APPEAL NO. 93994

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act) (formerly V.A.C.S., Article 8308-1.01 *et seq*.). On September 23, 1993, a contested case hearing was held in (city), Texas, with (hearing officer) presiding, to determine the following disputed issues: whether the appellant (claimant) sustained an injury in the course and scope of employment; whether (employer) timely contested the compensability of the injury and, if not, whether good cause existed therefor; and whether claimant had disability as a result of an injury on (date of injury). The respondent (carrier), who provided the employer's workers' compensation insurance, did not contest the compensability of the injury but did dispute that claimant had disability. The employer, who appeared at the hearing to dispute the compensability of the claim, became a party to the proceeding and was assisted by an ombudsman of the Texas Workers' Compensation Commission (Commission). The hearing officer found that claimant was injured at work on (date of injury), as a result of breathing toxic paint fumes in an enclosed area, and that the employer exercised reasonable diligence in contesting the compensability of the injury. Based on these findings, the hearing officer concluded that claimant was injured in the course and scope of his employment on (date of injury), and that the employer properly and timely contested the compensability of the injury. Neither the employer nor carrier filed an appeal.

The hearing officer further found that as a result of his injury claimant was unable to work from (date) through May 29, 1992, from October 13 through October 16, 1992, and from October 29 through October 30, 1992, and concluded that claimant had disability intermittently from (date) through October 30, 1992, for a total of 16 days. While apparently accepting those three periods of disability, the claimant has appealed the determination concerning the extent of his disability asserting, in essence, that he also had disability not only for certain other days or hours, but also since February 26, 1993, the day he was terminated because of the employer's financial condition. The carrier responded asserting the sufficiency of the evidence to support the disability determination of the hearing officer.

DECISION

Finding the evidence sufficient to support the challenged finding and conclusion, we affirm.

In his opening statement to the hearing officer, claimant stated that after his (date of injury), pulmonary injury sustained at work while spray painting in an enclosed boat house, he "had intermittent periods of disability after that from (date) of 1992 to May 29 of 1992, October 13 of 1992 until October 16 of 1992, and October 29 to October 30 1992, and then thereafter, he was able to do some light-duty work, and he continued working light duty until he was terminated. The light-duty has not since been offered by the employer, and it is claimant's position that he should be entitled to draw temporary income benefits [TIBS] for that period of time until the present." We note that these asserted periods of disability in May and October 1992 correspond precisely to the three periods of disability found by the hearing officer. No other recurrent periods of disability were asserted by claimant at the

hearing, aside from his contention that he also had disability from February 26, 1993, to the date of the hearing.

Claimant, who testified that he had worked in employer's maintenance department for approximately 14 years, denied he had a pre-existing asthma condition but acknowledged prior bouts of bronchitis. He said that on (date of injury), while at work painting the interior of a boathouse, which had been draped with plastic sheets to protect nearby boats, he became ill sometime before noon. He went to the home of a relative where his wife picked him up. The next day, he went to the hospital where he said he was admitted for three days and treated by (Dr. B). Dr. B's report for this "(date) - 5/23/92" hospitalization period stated a principle diagnosis of acute bronchitis with chronic obstructive pulmonary disease. Claimant also testified he was off work "about a week" before returning to his job. A written statement from (Ms. M), employer's manager, stated that claimant became ill on (date of injury), left work at lunchtime, and "was out for several weeks." This evidence was the apparent basis for the hearing officer's finding that claimant had disability from (date) through May 29, 1992, a period for which claimant asserted at the hearing that he had disability.

Claimant further testified that he was referred to (Dr. O), an occupational and pulmonary medicine specialist, who apparently became his treating doctor. He indicated that while Dr. O did not take him off work, he cautioned claimant to avoid dust, vapors, perfumes, paints, aerosols, etc. In Dr. O's undated report to Dr. B, he said he had asked claimant to "avoid exposures" and hoped "that this is possible at his place of employment." Claimant testified that employer's manager, Ms. M, knew of this work restriction and had no problem with it. Claimant said "there was plenty of stuff for me to do other than that," and that his two coworkers could "do the welding and stuff" while he "was still doing the light-duty stuff like electrical problems and stuff like that."

