." Apparently it would be appropriate to consider the information given to Mr. T, a hospital employee who supervised respondent, whether or not he, in turn, provided that information to KW, who prepared the package upon which termination was based. Respondent said she gave a doctor's excuse to Mr. T and there is no dispute as to this; KW said she did not see such an excuse. KW attributed her conclusion that respondent had the flu to several sources at different times in her testimony. Respondent said she saw Dr. P in November for swollen legs and back pain. Significantly, RS, a manager in the hospital, acknowledged that the basis for the firing

could be reviewed after the fact. If it were not right when reviewed, even though it may have appeared to be right at the time, the respondent would have been reinstated. This panel is now told by appellant that the hearing officer does not have the ability to examine what may have actually happened, but should only examine the termination decision based on the information provided at the time. No authority is cited for this proposition. The hearing officer can determine what the facts were at the time, not just what the employer knew those facts to be, in determining good cause. In Texas Workers' Compensation Commission Appeal No. 92016 (Docket No. redacted) decided February 28, 1992, the hearing officer's query into factors influencing a termination other than those alluded to by the employer was upheld and resulted in a determination of termination without good cause.

The evidence sufficiently supports the finding that respondent was absent in November 1991 because of pain stemming from her earlier compensable injury. Appellant's witnesses agreed that absences based on a workers' compensation injury would not have resulted in termination. This finding is based not just on respondent's testimony, but also on the medical evidence of record. Appellant's evidence, to the contrary, was admittedly incomplete as to the facts of the absences provided by Mr. T to KW. KW, while adamant that respondent had the flu at the time in question, was not clear as to her sources for that conclusion. The hearing officer is the sole judge of the weight and credibility of evidence. Article 8308-6.34 (e) of the 1989 Act. She can believe part or all or none of a witness' testimony and resolves conflicts and inconsistencies in the evidence. Bullard v. Universal Underwriters Ins. Co., 609 S.W.2d 621 (Tex. Civ. App.-Amarillo 1980, no writ).

The hearing officer concluded that termination was not for good cause and that conclusion was supported both by sufficient evidence of record and by the finding that the absence in question was based on a workers' compensation injury. Since the termination was not for good cause and respondent was on light duty at the time, disability continues. *See* Appeal No. 91045, *supra*. In addition, there is evidence of record that after the termination, respondent was removed entirely from any type of work status by her physicians. Since the hearing officer did not find good cause for the termination, she did not have to decide whether the evidence of the respondent, as to her inability to secure work after the termination, was sufficient to reinstate temporary income benefits. *See* Appeal No. 91027, *supra*. The conclusion that temporary income benefits are due, based on the compensable injury, after the November 18, 1991 termination, follows from the finding that disability continued after that time.

The decision and order are sufficiently supported by the evidence, findings of fact, and conclusions of law, and they are affirmed.

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Joe Sebesta
Appeals Judge

CONCUR:

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Stark O. Sanders, Jr.
Chief Appeals Judge

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Philip F. O'Neill
Appeals Judge