APPEAL NO. 93700

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. Section 401.001 *et seq*. (1989 Act). A contested case hearing was held in (city), Texas, on (date of injury), to decide three issues: whether the claimant suffered a repetitious trauma injury in the course and scope of his employment; whether the claimant notified his employer of a work-related injury within 30 days or has shown good cause for his failure to do so; and if claimant did suffer a repetitious trauma injury in the course and scope of his employment, does he have disability entitling him to temporary income benefits (TIBS). The hearing officer, (hearing officer), determined the first two issues in favor of the appellant, claimant herein, and these issues are not before this panel on appeal. The claimant appeals the hearing officer's determination that he has not had any period of disability as a result of his compensable injury as of (date of injury), the date of the hearing; he also alleges error in the hearing officer's failure to sanction the respondent, hereinafter carrier.

DECISION

We affirm the hearing officer's decision and order.

The claimant, who had been employed by (employer) as assistant manager, paint department, testified that his long hours on his feet and his varied duties--which included waiting on customers, unloading paint from trucks, and restocking shelves--caused him to suffer an aggravation of hip problems which arose from a fracture-dislocation injury in 1957. He also said his job caused him to experience knee pain. The doctor who treated him, (Dr. F), indicated that the claimant's work activities aggravated his hip and his knees. Claimant said that Dr. F never took him off work, although he wrote in a June 11, 1993 letter, "I do not believe that [claimant] can handle this type of work, but he can handle a lighter type work."

The claimant, who began working for employer in April of 1992, said that in August of that year, when he realized that the problems he was having were related to his work, he applied for selective placement, a corporate policy by which employees can shift their job duties around pursuant to their physical needs and restrictions. The same month, he said he had a meeting with employer's district manager who, he said, became angry and contended claimant had lied on his application for employment. Shortly thereafter, toward the end of August, he said he was told by his employer that his job performance was "below par." On November 17th, he was terminated for poor performance; he said he had not yet given employer the results of Dr. F's evaluation.

The claimant stated at the hearing that he has applied for, and has received, unemployment benefits and that he has gotten only occasional work serving papers on behalf of an attorney. He said he undertakes a weekly job search which has been unsuccessful; he surmised that if he was honest with a potential employer who asked whether he had any disability, or the circumstances of his prior job, that could prevent him from being hired. He said, however, that he had heard nothing from many of the jobs he had applied for, and that employers "don't ever tell you why they turn you down." He acknowledged that he has told the Texas Employment Commission that he is able to and available for work, and said he could presently work, with some limitations.

The evidence also showed claimant had been in contact with the Department of

Veterans Affairs; an April 23, 1993 letter from a counseling psychologist with that agency stated that various factors, including claimant's service connected disability, the amount of time since he received his bachelor's degree, and his loss of employment with employer, were considered and a recommendation of "serious employment handicap" was granted, making claimant eligible for Chapter 31 training.

(Ms. C), employer's store manager, testified that claimant received his first employee review eight weeks after he was hired, pursuant to company policy. She said at that time claimant was given a negative review, with areas of deficiency pointed out. She said she later had other conferences with claimant concerning his job performance, including a conference in August at which the district manager, (Mr. M) was present. Ms. C said she did not recall Mr. M telling claimant that he lied on his employment application. She said claimant mentioned problems with his hip and his occasional need to sit down while working, but that she was not made aware that the problems were related to the job. She said claimant received written warnings about his job performance.

The hearing officer determined that, although the claimant suffered a compensable repetitious trauma in the course and scope of his employment, he has not had any period of disability as a result of the injury as of (date of injury), the date of the contested case hearing. In his appeal, the claimant points to evidence, such as Dr. F's June 11th letter, the letter from the Department of Veterans Affairs stating claimant had a serious employment handicap, and the fact that he has unsuccessfully looked for work, in support of a finding of disability.

The 1989 Act defines disability as the inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage. Section 401.011(16). This panel in the past has refused to articulate an absolute rule stating that termination for cause will bar a claim for disability. *See* Texas Workers' Compensation Commission Appeal No. 92200, decided July 2, 1992; Texas Workers' Compensation Commission Appeal No. 91027, decided October 24, 1991. Nevertheless, the reason for termination may be one factor for the fact finder to consider in determining whether a claimant's inability to obtain or retain employment is due to the compensable injury rather than to another cause or causes. Additional probative evidence may be supplied by a claimant's treating doctor; in this case, Dr. F did not find claimant unable to work due to his condition, although he opined that claimant "could not handle" a job which required "standing on concrete floors for long periods of time." Regarding the Department of Veterans Affairs letter, that is merely evidentiary and is not dispositive of the issue. *Compare* Texas Workers' Compensation Commission Appeal No. 93636, decided September 3, 1993 (claimant held not entitled to supplementary income benefits where he relied solely on Social Security Administration determination of disability and made no good faith effort to seek employment). Also evidentiary were claimant's statements that, as he averred in his application for unemployment benefits, he has been and is able to work. Our review of the foregoing evidence of record convinces us that there is sufficient evidence to support the hearing officer's determination that claimant's inability to secure employment was not due to the compensable injury, and thus he did not have disability. This is not, as claimant

contends, inconsistent with the statement in the hearing officer's order that the claimant may become entitled to TIBS for the period beginning on and after (date) if he can establish that he had disability for at least eight days and had not reached maximum medical improvement. This panel has held that disability is a condition that can recur. Texas Workers' Compensation Commission Appeal No. 91122, decided February 6, 1992.

Claimant's second point of error concerns the hearing officer's failure to address claimant's request for sanctions and orders. The record shows that the day of the hearing the claimant presented to the hearing officer such request, concerning carrier's alleged failure to fully answer the claimant's interrogatories and to file a wage statement; the request further seeks authorization for and payment of medical treatment by Dr. F and for payment of TIBS. We note that the issues of medical treatment and TIBS are disposed of by the hearing officer's order, which orders carrier to pay for such treatment and denies TIBS. With regard to the carrier's failure to answer claimant's interrogatories, claimant argued at several points during the hearing that carrier's failure to provide him with a telephone number and/or address for Mr. M (who no longer worked for employer) thwarted claimant's discovery. While claimant contends on appeal that lack of this information hampered his ability to prove disability, it appeared from arguments made at the hearing that Mr. M's testimony would be relevant to the issue of timely notice--an issue which the hearing officer found in claimant's favor. With regard to an alleged failure to timely provide a wage statement, Section 408.063(b) of the 1989 Act provides that the employer shall file a wage statement showing the amounts of all wages paid to the employee within 30 days of the employer's receipt of notice of injury; Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 128.2 (Rule 128.2) further provides that this shall be done only if the employee is disabled for at least eight days. Failure to comply with these requirements is subject to a class D administrative violation. Even assuming that such noncompliance by the employer had occurred in this case, that generally would be a matter under the authority of the Commission's Division of Compliance and Practices, *see* Section 415.031, and not one to be addressed pursuant to a contested case hearing (although we note that a hearing officer has authority, among other things, to request additional evidence and to issue orders where, in his or her opinion, such is warranted; *see* Rule 142.2).

The decision and order of the hearing officer are affirmed.

Lynda H. Nesenholtz
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Joe Sebesta
Appeals Judge