Dr. O's records reveal that he first saw claimant on July 6, 1992. His ultimate diagnosis included "toxic bronchitis exacerbating viral bronchitis [by exposure to enamel paint], pre-existing asthma in exacerbation, and rhinitis with probable sinusitis." Dr. O recommended avoidance of exposure to the dust, vapors, aerosols, and fumes to which the claimant "was frequently exposed," and he cautioned claimant to wear protective respiratory devices. The medical records and claimant's testimony seemed to indicate that Dr. O returned claimant to work but apparently restricted him from exposure to the above-mentioned substances. Dr. O's July 6, 1992, narrative report stated: "It may be that he is not ready to return to work at this point in time although he related that his income is based on his maintaining his employment. I have asked him to avoid exposures and hope that this is possible at his place of employment." While claimant testified that his maintenance work included sanding, painting and welding, he did not indicate the proportion of his normal work time devoted to such duties.

According to Dr. O's report (hereinafter case review), dated January 9 (sic), 1993, which summarized claimant's treatment including a visit on January 18, 1993, claimant

improved in July 1992 and continued working while he "avoided exposures to irritant substances." Further, Dr. O saw claimant on follow-up on July 13th, July 20th, August 10th, September 28th, October 14th, and October 22, 1992, and he also took various calls from claimant including October 12th and 13th. Neither Dr. O's records nor claimant's testimony indicated that he was in the hospital during the period from October 13 through 16, 1992.

After working during the morning on October 29, 1992, claimant was admitted to the hospital for three days complaining of shortness of breath and a tight feeling in his lungs which began the previous evening. The history in the hospital records of this admission indicated that claimant, then 30 years of age, had a history of bronchopneumonia twice a year for the past three to four years, that he had problems with bronchospasm "since June of this year" after exposure to spray paint fumes in an enclosed area at work, that he was hospitalized for three days thereafter, that he has since had trouble with shortness of breath and bronchospasm, that both his father and his son have asthma, that his occupation is in maintenance, and that he "does welding and painting on occasion." Dr. O's record of November 5th indicated this period of hospitalization was "about two days."

Dr. O's case review further indicated that following his October 1992 hospitalization, claimant was seen on follow-up on November 5th, possibly on November 20th, on December 7th, and on January 18, 1993. Throughout the period from July 6th to January 18th, Dr. O frequently changed and adjusted claimant's medications. Dr. O's diagnosis on January 18, 1993, included: 1. Pre-existing asthma exacerbated by work place exposure; 2. Toxic bronchitis; 3. Acute bronchitis - resolved; 4. Rhinitis - ongoing; 5. Sinusitis - resolved; and 6. Physical deconditioning. This report also stated: "It is possible that [claimant] has developed occupational asthma as a result of sensitization from exposure to enamel paint. This is difficult to establish. [Claimant] had pre-existing occult asthma that continues to be exacerbated by his exposure. [Claimant] also developed toxic rhinitis, from his exposure, with a recurrent nasal inflammation and symptomatology." The prognosis portion of the report stated: "Anticipated length of continued disability was not known at the time of the initial evaluation (apparently referring to Dr. O's January 1993 evaluation) but patient was to be re-evaluated in six to twelve weeks with respect to answering this question."

In a March 9, 1993, report, Dr. O stated: "He has stabilized and has achieved a status where he can continue working. He is to avoid, however, any type of inciting agents that may aggravate his asthma including chemical fumes, dust, vapors, all types of dust, and extremes of temperature. If he can be provided with this type of working environment he should be able to perform any type of activity including physical exertion." In an April 9, 1993, report, Dr. O stated that claimant "will not be able to work in any type of environment where there is possible exposure to irritating dust, vapors, aerosols and fumes."

Claimant testified that he worked until February 26, 1993, when he was advised by the employer that employer's poor financial condition required that he be let go. At that time, claimant said he was still under the work restriction regarding the avoidance of noxious fumes and dust. He said he applied for and receives unemployment benefits and that he has not yet been able to find a job in the maintenance field because of Dr. O's restrictions.

