APPEAL NO. 94238

This appeal is brought pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on January 14, 1993, in (city), Texas, with (hearing officer) presiding as hearing officer. The issues at the hearing were what was the correct date of injury and whether the respondent (claimant) had disability from September 15, 1993, to the date of the hearing. The parties stipulated that the date of injury was (date of injury). The hearing officer also determined that the claimant had disability which began on September 16, 1993, and continued through the date of the hearing. The appellant (carrier) appeals this determination arguing that the claimant did not meet his burden of proof with regard to the disability issue and that the finding of the hearing officer on this issue is contrary to the great weight and preponderance of the evidence. The carrier also contends on appeal that the hearing officer erred in failing to address all elements in the statutory definition of disability, specifically, in failing to address whether the claimant sustained a compensable injury that is the cause of his disability. The claimant replies that the decision is supported by sufficient evidence and that the compensability of the injury was not properly an issue before the hearing officer.

DECISION

Finding no error and the evidence sufficient to support the findings of fact and conclusions of law, we affirm the decision and order of the hearing officer.

The claimant testified that on (date of injury), he worked as a custodian for the (employer) which at the time was providing custodial services at a local school. On this date, he said he injured his neck while moving some furniture. Also on this same date (whether before or after the injury is not clear from the record), he gave his employer written notice that he was resigning effective August 10, 1993, because he had been hired three days before by the (city) (school district) as a teacher's aide. He stated that on (date), he first visited (Dr. E) for his neck injury. Dr. E diagnosed cervical sprain and excused him from work until August 10, 1993, when he released the claimant to return to limited work (no overhead work; no lifting over 10 pounds). The claimant said he returned to work on August 10, 1993, and performed light duty consistent with Dr. E's directive for his last scheduled day of work before beginning his new job with the school district. Dr. E continued the claimant in light duty status and referred him to (Dr. P) on November 3, 1993, for additional evaluation. X-rays taken for Dr. P were normal; MRI testing showed mild degenerative spondylolysis and bulging of the annulus at C3-4, but no evidence of frank disc herniation or nerve root compression. Since, according to Dr. P, surgery was not indicated he referred the claimant back to Dr. E. The claimant said that because his condition was not improving under Dr. E's care, he got Dr. E to refer him to (Dr. PT). On December 6 1993, Dr. PT diagnosed long term "severe cervico-scapulo-thoracic myositis" and concluded his report with the comment: "At this time, I do not believe that he is capable of work."

Meanwhile, according to his testimony, the claimant continued working as a teacher's aide from August 19, 1993, his first day on the job, until September 15, 1993, when he was terminated from this position because of "incorrect information on (his employment

application) with regard to conviction of felony or misdemeanor." He testified that he had been physically able to perform the duties of teacher's aide because they were within the limited duty restrictions established by Dr. E and that but for his termination, he would still have a job with the school district. He stated that he started collecting unemployment benefits in October 1993 and on his application for these benefits indicated he was able to work. He also said he applied for work with approximately nine potential employers and told them about his work limitations. He said he has not been hired, but has never been told that he was not hired because of his injury. He did not, however, reapply for work with either of his two previous employers.

Based on this evidence, the hearing officer found that the claimant was injured on (date of injury); that he was terminated from employment with the school district because of "incorrect information" on his employment application; that he sought light duty employment through his own efforts and through the Texas Employment Commission; that he currently is under light duty work restrictions; and that he "cannot obtain and retain employment at wages equivalent to his preinjury wage because of his compensable injury." The hearing officer made conclusions of law that the claimant's date of injury is (date of injury), and that he had disability from September 16, 1993, through the date of the hearing.

The carrier contends in its appeal that the claimant failed to meet its burden of proof to show he has disability and further points to numerous factors, other than a compensable injury, that it believes were the cause of the claimant's inability to obtain and retain employment at his pre-injury wages after September 15, 1993. These include, either separately or in combination, his admitted voluntary resignation from his job with his employer effective August 10, 1993; his again admitted termination on September 15, 1993, for cause from his job with the school district; his failure to request reinstatement with either of these employers; general economic conditions; and, as discussed in more detail below, his lack of a compensable injury.

