APPEAL NO. 94123

This appeal is considered in accordance with the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On December 29, 1993, a contested case hearing was held. The issue to be determined was whether the claimant, who is the respondent, had disability from May 20, 1993, until June 24, 1993, as a result of an injury to his little finger which occurred on (date of injury), while he was employed by (employer). Two other issues from the benefit review conference involving impairment and maximum medical improvement (MMI) were resolved prior to the hearing, and were withdrawn by the parties as issues.

The hearing officer determined that the claimant had disability for the period of time sought. Most of her findings of fact concern the merits of claimant's termination by the employer on May 20, 1993. The hearing officer also made a conclusion of law that claimant was unjustly terminated because of his work-related injury.

The carrier has appealed nearly all findings in the hearing officer's decision. The carrier also argues that there is no evidence to support the conclusion of law that claimant was wrongfully terminated because of his injury, pointing out that the claimant did not even contend that this was the case. The carrier recounts the evidence it feels refutes the hearing officer's determination that claimant's little finger injury caused an inability to obtain and retain employment at his pre-injury wage (as disability is defined by the 1989 Act). There is no response from the claimant.

DECISION

We reverse the decision of the hearing officer, and render a new decision that claimant did not have disability from his compensable injury for the period from May 20, 1993, until the date he reached MMI on June 24, 1993.

The claimant was injured (date of injury), as he was weighing boxes for his employer. He dislocated his left little finger. He had medical treatment that day, and returned to full-time, unrestricted work for the next several months, working overtime hours in a number of weeks. The record indicated that claimant next saw a doctor, Dr. K, on April 16, 1993. He stated that this occurred "when I heard that [Parent Company] had bought the company and that I thought I wasn't feeling good still." Dr. K concluded that claimant had calcification of the medial proximal phalanx of the injured finger. He was referred to Dr. S, who prescribed physical therapy in May, and recommended light work beginning May 6, 1993. Claimant agreed that he was assigned to light work as a result, in the laundry room. From a review of Dr. K's or Dr. S's medical history notes, it appeared that claimant's complaints were that the frequent lifting of 50-pound bags of flour or packing meat patties on the job caused pain and swelling in his left little finger.

Around March 5, 1993, the employer was purchased by Parent Company for whom the claimant had previously worked. There was testimony from the risk manager for the employer, Mr. H, that Parent Company was a non-subscriber, and that meetings were

held by the employer to explain this to employees. Mr. H stated that claimant was upset at these meetings about the fact that Parent Company would not be a subscriber. Mr. H testified that soon after this, in April 1993, claimant started going to a doctor regularly about his finger. Mr. H said that shortly before claimant left the company, on May 20, 1993, he was reassigned to duties in keeping with restrictions from Dr. S.

Claimant had sustained at least one work-related injury while employed by Parent Company. There was somewhat prolonged testimony regarding the extent to which claimant disclosed his prior injury history to employer when he began working in December 1992. Claimant contended he told the employer's company nurse, prior to a physical examination, about his injuries while working for Parent Company, but that he was told that if he passed the physical there would be no problem. However, the health history form claimant signed indicated he had no prior injuries, and contained a statement in which he acknowledged that he could be terminated for false answers or wilful omissions in connection with the interview for his physical.

Claimant was Spanish speaking but had some fluency in English. He said he signed the health forms without reading them or without them being translated. As he testified, claimant both agreed and disagreed that he falsified forms relating to his employment by the employer.

Mr. H testified that in May 1993 when he received, as part of a quarterly review, a loss run printout for Parent Company for the years 1988 through 1990, he saw claimant's name come up twice. Curious as to whether it was the same person, Mr. H said he pulled the claimant's personnel file, determined he was the same person, and saw that claimant had falsified his health forms. Because of employer's strict policy to terminate under such circumstances, claimant was terminated on May 20, 1993. The termination letter indicated that he was terminated for making false responses on his Health History Form. Claimant was terminated at a meeting attended by two supervisors, one of whom was Spanish speaking. Mr. H said that the health forms purportedly falsified by claimant were not part of the actual employment application, but were part of the "application process." Mr. H stated that other employees had been terminated for the same reason. Claimant said that he would not have quit work because of his finger if he had not been terminated.