While claimant stated that he was paid $9.90 per hour and worked, normally, a five-day week from 8:00 a.m. to 4:30 p.m., he did not testify to any particular dates that he was paid less than his pre-injury wage. When asked how he was paid for his lost time days, he testified as follows: "I took vacation days and sick-leave days until I filed for the comp, and whenever I filed comp, the insurance carrier reimbursed me for those days. Some of the days I didn't get paid at all from work." Claimant said his private group health insurance paid his medical bills and that later on he was reimbursed, apparently by the carrier, for the portions he paid. There were indications in the record that claimant apparently did not contemplate a workers' compensation claim until sometime in October or November and he indicated he filed his claim in December 1992.

At the hearing's close, claimant argued with respect to disability after February 26th that the employer failed to continue to offer light duty after claimant was terminated through no fault of his own, and he summarized his position thusly: "And there has been no evidence presented here today that he has received any sort of earnings during this time period. Therefore, its our contention that temporary income benefits [TIBS] are due for that time as a result of his injury in the course and scope on (date of injury)."

In his appeal the claimant urges, for the first time, that in addition to the periods of (date) through May 29, October 13 through October 16, and October 29 through October 30, 1992, Dr. O's records reveal that claimant also lost time from work on July 2 (1/2 day), July 13 (2 hours), July 20 (2 hours), August 31 (2 hours), September 15 (1/7 week), September 28 (2 hours), October 12 (1/2 day), November 2 through 6 (5/7 week), and December 7, 1992 (2 hours). These periods correspond to a single page in the medical records which identifies claimant as the "patient" and purports to state claimant's "days off from work." Not only does this document not indicate the sources or references for the compiled entries, it contains no explanation as to why claimant was off work on the days noted (though it does state that the two hour periods were for doctor's appointments). Nor does the document indicate that claimant received less than his pre-injury wages for those times.

Section 401.011(16) defines "disability" as the "inability because of a compensable injury to obtain or retain employment at wages equivalent to the pre-injury wage." In Texas Workers' Compensation Commission Appeal No. 93953, decided December 7, 1993, the Appeals Panel addressed the burden of proof of disability as follows:

It is axiomatic that in a workers' compensation case a claimant has the burden of proving by a preponderance of the evidence that he or she sustained disability

> as a result of a compensable injury. (Citations omitted.) Clearly, the claimant has the burden of proving when a period of disability begins. Since disability is not necessarily a continuing status, a claimant may have intermittent or recurring periods of disability. In such a case, the claimant has the burden of proving when each period or recurring disability is reestablished. (Citations omitted.) The Appeals Panel has also held that when an employee is no longer employed by the employer, the employee has the burden to show disability continues after the termination of employment. (Citation omitted.) Although neither a conditional nor unconditional work release in itself ends disability, an employee under a conditional work release does not have the burden of proving inability to work. (Citation omitted.) However, "[w]here the evidence establishes an unconditional medical release to return to full duty status of the employee, the employee has the burden to show that disability is continuing." (Citation omitted.)

Consistently running through these decisions, explicitly or implicitly, (citation omitted), is the requirement that the claimant establish by a preponderance of the evidence the precise duration of the claimed disability from inception to termination. (Citation omitted.) The carrier has no duty to affirmatively prove (as opposed to coming forward with evidence of a changed condition which may give rise to an issue) that a claimant is not entitled to benefits. To defeat a claim for benefits, the carrier can either rely on the claimant's inability to prove his or her case, or offer evidence that, if believed, will cause the fact finder to determine that the claimant did not establish his or her case by a preponderance of the evidence.

We have previously observed that disability is not necessarily a continuing status and that an injured employee may have disability recur after a period of no disability. *See* Texas Workers' Compensation Commission Appeal No. 91053, decided December 5, 1993. We find no merit to claimant's assertion on appeal that the hearing officer erred in not finding that claimant also had disability for these additional intermittent periods. Not only did claimant not specify such periods at the hearing, the two hour periods involved, apparently, claimant's merely leaving work to keep medical appointments, and there was no explanation of the reasons for the stated absences involving the full day periods. There was no evidence that he was unable to retain employment at his pre-injury wage equivalent as a result of his compensable injury for those periods.

