APPEAL NO. 92282

On March 7, 1992, a contested case hearing was convened at (city), Texas, (hearing officer) presiding, and was continued on March 19th. The sole issue was whether claimant (respondent herein) continued to suffer disability after November 11, 1991, within the meaning of the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. Art. 8308-1.01 *et seq*. (Vernon Supp. 1992) (1989 Act), in that she is unable to obtain and retain employment at her pre-injury wages caused by her (date of injury) injury. The hearing officer, finding that respondent could only perform light duty work, was terminated from her job on November 11th, has sought employment but her lifting restriction has made her ineligible to obtain employment at preinjury wages, held that respondent has disability and is thus eligible for temporary income benefits after November 19, 1991. Appellant (carrier below) disputes the hearing officer's findings and conclusions as they related to an inability to obtain and retain employment at wages equivalent to those earned prior to (date of injury). No response was filed to the appeal.

DECISION

We affirm the decision and order of the hearing officer.

There is no dispute that respondent worked for (employer) as a parts truck driver and that she injured her neck and back while lifting a package out of a truck on (date of injury). The parties also stipulated that respondent was released to light duty work with lifting restrictions by (Dr. B) on May 10 and June 11, 1991, and that she returned to work on June 11th and was terminated November 11th.

Between June 11th and November 11th, when she was terminated, respondent continued to work for employer in virtually the same capacity as before, and at the same wage rate. Her employer provided assistance with those parts of the job she could not perform because of her condition (i.e., lifting parts onto the delivery truck).

(Mr. S), the parts manager for employer, testified that one of the company's invoices for parts dated October 22, 1991, showed up on a computerized suspense report of invoices for which payment had not cleared the cashier. He started investigating the missing invoice, and talked to the customer involved who said he had paid cash to respondent. However, because this delivery wasn't logged out to respondent, Mr. S did not pursue the matter further, although he said the money was never accounted for. A later suspense report showed another unpaid invoice dated November 7th, which he could not find in employer's files. He talked to that customer, who said respondent had made the delivery, and obtained the customer's copy of the invoice which contained the handwritten notation "Pd cash" on the front. Respondent was not asked to identify the handwriting as her own, although Mr. S said his dispatcher, who was respondent's sister, said the handwriting was respondent's. Mr. S said he attempted to talk to respondent about this incident, but when he told her they were missing some money and asked whether she knew anything about it she immediately walked out of his office and left for the day. Thereafter, Mr. S talked to

employer's personnel director, (Ms. K), who wrote out a termination report. A subsequent suspense report showed another unpaid invoice from November 7th; that customer also identified respondent as the driver. Mr. S and Ms. K both testified that the termination had nothing to do with respondent's workers' compensation claim nor her injury. Both also said they did not pursue any criminal action against respondent. Respondent had received an award from the employer for outstanding performance in August 1991. Respondent denied taking any cash from her employer.

Respondent testified that she has applied for numerous jobs since November 11th. These included other dispatcher jobs with automobile dealerships (including one for which she had worked previously); a day care center; two cashier jobs at supermarkets; part-time delivery person for a florist; and hostess at two restaurants. She said one of the restaurants had a three-step interview process. However, before she went back for the second interview her doctor said he did not recommend that she take the hostess job because it would required her to stand on her feet for several hours. She said she is limited in her job search because of her physical limitations. She has taken pain killers and muscle relaxants since her injury, although she said she did not take medication when she was driving. Except for the restaurant job, she has not been called by any of these employers. She testified that she has a ninth grade education and no special skills or technical training.

Respondent's boyfriend with whom she lives, (B M), said her injury prevents her from doing much work around the house. He was aware that she had applied for several jobs since being terminated.

The 1989 Act provides that an employee who has disability and who has not attained maximum medical improvement is entitled to temporary income benefits (TIBs). Article 8308-4.23(a). Maximum medical improvement was not raised in this case, and there is no evidence that any doctor has found respondent to have achieved it. "Disability" is defined in the act as "the inability to obtain and retain employment at wages equivalent to the preinjury wage because of a compensable injury." Article 8308-1.03(16). Because disability is necessary to the continued payment of TIBs, the cessation of disability will suspend TIBs.

Under the act's definition, respondent clearly did not have disability during that period of time postinjury when she was working for her employer at the same rate of pay. We have previously held, however, that an injured employee can go back and forth between periods of disability, so long as all the statutory prerequisites are met. *See* Texas Workers' Compensation Commission Appeal No. 91027 (Docket No. redacted), decided October 24, 1991.