Clearly, a claimant in a workers' compensation case has the burden to prove by a preponderance of the evidence that he has disability as a result of a compensable injury in the course and scope of employment. Garcia v. Aetna Casualty and Surety Company, 542 S.W.2d 477 (Tex. Civ. App.-Tyler, 1976, no writ). Disability need not be a continuing condition and we have recognized that a claimant can successively go into and out of periods of disability. *See generally* Texas Workers' Compensation Commission Appeal No. 91053, decided December 5, 1991. Whether disability exists as a result of a compensable injury is a question of fact and can be established by the claimant's testimony alone. Texas Workers' Compensation Commission Appeal No. 93854, decided November 9, 1993. In this case, Dr. E released the claimant to return to light duty work on August 10, 1993, and there is no evidence that he rescinded or converted this into an unconditional release through the course of his treatment. The latest treatment record of Dr. E on November 3, 1993, in evidence before care of the claimant was transferred to Dr. P shows that Dr. E continued the conditional release for two months more beyond. The evidence of Dr. PT reflects that on December 6, 1993, he considered the claimant unable to work at all.

Carrier makes much of the fact that the claimant voluntarily left one job on August 10, 1993, in which he was performing light duty, for a better paying job from which he was terminated for cause on September 15, 1993, and which the claimant testified he was able to perform because it was within the limits prescribed by Dr. E. In a similar case, Texas Workers' Compensation Commission Appeal No. 91027, decided October 24, 1991, the claimant, a nurse's aide, returned to light duty after a compensable injury, but was subsequently terminated for an act of dishonesty. The Appeals Panel discussed at length the question of whether an employee who returned to work and is subsequently terminated for cause, can still have compensable disability. Though not essential to the decision in that case, the Appeals Panel observed:

> [a] broadly stated rule forever denying workers' compensation benefits to an employee returned to light duty and subsequently discharged for cause . . . has the potential to undermine a very basic purpose of workers' compensation programs: to compensate injured workers for loss of earnings attributable to a work-related injury. While virtually all case authority holds that the reason for the termination must be justified or for a just cause, the results of the injury remain and may prevent any or very limited gainful employment at all. Therefore, we are convinced that an approach to this issue which also factors in the continuing effect of the injury on the capacity to obtain and retain some gainful employment is more in keeping with the 1989 Act, the intent and purposes or workers' compensation and is fairer to all parties.

In Texas Workers' Compensation Commission Appeal No. 92282, decided August 12, 1992, the Appeals Panel applied this principle and determined that "despite any termination for just cause, respondent may still be entitled to [temporary income benefits] if she can show that her disability was in some way caused by her compensable injury."

In the case under appeal, we conclude that the claimant's voluntary resignation from one job and termination for good cause from another job are factors to consider in determining disability, but do not as a matter of law preclude disability. *See* Texas Workers' Compensation Commission Appeal No. 92016, decided February 28, 1992. The claimant testified that his last day of work with his first employer and with the school district were within the limits placed on him by Dr. E. He also testified that he applied for numerous positions that he hoped were within his physical capabilities to work. The carrier asserted, correctly, that the claimant introduced no additional evidence to corroborate this testimony about his job efforts. We have held that an employee under a conditional medical release does not have to show that work is not available and that under these circumstances, disability has not ended unless the claimant in fact is able to obtain and retain employment. Texas Workers' Compensation Commission Appeal No. 93953, decided December 7, 1993; Texas Workers' Compensation Commission Appeal No. 93850, decided November 8, 1993; and Texas Workers' Compensation Commission Appeal No. 92193, decided July 2, 1993. In any event, pursuant to Section 410.165, it was for the hearing officer, as fact finder, to judge the weight and credibility of the evidence, including especially the claimant's own testimony about his job search efforts, in determining whether the claimant was unable

to obtain and retain employment after September 15, 1993, as a result of a compensable injury. In reaching this decision, he could find the claimant credible and rely on the medical reports in evidence, which unanimously support a conclusion that the claimant has physical limitations on his ability to work. Our review of the record in this case discloses no basis for us to determine that the findings and conclusions of the hearing officer as to disability were so against the great weight and preponderance of the evidence to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986).

At the hearing, the parties stipulated "that the date of injury is (date of injury)."[1] In closing argument, the carrier's attorney stated:

> In looking at the disability definition, being because of a compensable injury . . . I will direct the court [sic] to the compensable injury definition, meaning an injury arising out of the course and scope of employment, which is not at issue here but for which compensation is payable . . . I would submit that for a compensable injury to result, it must have been linked to a specific event in the work place to qualify, to establish a causal relationship between the injury and any inability to obtain and retain employment at a pre-injury wage rate. . . . It's clear from the claimant's testimony that he cannot relate any specific event which establishes a causal relationship between the injury and inability to obtain employment. [Emphasis added.]

The hearing officer found as fact that "[c]laimant was injured on (date of injury)," and that he "cannot obtain and retain employment at wages equivalent to his preinjury wage because of his compensable injury," and concluded as a matter of law that the claimant "has disability."