Claimant's appeal further asserts:

In addition to the actual time periods of being unable to work listed above, the Claimant's wages following his restricted release to return to work should have been used to evaluate the amount of [TIBs] owed to him. Because the employer ceased to offer work in accordance with the restrictions for the Claimant on February 26, 1993, the offset against [TIBS] ceased to apply and

the carrier should be required to pay [TIBS] to the Claimant from February 26, 1993, to the present.

There was no disputed issue at the hearing concerning the amount of TIBS paid the claimant, if any, and virtually no evidence on the matter. Thus we need not discuss it here.

The apparent gist of claimant's complaint on appeal, aside from the above discussed additional periods of intermittent disability, was the hearing officer's failure to find that he had disability after his termination on February 26th. Claimant seems to contend that the fact that he was terminated through no fault of his own, the fact that Dr. O's work restriction was never lifted, and the fact that he has not worked and received wages since February 26th equate to disability from and after that date.

Claimant's assertion that the hearing officer erred in failing to find that he had disability after he was terminated on February 26, 1992, is not well founded. In an early decision, Texas Workers' Compensation Commission Appeal No. 91045, decided November 21, 1991, we noted the difficulty presented in determining the end of disability under the 1989 Act's definition, particularly where the employee is precluded from working for the pre-injury employer for whatever reason. In this case, however, claimant did not contend he had disability at the time of his termination but rather that disability once again existed effective with his termination. As we have seen, claimant's burden was not only to prove that he was not able to obtain or retain employment at the equivalent of his pre-injury wages but also that such inability resulted from his compensable injury. The hearing officer could believe from the evidence that, notwithstanding that claimant was medically restricted from breathing noxious fumes and dust at work at least as far back as July 6th when he first saw Dr. O, after his (date of injury) injury he continued to work for the employer doing maintenance jobs which did not expose him to such fumes and dust, and ostensibly did so at his pre-injury wages, until he was terminated because of the employer's financial condition. The hearing officer could believe from the evidence that it was not as a result of his injury that claimant was unable to obtain employment after February 26th but rather the result of his simply being unable to find a job. Dr. O stated that claimant was capable of performing physical exertion and work so long as he avoided breathing noxious fumes and dust. Compare Texas Workers' Compensation Commission Appeal No. 93449, decided July 21, 1993, where we affirmed a hearing officer's determination that an injured employee did have disability arise several weeks after he had been terminated with good cause from his employment.

Disability was a fact question for the hearing officer who is the sole judge of the weight and credibility of the evidence. Section 410.065(a). As the trier of fact, the hearing officer resolves conflicts and inconsistencies in the evidence. Garza v. Commercial Insurance Co. of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). The hearing officer may believe all, part, or none of the testimony of a witness (Taylor v. Lewis, 553 S.W.2d 153 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.)) and may believe one witness and disbelieve others (Cobb v. Dunlap, 656 S.W.2d 550 (Tex. App.-Corpus Christi

1983, writ ref'd n.r.e.)). Though not obligated to accept the testimony of a claimant, an interested witness, at face value (Garza, *supra*), issues of injury and disability may be established by the testimony of a claimant alone. *See e.g.* Texas Workers Compensation Commission Appeal No. 91083, decided January 6, 1992, and Texas Workers' Compensation Commission Appeal No. 92069, decided April 1, 1992. As an interested party, the claimant's testimony only raises an issue of fact for determination by the fact finder. Escamilla v. Liberty Mutual Insurance Company, 499 S.W.2d 758 (Tex. Civ. App.-Amarillo, no writ). We do not substitute our judgment for that of the hearing officer where, as here, the challenged findings are supported by sufficient evidence. Texas Employers Insurance Association v. Alcantara, 764 S.W.2d 865 (Tex. App.-Texarkana 1989, no writ).

The challenged findings and conclusions of the hearing officer are not so against the great weight and preponderance of the evidence as to be manifestly unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951); Pool v. Ford Motor Co., 751 S.W.2d 629 (Tex. 1986).

Finding the evidence sufficient to support the findings and conclusions, the decision of the hearing officer is affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Robert W. Potts
Appeals Judge