APPEAL NO. 941261

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On August 16, 1994, a hearing was held. She determined that respondent (claimant) had disability since September 29, 1993, after her discharge on September 28, 1993, and subsequent to a compensable injury on _____. Appellant (carrier) asserts that the great weight of the evidence is against the determination of disability and that since claimant received some unemployment compensation, she should not be allowed to recover workers' compensation. Claimant replies that the decision should be upheld.

DECISION

We affirm.

Claimant worked for (employer) since 1990 as an administrative assistant. On _____, she fell and injured her right ankle and neck. She saw (Dr. B) on September 22, 1993, who put her on restricted duty. At one point a subsequently seen physician, (Dr. T), anticipated that claimant might be able to return to full-time work in February 1994, but a referral doctor, (Dr. C), in April 1994 stated that she was still on light duty. The record contains no indication subsequent to that time that claimant has been removed from light duty.

Claimant was discharged from her employment on September 28, 1993. The president of the company, (Mr. Co) said that claimant was discharged because of taking a telephone on a smoking break outside, excessive smoking breaks, using a company computer to compose a resume for her son, and having recorded an incorrect time on her time card. Mr. C said that on September 20, 1993, claimant had been provided her performance review; he characterized it as including some good points and some deficiencies, but agreed that a bonus was given claimant, which was characterized as less than what she expected. He testified that in the next eight days claimant's performance significantly diminished. (Mr. E) his office manager, reported to Mr. Co that claimant was smoking outside with a telephone. Claimant had indicated on her performance report of September 20th that Mr. E had sexually harassed her, doing such things as asking her the color of her panties, what kind of panties she was wearing, and touching her. (Ms. C) testified that she had worked for employer and seen Mr. E rub claimant's leg and heard him inquire as to underwear. She complained to Mr. Co about Mr. E, but also mentioned Mr. E's temper as a source of her concern in making a complaint. Mr. Co agreed that he had seen magazines in Mr. E's office featuring unattired females. In describing the "insubordination," which he ascribed to claimant in asserting that she did not follow rules about smoking, Mr. Co commented that he wished to provide "professionalism" for his customers. Mr. Co did not address professionalism in regard to claimant's and Ms. C's assertions of unacceptable behavior by Mr. E but agreed that Mr. E has not been discharged.

Carrier asserts that the finding of disability is against the great weight of the evidence, but does not specifically address the hearing officer's "Discussion" of the evidence, in which claimant's termination was said to be not for cause. In the event the disability assertion is considered to turn on the basis for termination, the record contains sufficient evidence to support the absence of a finding of fact that claimant was terminated for cause.

Texas Workers' Compensation Commission Appeal No. 91045, decided November 21, 1991, stated that when a claimant has only a conditional medical release to work, disability has not ended unless claimant obtains and retains employment at equivalent wages to the preinjury wage. Texas Workers' Compensation Commission Appeal No. 92193, decided July 2, 1992, stated, in citing Appeal No. 91045, that an employee under a conditional medical release did not have to show that work was not available; it agreed that a return to light duty did not mean that disability had ended. While Mr. Co testified that claimant worked several days after her injury, he acknowledged her limitation by stating that she was not required to go up stairs to retrieve records or attend staff meetings after the injury. As stated, the hearing officer made no finding that claimant had been terminated for cause.

In regard to discharge for cause, Texas Workers' Compensation Commission Appeal No. 93449, decided July 21, 1993, pointed out that even when there is termination for cause, the existence of disability has not been foreclosed.

With claimant's testimony regarding attempts to find work she could do notwithstanding her right ankle and attempting to work in two separate jobs after leaving employer, coupled with her doctors limiting the extent of her work, the determination of disability is sufficiently supported by the evidence.

Carrier also asserts that (Mr. TB), Executive Director, Texas Workers' Compensation Commission, has stated in a memorandum dated November 4, 1992, that a claimant "should never [emphasis as written] receive more benefits than he is entitled to under the law." While a memorandum does not have the force of statute or rules, the memorandum in question does not say "never"; it does say "a claimant should receive the benefits he or she is entitled to under the law--no more or no less." That memorandum discusses only benefits under the 1989 Act; it does not address unemployment compensation or any other benefits under any other law, federal or state. Carrier also cites Texas Workers' Compensation Commission Appeal No. 93531, decided August 10, 1993, in making its assertion. That appeal did say "a claimant should receive the benefits he or she is entitled to under the law--no more or no less." That appeal also was only addressing the 1989 Act. In addition, it considered a question in which a carrier had paid impairment income benefits of $15,000.00 in increments of $300.00 per week for 50 weeks when claimant should have received increments of $200.00 per week for 75 weeks. That case

did not require the carrier to pay an additional 25 weeks since the total, under the 1989 Act, was correct. Other Appeals Panel decisions cited did not address unemployment insurance, but rather continuation pay from the employer.

Texas Workers' Compensation Commission Appeal No. 94135, decided March 16, 1994, is cited as discussing a memorandum that stated, "a claimant should never receive more benefits than entitled to under the law" [emphasis added]. Appeal No. 94135 refers to such a memorandum as having been cited by that carrier but does not address it further. In that case the appeals decision made it clear that it was not dealing with limiting temporary income benefits paid for disability and additionally did not address benefits paid under any other law as opposed to the 1989 Act.

The income benefits at issue in the case on appeal are temporary income benefits paid for disability. Texas Workers' Compensation Commission Appeal No. 92193, decided July 2, 1992, cited Texas Workers' Compensation Commission Appeal No. 91132, decided February 14, 1992, as holding that the 1989 Act provides no credit against workers' compensation benefits for unemployment benefits received. Appeal No. 91132 noted that unemployment legislation provided that no payments would be made in periods in which workers' compensation payments are provided, but observed no similar provision in the 1989 Act. Whether the hearing officer considers claimant's prior statements made to another agency as entitled to more weight than a statement made in furtherance of a workers' compensation claim, and thereby holds that claimant is able to obtain and retain work, is a determination of fact for the hearing officer to make. In this case, the medical evidence shows that claimant was on a limited release to work; claimant testified that she did try to find work and considered herself able to do certain work; she told the other agency that she could work. On the other hand she only worked for a very limited time during the period of disability in question and testified that she did not make the hourly wage she had made prior to the injury. Part of the definition of disability includes the economic factor of amount of wages received. *See* Section 401.011(16). No medical evidence indicated that claimant had been released unconditionally to work. The evidence sufficiently supports the determination that claimant had disability; claimant has not received a "double recovery" or "windfall" under the 1989 Act.

Carrier also says that claimant's conduct amounts to "constructive fraud." We observe that this issue was not an issue at the hearing nor was it litigated. When a matter is raised for the first time on appeal and could have been raised at the hearing, it will not be considered. *See* Texas Workers' Compensation Commission Appeal No. 91100, decided January 22, 1992.

Finding that the decision and order are not against the great weight and preponderance of the evidence, we affirm. *See* In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

Joe Sebesta
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Alan C. Ernst
Appeals Judge