That same decision also held that:

> A broadly stated rule forever denying workers' compensation benefits to an employee returned to light duty and subsequently discharged for cause . . . has the potential to undermine a very basic purpose of workers' compensation

> programs; to compensate injured workers for loss of earnings attributable to a work-related injury. While virtually all case authority holds that the reason for the termination must be justified or for a just cause, the results of the injury remain and may prevent any or very limited gainful employment at all . . . an approach to this issue which also
>
> factors in the continuing effect of the injury on the capacity to obtain and retain some gainful employment is more in keeping with the 1989 Act . . . *Id*.

Applying this rule to the facts of the instant case, we believe it is clear that, despite any termination for just cause, respondent may still be entitled to TIBs if she can show that her disability was in someway caused by her compensable injury. While not raised by appellant, and no reply was filed by respondent, we note at the outset that the record contained sufficient evidence to support the hearing officer's finding that respondent's termination was based on just cause.

Appellant contends, however, that the definition of "disability" contains a two-part test, requiring a claimant to prove, apparently separately, that he or she cannot obtain employment and cannot retain employment. Because respondent returned to her preinjury job at wages equivalent to those earned prior to (date of injury), and lost that job for reasons not related to her compensable injury, appellant argues that she did not meet her burden of proof that she is unable to retain employment at equivalent wages because of her injury.

We do not believe the language of the 1989 Act merits this distinction for the reasons set forth in Appeal No. 91027, *supra*. There is nothing to indicate that the Legislature in enacting the definition of disability meant to establish two separate hurdles for a claimant to jump in determining whether he or she cannot "obtain and retain" employment. The fact that the two words are conjunctively connected indicates that they should be considered together rather than separately. Normally the words "and" and "or" are not considered interchangeable. The word "and" may sometimes be construed to mean "or," but this is usually done only to effectuate the manifest intent of the Legislature, or where not to do so would render the meaning ambiguous or would result in an absurdity or a mistake. Robinson v. Reliable Life Insurance Company, 569 S.W.2d 28 (Tex. 1978).

We believe it more nearly effectuates Legislative intent to find "obtain and retain" employment to be a single concept. In addition, this interpretation achieves no absurd or ambiguous result. Rather, it is consistent with the concept of disability under the 1989 Act that a claimant not be foreclosed from income benefits simply because he is able to secure employment; his compensable injury also must not prevent him from keeping that job.

To continue receiving TIBs, then, respondent must demonstrate that her inability to obtain and retain employment at postinjury wages was due to her compensable injury. Appellant argues that respondent testified at the hearing that she had applied for work at a number of places and was either told that they were not hiring, or was never given a reason

as to why she was not hired. Not one prospective employer, appellant contends, refused to hire her because of any physical limitations arising from the (date of injury) injury.

We have previously said that determining the end of disability within the meaning of the 1989 Act can be a very difficult and imprecise matter. *See* Texas Workers' Compensation Appeal No. 91045 (Docket No. redacted), decided November 21, 1991. That decision distinguished a situation in which the claimant has received a medical release to full duty status from one in which the medical release is conditional. In the latter circumstance, we said, evidence to establish disability must show that there is "employment at preinjury wage levels reasonably available to the employee meeting the conditions of the medical release, taking into consideration reasonable limitations on the type of work suitable within the framework of the employee's abilities, training, experience, and qualifications, and that the employee has not availed himself of such employment opportunities." *Id*.

The evidence in this case shows respondent applied for at least one job, the hostess position, that her doctor recommended against because of physical requirements. It does not matter that she may have never held this type of job in the past; as we have previously held, "disability" is not premised on the inability to obtain and retain employment in the type of work the employee was doing when injured. Texas Workers' Compensation Commission Appeal No. 92083 (Docket No. redacted), decided April 16, 1992. This position also appears to have been suitable to respondent's limited education and skills. Considering this evidence, we do not believe the hearing officer's conclusion that respondent had disability was in error because there was no direct evidence that an employer had refused to hire her because of her injury.

We note that Finding of Fact No. 11 says that respondent's inability to lift more than 15 pounds causes her to be unable to obtain employment at wages equivalent to those she earned prior to (date of injury). The record shows that her doctor felt that it was the prolonged standing, rather than a lifting restriction, that prevented her from pursuing a particular job. However, we believe this is harmless error, since Finding of Fact No. 13

says that as of November 19, 1991, respondent's (date of injury) injury caused her to be able to obtain and retain employment at wages equivalent to those she earned prior to (date of injury).

Accordingly, the decision and order of the hearing officer are affirmed.

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Lynda H. Nesenholtz
Appeals Judge

CONCUR:

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Joe Sebesta
Appeals Judge

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Robert W. Potts
Appeals Judge