APPEAL NO. 92557

On August 25, 1992, a contested case hearing was held in (city), Texas, with (hearing officer) presiding as the hearing officer. The issue framed at the CCH was: "Did [claimant] suffer disability after 11 June 1992 within the meaning of Article 8308-1.03(16), and that he was unable to obtain and retain employment at wages equivalent to those he earned prior to (date of injury), caused by a (date of injury) injury." The hearing officer found that the claimant had suffered a compensable injury on (date of injury), and that this injury caused him to be unable to obtain or retain employment after June 11, 1992. The hearing officer further found that (employer) did not make an offer of light duty employment and that "the carrier may not offset its liability for temporary income benefits" after June 11, 1992 based on an offer of light duty employment. The carrier appeals alleging as error that the hearing officer "misinterpreted and misapplied the definition of disability in Article 8308, Section 1.02(16) (sic)." The claimant responded and alleged the hearing officer's Conclusion of Law No. 5 was "unwarranted" and asks for temporary income benefits (TIBS) for the period of April 30, 1992 through June 11, 1992. The carrier responded to claimant's cross-appeal and reiterated that "the sole issue before the hearing officer at the contested case hearing was whether the claimant suffered disability 'after 11 June 1992'." The appeal is considered under provisions of the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq.* (Vernon Supp. 1992) (1989 Act).

DECISION

After reviewing the record, we affirm the hearing officer's decision.

The facts are somewhat confusing in that the greater part of the contested case hearing (CCH) dealt with the circumstances and justification of claimant's termination on April 30, 1992. Additionally there was a tape and two partial transcriptions of a conversation claimant had with a coworker and others on or about July 14, 1992, with the tape and one partial trancscription eventually admitted as claimant's Exhibits 9 and 11.

Basically, the 28 year old claimant was employed as a general laborer at $7.75 an hour. On (date of injury) while claimant was walking down the stairs he noticed a pain in his knee. The record and evidence is silent on what happened between (date of injury), and April 30, 1992. On April 30, 1992, the claimant stated he had to go see the doctor and claimant's wife was to call the employer for him. Testimony from the employer was that employees who were absent or late without calling in would be fired. It was further the testimony of (Mr. D), who was claimant's supervisor, that when claimant did not show up for work, Mr. D called his manager (Mr. C) and told him that claimant was being fired. Mr. D's further testimony is that claimant's wife did call around 10:30 a.m. saying claimant "was taking off to go to the doctor." Apparently claimant first sought medical treatment for his knee on May 4, 1992 from (Dr. MK). Dr. MK ordered an MRI of the knee on May 5, 1992, but the MRI apparently was not done until June 11, 1992. Claimant subsequently saw (Dr. PF) on May 7, 1992, and again on June 10 or 11, 1992. Dr. PF's report, dated August 24, 1992, states that had the MRI report been available as originally requested, the doctor ". . .

would have extended the light duty indefinitely (until his [claimant's] surgery, for example)." The MRI revealed claimant had a torn cartilage in the left knee. Dr. PF, by report dated 6-11-92, which was made available to the employer, released claimant for "light" duty. Employer at some time in the summer of 1992 had prepared a list and job analysis of light duty assignments "available had [claimant] not been fired." The testimony of both claimant and employer was that the light duty assignments were never communicated to claimant. There is some testimony that claimant subsequently had a knee operation and received benefits. The issue before us is only whether claimant had disability, as defined by the Act, after June 11, 1992.

The hearing officer found:

9.As of 11 June 1992 [claimant's] (date of injury) injury caused him to be unable to obtain and retain employment at wages equivalent to those he earned prior to (date of injury).

10. On 11 June 1992, [employer] could have offered [claimant] light duty employment within the medical restriction of [Dr. PF], and paid [claimant's] $7.75 per hour, but for the fact that he had been terminated on 30 April 1992.

11.[Employer] did not make an offer of light duty employment to [claimant] after 11 June 1992."

and concluded:

5. Because [claimant] has failed to show by a preponderance of evidence that his (date of injury) injury caused him to be unable to obtain and retain employment at wages he earned prior to (date of injury) from 30 April 1992 through 11 June 1992, he is not entitled to temporary income benefits under Article 8308-4.23 for that period of time.

6.Because [claimant] has shown by a preponderance of evidence that beginning 11 June 1992 his (date of injury) injury caused him to be unable to obtain and retain employment at wages he earned before (date of injury), he had shown that he is eligible for temporary income benefits under Article 8308-4.23 beginning 11 June 1992.

7.Because (i) [employer] did not make an offer of light duty employment under Rule 129.5 and Article 8308.4.23(c) and (f) to [claimant] and (ii) and there is no showing that any other offer of light duty employment was made to [claimant] under Article 8308-4.23 at any time after 11 June 1992, the carrier may not offset its liability for temporary income benefits under Article 8308-4.23(c) and (f).

The carrier appealed Finding of Fact 9 and Conclusion of Law 6, as set out above, arguing that the availability of light work within the doctor's restrictions bars a finding that claimant was disabled within the meaning of Article 8308-1.03(16). Article 8308-1.03(16) defines disability as "the inability to obtain and retain employment at wages equivalent to the preinjury wage because of a compensable injury." Carrier argues that claimant was unable to obtain and retain employment at wages equivalent to the preinjury wage because he had been terminated for cause, rather than because of a compensable injury. Stated another way, carrier argues that claimant's inability to earn preinjury wages was not due to his injury but rather due to the fact that claimant had been terminated.

The claimant responds and contests the hearing officer's Conclusion of Law No. 5, set forth above, arguing he is entitled to TIBS for the period of April 30, 1992 through June 11, 1992. The carrier responds to the cross-appeal urging that Conclusion of Law No. 5 is correct and the hearing officer is the sole judge of the weight and credibility of the evidence pursuant to Article 8308-6.34(e). Carrier also renews the argument that the sole issue of the case is disability after June 11, 1992.

