

APPEAL NO. 93707

Pursuant to the Texas Worker's Compensation Act, TEX. LAB. CODE ANN., § 401.001 *et seq.* (1989 Act) (formerly V.A.C.S Art. 8308-1.01 *et seq.*), a contested case hearing was held in (city), Texas, on July 12, 1993, (hearing officer) presiding as hearing officer. He determined that the respondent (claimant) has had disability based upon his compensable injury commencing (date of injury). Appellant (carrier) urges that the great weight and preponderance of the evidence is so against the hearing officer's determination that it is wrong and unjust and erroneous as a matter of law. Claimant urges that the determination of disability be upheld and argues that his disability y began long before (date of injury).

DECISION

Finding the great weight and preponderance of the evidence so against the hearing officer's determination as to render it clearly wrong and unjust, we reverse and render a new decision.

A finding that on or about (date of injury), the claimant sustained a compensable injury, tendinitis of the right wrist and elbow, was made in a companion case. The only issue at this contested case hearing was whether the claimant had disability as a result of the (date)st injury, and if so, for what periods of time. There was evidence that the claimant continued to work for his same employer, omitting some of his heavy duty activities, up until January 30, 1993, when he was terminated for good cause unrelated to any injury. He subsequently sought other employment and obtained a temporary job in February that lasted, according to his own testimony, until the latter part of April. In his reply to the carrier's appeal, the claimant states, in referring to a phone interview conducted on April 19, 1993, that the interview "caused me to be late for work" and that he was dismissed from his job because of it. During his testimony at the hearing, the claimant acknowledged that the reason he was not being given work by the temporary agency is because none was available and that he would take a job if they gave him one. He also testified that because of his limitations he could not do heavy work as he could before. On his application with the temporary agency he also indicated "none" to a question about listing doctor, hospital or clinic where he last received medical treatment, and checked "no" to the question "do you have any physical limitations that preclude you from performing any work for which you are being considered or do you need special accommodations." Medical records introduced from the November 1992 time frame show the claimant's wrist and elbow tendinitis condition and indicate on-going duty limitations, and one report from a "03-09-93" visit dated (date), indicates that "he is unable to work, heavy duty with the right arm" and "he is limited to no heavy lifting with right arm, and no detailed hand work with the right arm." Another report showing a "04 20 93" visit indicates "on exam today he is unchanged from the past" and notes he has different employment and that he "has minimal symptoms there at work."

The hearing officer found that the claimant's injury did not cause him to be unable to obtain and retain employment at his preinjury wage until (date), and that since that date he has had continuing inability to obtain and retain employment at wages equivalent to his

preinjury wage because of the tendinitis. We do not find a sufficient evidentiary basis for that portion of his findings that since (date), the claimant has had disability. To the contrary, this portion of his findings is so against the great weight and preponderance of the evidence as to be clearly wrong and unjust, requiring our reversal.

Section 401.011(16) defines disability as "the inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage." The evidence sufficiently supports the lack of disability up to (date), as found by the hearing officer. However, the evidence does not show that any significant thing happened on (date), to change the absence of disability. To the contrary, the medical and other evidence rather compellingly shows that the claimant's physical condition remained virtually the same before and after (date), and that he was employed in the same position both before and after that date according to his own testimony and his assertion in his reply to this appeal. He also testified that he agreed that the reason the temporary employment service did not have a job for him after April 19, 1993, (when the job either ended or he was dismissed for being late to work as he states in his reply) was because of unavailability of work and not his injury, and he stated he would accept a job from them if offered. Under these circumstances, we cannot find a sufficient evidentiary basis for the finding that disability somehow occurred on (date of injury).

We have observed that it is possible for an injured person to go in and out of disability because of changed conditions. See *generally* Texas Workers' Compensation Commission Appeal No. 92257, decided August 3, 1992; Texas Workers' Compensation Commission Appeal No. 92506, decided November 6, 1992. However, there is not a sufficient basis to establish that this was the situation in this case on (date of injury). Further, we have held that where an injured employee is retained in a working position by the employer but is subsequently terminated for good cause, and there is no changed condition regarding the injury or medical problem, disability does not necessarily thereby recur since the reason for the inability to obtain or retain employment at the preinjury wages is no longer resulting from the compensable injury. Texas Workers' Compensation Commission appeal No. 91027, decided October 24, 1991. Finding insufficient evidence to support the determination that the claimant had disability beginning (date of injury), and that the great weight and preponderance of the evidence is contrary thereto, we reverse and render a new decision that the claimant did not have disability beginning (date of injury).

Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Lynda H. Nesenholtz
Appeals Judge