The carrier alleges on appeal that the hearing officer erred by failing in his decision and order to address, as an essential element of disability, the existence of a compensable injury and that it presented evidence and argument at the hearing on this issue which would establish that the claimant failed to prove the existence of a compensable injury.

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." (Emphasis added.) Clearly, the existence of a compensable injury is a threshold issue to a finding of disability. *See* Texas Workers' Compensation Commission Appeal No. 92217, decided July 13, 1992. We recently addressed the question of whether a determination of disability by a hearing officer could be made in the absence of a finding of compensable injury in Texas Workers' Compensation Commission Appeal No. 94052, decided February 28, 1993. Although in that case the claimant testified about the circumstances of her injury,

[1]When the possibility of a stipulation was first brought up, carrier's attorney expressed a willingness to agree to "the date of--at least the alleged injury--is (date of injury)." The stipulation ultimately agreed to had no reference to an "alleged" injury.

the only stated issues were election of remedies and disability. The hearing officer found that the claimant had disability. The Appeals Panel, however, concluded that this finding of disability was predicated on an "impermissible inference and waiver." The inference as stated by the hearing officer was that `[c]arrier would not stipulate compensability, so it is inferred that issue has been previously decided or that [carrier] did not timely contest it.' The waiver as described by the hearing officer was that "since an `issue regarding course and scope' was not urged by either party, the [carrier] was foreclosed, as a matter of law, from contesting disability on that basis." The Appeals Panel found that this was an improper attempt by the hearing officer to resolve an issue [compensability] that was not before him. In addition, the Appeals Panel found no evidence to support the impermissible inference, but evidence to the contrary that the carrier disputed compensability from the outset. The Appeals Panel concluded:

> Without a disputed issue properly before the hearing officer, i.e., whether the claimant sustained an injury in the course and scope of employment [a compensable injury], a necessary predicate for a determination of disability, and with no evidence to establish that such issue had been previously decided or otherwise resolved, we necessarily reverse and remand on this issue. . . . Where there is a predicate issue necessary to the disposition of a disputed issue before the hearing officer, it should be resolved prior to the hearing [either by agreement, stipulation, or dispute resolution] or made an issue at the hearing. [Citations omitted.]

In the case now under appeal, we observe first, that the omission of the word "compensably" from the finding "that [c]laimant was injured on (date of injury)," was likely an oversight when considered in conjunction with the further finding that the claimant had disability "because of his compensable injury" and that by fair implication at least, the hearing officer did find the existence of a compensable injury as a predicate to his finding of disability. Unrebutted evidence was presented by the claimant about the circumstances of the injury from which the hearing officer could conclude that he in fact sustained a compensable injury. *See* Texas Workers' Compensation Commission Appeal No. 931117, decided January 21, 1994. In any event, contrary to the facts of Appeal No. 94052, *supra*, there is evidence that the parties in fact addressed and resolved the issue of compensable injury before the hearing and reaffirmed this resolution at the hearing. At the benefit review conference (BRC), one issue was stated as: "Did the Claimant have disability from September 15, 1993, to the present?" The benefit review officer (BRO) commented in his report that the claimant's inability to obtain and retain employment "is not the result of a compensable injury." The other issue was: "What is the correct date of injury?" and the only discussion on this issue had to do with the respective positions of the carrier that the date of injury was August 2, 1993, and the claimant that the date of injury was (date of injury). No written comment or statement of dispute in response to this report was introduced into evidence by the carrier at the hearing. *See* Rule 142.7. The carrier agreed to the formulation of issues at the hearing, and as discussed above, stipulated to a date of injury. Finally, in his closing argument, the carrier expressly stated compensability was not an issue. We believe that a fair reading of these proceedings compels the conclusion that the carrier not only did not

raise compensability as an issue at the hearing, but in effect conceded the issue as part of its stipulation. To allow the carrier to add, almost as an afterthought to his appeal, that compensability remained as an issue still to be decided, would require us not only to ignore prior proceedings at the BRC, but to consider the stipulation on date of injury an essentially meaningless act. This we decline to do. Whether styled a waiver of the issue of compensability or an implied determination of this issue, the result is the same. The hearing officer predicated his finding of disability on the existence of a compensable injury as testified to by the claimant without objection by the carrier. His findings of fact and conclusions of law are supported by sufficient evidence and are not incorrect as a matter of law.

The decision and order of the hearing officer are affirmed.

Alan C. Ernst
Appeals Judge

CONCUR:

Lynda H. Nesenholtz
Appeals Judge

Gary L. Kilgore
Appeals Judge