Claimant did not look for employment after his termination because his finger hurt. He continued to received physical therapy. According to notes of his therapist dated June 3, 1993, claimant was quoted as saying "I'm ready to start work." Claimant cancelled a week of physical therapy beginning June 7th, was a "no show" for two sessions the following week, and apparently ceased going altogether after this. The therapy records show that claimant was right-handed.

Dr. S certified claimant reached maximum medical improvement (MMI) June 24, 1993, with zero percent impairment. A designated doctor, Dr. T, agreed with MMI but found one percent impairment. Claimant stated he became employed by a temporary company after MMI. While claimant's medical records document pain and stiffness, there is nothing indicating an inability to use the hand. Throughout the period of time after(date of injury), injury, claimant worked variable hours, generally from 35-45 hours a week. During the week after claimant said he was put on light duty, he worked 40 hours. The week of his termination (which ended May 22nd), he is shown as having worked 26.80 hours.

The hearing officer's findings of fact indicated that claimant was terminated for false statements on the employment application itself, that the Health History Form was not part of the application, was not falsified, and that claimant was therefore not fired for just cause. Aside from the fact that the hearing officer appears to have misunderstood the basis for termination, it appears to us that the hearing officer allowed the employment issue to overshadow and effectively "trump" the real inquiry: whether the claimant's little finger injury caused an inability to obtain and retain employment. The overwhelming weight and preponderance of the evidence is that it did not.

Notwithstanding claimant's contention that he could not work because of pain, the evidence indicated an unbroken work history of over four months after his injury, most of it doing his regular job. This job, according to Dr. S's medical history, involved lifting 50-pound sacks of flour regularly. He was able to perform laundry room jobs during the period of time he was on light duty. There is evidence that claimant pronounced himself ready to work on June 3rd, after he was terminated. After this, claimant essentially stopped going to physical therapy. He became employed upon being certified at MMI. The nature of his injury, dislocation of the little finger of his nondominant hand, does not appear to be the nature that would preclude all gainful activity. It did not in fact preclude claimant from engaging in employment activity. He ceased work because he was terminated. Even though he claimed he could not work because his finger hurt, he would not have quit work because of his finger. Against all this is claimant's statement that he could not work after termination because his finger hurt, and the fact that he was on light duty release.

It is important to emphasize that the case before the hearing officer concerned whether the claimant had disability, as that is defined in Section 401.011(16): "the inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage." It was neither an employment law case nor one for unemployment benefits. For purposes of workers' compensation, the central inquiry for determining eligibility for temporary income benefits (TIBS) must always be whether the injury causes disability. While circumstances of a person's termination from a company may be evidence that may be considered on this point, the equity of a termination should

not override the baseline consideration of whether the injury prevented employment equivalent to the pre-injury wage.

Texas Workers' Compensation Commission Appeal No. 91027, decided October 24, 1991, was the first case by the Appeals Panel to consider the effect of a termination for cause on TIBS. That case specifically declined to adopt a rule whereby the facts surrounding a termination would decide the issue, stating "we are convinced that an approach to this issue which also factors in the continuing affect of the injury on the capacity to obtain and retain gainful employment is more in keeping with the 1989 Act, the intent and purposes of workers' compensation and is fairer to all parties." The rationale for finding that claimant did not have disability in that case was not that she was fired for good cause from a light duty job, but that there was a lack of evidence linking her injury to inability to obtain and retain employment. Likewise, we find a lack of such evidence in the case at hand, regardless of how one might view the facts surrounding claimant's termination.

We agree with the carrier that the evidence does not support the conclusion of law that claimant was unlawfully discharged due to his injury. In claimant's opening statement, the assisting ombudsman stated that he was terminated for reasons other than his injury. Claimant did not assert that he was fired because of his injury. While he disputed that he had falsified his health form, he did not question that it motivated his termination. Indeed, he was employed for over five months after his injury, with no evidence of retaliatory actions taken by the employer. Moreover, it was unnecessary to conclude, one way or the other, whether the employer had violated TEX. REV. CIV. STAT. ANN. art. 8307c.

We recognize that the hearing officer is the sole judge of the relevance, the materiality, weight, and credibility of the evidence presented at the hearing. TEX. LAB. CODE ANN. § 410.165(a). 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.).

We therefore reverse the hearing officer's decision that claimant had disability from May 20 through June 24, 1993, as well as findings of fact and conclusions of law that underlie this determination.

Susan M. Kelley
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Gary L. Kilgore
Appeals Judge