Carrier in its closing statement cited Texas Workers' Compensation Commission Appeal No. 91045, decided November 21, 1991 as being factually similar to the instant case. As carrier points out, that case was decided on the issue of MMI and disability. There is language in that case which is both prophetic and helpful. The appeals panel noted "where the employee remains in the employment of the preinjury employer, a problem is less likely to arise. However, where, as here, the employee is precluded from working for the preinjury employer, for whatever reason, the removal of disability, as defined, is somewhat more convoluted." That case interprets the law as requiring the employee to show an inability to obtain and retain employment at preinjury wages because of a compensable injury, citing Montford, Barber, Duncan, A Guide to Texas Workers' Comp Reform, Vol. 1 Sec. 4.23 pp. 4-91, (Butterworth Legal Publishers, Austin, Texas, 1991). In Texas Workers' Compensation Commission Appeal No. 91027, decided October 24, 1991, the appeals panel poses some questions concerning the effect of a termination for cause and states that most cases will be resolved on the specific factual setting. In that case, the employee returned to light duty and was subsequently terminated. There was a finding that the termination for cause was not a ruse or without reasonable justification. "Disability" was defined and the panel held "the respondent's [claimant's] inability to obtain and retain employment at the time of her termination was not because of her compensable back injury but was because of misconduct unrelated to that injury." The appeals panel in Appeal No. 91027 *supra*, failed to find any Texas authority directly on point but cited several cases which stand for the proposition "that where an employee has returned to employment and is subsequently terminated for sufficient misconduct, such will not support a determination of compensable disability." In a general discussion of the matter regarding employees returned to light duty and subsequently discharged the panel stated:

It is our opinion 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. Therefore, we are convinced that 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, the intent and purposes of workers' compensation and is fairer to all parties.

There are several other cases in the same general vein including Texas Workers' Compensation Commission Appeal No. 92428, decided October 2, 1992 where the employee's presence at the CCH was precluded because he was in jail. What makes that case germane to the issue at hand is the following discussion:

With the evidence in this state, we do not reach the matter of whether a claimant's
> entitlement to temporary income benefits based upon disability as defined in the 1989 Act would end upon incarceration. By definition, disability requires that the inability to obtain or retain employment at wages equivalent to the preinjury wage be because of a compensable injury. Needless to say, incarceration results in the inability to obtain or retain employment other than whatever programs or opportunities are provided by the particular institution. There is no evidence on this latter matter in this case. We are not aware of any Texas case authority in this area as regards disability under the concepts of the 1989 Act. We do observe there is a split of opinion in other state jurisdictions. *See generally* Larson's Workmen's Compensation Law, Vol. 1 C, §47.31(g), pp. 8-333 Matthew Bender, N.Y., N.Y.

In the instant case, claimant suffered a compensable injury on (date of injury), apparently worked through April 29, 1992, and when he was absent from work and failed to timely call in, he was terminated on April 30, 1992. The hearing officer found, and it appears to be conceded, that claimant was released by a doctor to light duty work on June 11, 1992. An employee can have disability, as defined by the 1989 Act, after he/she has been terminated. In this case, the issue is whether claimant could obtain and retain employment at preinjury wages because of his compensable injury. The claimant testified he could not, his testimony is supported by the doctors, particularly Dr. PF, and the hearing officer found in Finding of Fact No. 9, cited previously, the injury caused disability as defined by the Act. Conclusion of Law No. 6 is the natural conclusion for Finding of Fact No. 9. The fact that claimant was fired on April 30, 1992 does not preclude him from being unable to obtain and retain employment at preinjury wages because of his compensable injury--with perhaps another employer if, as in this case, the preinjury employer chose to uphold the termination of employment. To prove disability, as defined, it is not necessary that the employment be with the preinjury employer. Whether the claimant could obtain and retain employment at

preinjury wages is a factual determination to be made by the trier of fact, in this case, the hearing officer. The hearing officer so found in Finding of Fact No. 9. Discussion of a *bona fide* offer of light duty as contemplated in Article 8308-4.23(f) is not applicable, because the employer had fired claimant and never offered, or intended to offer, claimant light duty. The carrier's contention is without merit.

The claimant in his response, in essence, files a cross-appeal by objecting to the hearing officer's Conclusion of Law No. 5 cited above. In that conclusion, the hearing officer is saying that claimant has failed to prove he was disabled, as defined by the Act, from April 30, 1992 through June 11, 1992. Claimant cites us to claimant's Exhibit 5, a narrative report by Dr. PF, dated August 24, 1992, quoted previously. Claimant's contention is without merit in that there was no disputed issue at the CCH regarding disability before June 11, 1992. The hearing officer's Conclusion of Law No. 5 was superfluous and not necessary for his decision.

The hearing officer is the sole judge of the relevance and materiality of the evidence offered and of the weight and credibility to be given to the evidence pursuant to Article 8308-6.34(e). The hearing officer has great latitude to resolve conflicts, including expert medical testimony. *See* Texas Employers' Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th District] 1984, no writ). The findings will be upheld unless it is determined that they are so against the great weight and preponderance of the evidence as to be manifestly wrong or unjust. *See* In Re Kings Estate,150 Tex. 662, 244 S.W.2d 660 (1951). We will not substitute our judgement for the

hearing officer, as trier of fact, when the challenged findings are not against the great weight and preponderance of the evidence.

The hearing officer's decision and order are affirmed.

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Thomas A. Knapp
Appeals Judge

CONCUR:

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Philip F. O'Neill
Appeals Judge

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Lynda H. Nesenholtz
Appeals Judge