

APPEAL NO. 92399

On June 25, 1992, a contested case hearing was held in (city), Texas, with (hearing officer) presiding, to consider the sole issue of whether the claimant, (claimant), the respondent herein, had disability as a result of either or both of two job-related injuries, which were sustained on (date of injury), and (date). The hearing officer determined that, because respondent worked after the first injury, and was fired for cause after the second injury, he did not have disability immediately following either injury, but had proven that he since was unable to obtain and retain employment equivalent to his preinjury wage because of a compensable injury. She consequently found no disability for the period from (date of injury) through March 1, 1992, but found disability from March 1, 1992 to the date of the hearing. At the time of both injuries, the respondent worked for the City of (city) (City).

Appellant contends that the hearing officer erred by finding that the respondent had disability from March 1, 1992, because there is no evidence, or insufficient evidence, to support such findings and conclusions. Appellant also contends that the respondent failed to carry his burden of proof that he was unable to obtain and retain employment as a result of his (date of injury) injury. Appellant emphasizes that the respondent was fired for cause, has actually worked for two different employers since his termination by the City, and has applied for unemployment benefits hence certifying an ability and willingness to work.

DECISION

After reviewing the record, we affirm the determination of the hearing officer.

The employer is a self-insured municipality. Respondent had worked primarily in maintenance for the City since 1979. Respondent injured his back on (date of injury) as he unloaded heavy items from the back of a truck. Medical evidence in the record diagnoses respondent's condition as a herniated disk. On (date), he sustained a "whiplash" neck injury when he had a motor vehicle collision while driving between work sites. Respondent stated that this neck injury no longer bothers him. Respondent acknowledged that he had some substance abuse problems and treatment in the past; he acknowledged that due to personal stresses, he had "backslid" and used drugs a month before his second accident. Nevertheless, drugs were detected in a required test after the second accident and he was terminated. He stated that he had signed a paper acknowledging that he could be terminated if he ever failed a drug test.

Respondent earned \$8.46 per hour before his first injury because he was working on a special project. He stated that he went back down to his usual salary of \$8.06 per hour before the second injury. Respondent acknowledged that he had continued to work after his first injury, noting that he has four children to support and could not afford to be off work. After his termination, he applied for, but did not receive, unemployment benefits. Respondent's consistent testimony was that he wants to work and is willing. However, his back hurts worse than it did immediately after the first accident and he stated that he was even unable to stand for very long without lying down, or to assist with chores around the

house. After being off work a few months after he was terminated, respondent was employed by two employers. One, (AT), gave him temporary job placements from October 1991 until February 1992 that paid around \$5.00 per hour. Eventually, he said, AT was not able to place him at jobs where it was possible for him to put his feet up to relieve pain from his back. Respondent stated that after working for AT, he worked for (employer) for a week, until he was terminated February 29, 1992 for stating that he had claimed workers' compensation for a back injury. He said that he has repeatedly looked for employment but no one is hiring him; the railway is the only employer he was able to say for sure refused further work because of his back.

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." Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.03(16) (Vernon's Supp. 1992) (1989 Act). We cannot agree that the hearing officer has erred by establishing March 1st as the date upon which respondent's inability to obtain and retain employment as a result of his injury commenced. That date marks the date at which sufficient evidence indicates he was terminated from the railway employer, for the specific reason that he had incurred a back injury. The trier of fact could conclude that respondent's continued search for work and his inability to find it favored, rather than disproved, his contention that he was unable to obtain and retain employment due to his injury. His testimony supports a conclusion that the debilitating injury was the one which occurred on (date of injury).

The hearing officer is the sole judge of the relevance and materiality, the weight and credibility, of the evidence offered in a contested case hearing. 1989 Act, Art. 8308-6.34(e). We would note that the 1989 Act recognizes that compensable disability is not limited only to time lost immediately following an injury but may arise at a later date. See Article 8308-4.22(b). 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 Co. v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.). The fact that a claimant may hold himself out as available for work in an application for unemployment benefits is not necessarily adverse to his testimony during trial of the case that he is unable to obtain and retain employment due to his injury. See Aetna Casualty & Surety Co. v. Moore, 386 S.W.2d 639 (Tex. Civ. App.-Beaumont 1964, writ ref'd n.r.e.).

There being sufficient evidence to support the decision of the hearing officer, we affirm.

Susan M. Kelley
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Lynda H. Nesenholtz
Appeals Judge