APPEAL NO. 970597

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on March 12, 1997. With respect to the issues before him, the hearing officer determined that the employer did not make a bona fide offer of employment to the appellant (claimant) and that the claimant did not have disability as a result of his compensable injury. In his appeal, the claimant asserts that the hearing officer's determination that he did not have disability is against the great weight and preponderance of the evidence. In its response, the respondent (carrier) urges affirmance. The carrier did not appeal the hearing officer's determination that the employer did not make a bona fide offer of employment to the claimant and, therefore, that determination has become final under Section 410.169. In a letter received April 30, 1997, the claimant's attorney submitted an attachment for his appeal. As the carrier noted in its objection to the attachment, the Appeals Panel will not generally consider evidence presented for the first time on appeal. Texas Workers' Compensation Commission Appeal No. 92326, decided August 28, 1992. However, we note that the document attached for our consideration is a letter from the Texas Workers' Compensation Commission (Commission) to the claimant advising him that his treating doctor had certified maximum medical improvement (MMI) and assigned an impairment rating (IR). That letter also noted that, as a result of that certification, the claimant may be entitled to impairment income benefits. It simply has no relevance to the issue of disability or to the claimant's entitlement to temporary income benefits.

DECISION

Reversed and remanded.

It is undisputed that the claimant sustained a compensable injury on _____, when, in the course and scope of his employment with (employer), he had an accident while riding a four-wheeler in the field and broke his left arm. The claimant's treating doctor for his compensable injury is Dr. H. On _____, Dr. H completed an Employee Fitness Certificate stating that the claimant could work in a light-duty job, noting that he could perform the job duties of walking, sitting, standing and paperwork. In treatment notes of June 26, 1996, Dr. H states that the claimant "was advised not to do any work activities other than some desk work." On July 7, 1996, Dr. H stated that the claimant was "not to return to regular work activities until released." In a light-duty slip dated July 10, 1996, Dr. H noted "[t]his man is not to be doing manual labor or driving. He is not to work unless he can sit & write or answer telephones." In a note of September 18, 1996, Dr. H stated that the claimant "may return to all work duties except heavy lifting or twisting of L arm (15 lbs)." In a letter to the claimant's attorney dated November 5, 1996, Dr. H stated that he released the claimant to full-duty work on October 16, 1996.

The claimant testified that on June 22, 1996, he started working in a light-duty position with the employer in the office. He continued in that job until July 5, 1996, when he took previously scheduled unpaid leave that continued until July 20, 1996. The claimant

stated that, while he was working light duty, he was occasionally required to do things that were not within his restrictions. Specifically, he testified that he had to drive to city to pick up a new vehicle on two occasions and he was also required to wash and wax company vehicles. On cross-examination, the claimant acknowledged that, when he started his unpaid leave, he understood that he would return to a light-duty position with the employer at the employer's next job site in State 1. However, he testified that he could not travel to State 1 because he did not have the money to pay for his ticket and the employer would not send him the money, instead telling him that he would be reimbursed for his bus fare when he arrived at the job site. He testified that he was physically capable of performing a light-duty job with the employer and that he did not take the job in State 1 because of his transportation problems. Finally, the claimant testified that from July 5, 1996, through October 1996, he performed general maintenance duties, including sweeping, picking up trash and using a leaf blower to clean the parking lot, at the motel where he and his family were living in exchange for half of the $500.00 per month rent. He stated that his wife was cleaning 10 rooms per day in exchange for the other half of the rent. He stated that he performed all of the work at the motel with his right arm which was not injured and that, although it was sometimes difficult for him to do the work, he did it to make sure that he and his family had a place to live. The carrier introduced a surveillance video which showed the claimant using a leaf blower in the motel parking lot. In the video, the claimant is holding the blower in his right hand and his left arm is in a sling.

Mr. B, the employer's safety manager, testified that the claimant was given a light-duty position on the day after his compensable injury. Specifically, he stated that the claimant was given a job in the office "photocopying, answering the phone and that sort of thing." He testified that the claimant continued in the light-duty position until he was scheduled to be off. Mr. B stated that he had a conversation with the claimant before his time off started in which he told the claimant that the light-duty position would continue after his time off and the claimant agreed to return light duty with the employer. He testified that the employer made repeated efforts to get the claimant to State 1 so he could continue in the light-duty position but those efforts proved to be unsuccessful.

As noted above, the hearing officer determined that the employer did not make a bona fide offer of employment to the claimant in accordance with Section 408.103(e) and Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 129.5 (Rule 129.5) because the work was not "geographically accessible" to the claimant. That determination was not appealed and it has become final under Section 410.169. Despite his determination that the employer had not made a bona fide job offer to the claimant herein, the hearing officer determined that the claimant did not have disability as a result of his compensable injury. In the discussion section of his decision and order, the hearing officer explained that determination as follows:

> As to the issue of disability, Claimant testified that he continued to work through July 5, 1996 at which time he took scheduled unpaid leave. At the conclusion of the leave period, on July 20, 1996, Claimant testified that he was ready and willing to return to work at the position offered. His inability to

begin work was due to his financial condition not allowing the purchase of travel fare rather than his physical condition related to the _____ injury. Claimant testified that he would have been physically able to perform the job in State 1. The job in State 1 was to be at wages equivalent to Claimant's preinjury wage.

Claimant asserted disability through December 18, 1996, when, according to Claimant's testimony, [Dr. H] gave him a full release to work. However, Claimant provided insufficient evidence, in light of the contrary testimony, that he was unable to obtain and retain employment at wages equivalent to his preinjury wage as a result of the _____ compensable injury.

Disability is defined in the 1989 Act as "the inability because of a compensable injury to obtain or retain employment at wages equivalent to the preinjury wage." Section 401.011(16). The claimant has the burden of proving that he has disability. Texas Workers' Compensation Commission Appeal No. 941566, decided January 4, 1995. The compensable injury need not be the sole cause of the disability. Texas Workers' Compensation Commission Appeal No. 960054, decided February 21, 1996; Texas Workers' Compensation Commission Appeal No. 941012, decided September 14, 1994. In Texas Workers' Compensation Commission Appeal No. 950246, decided March 31, 1995, the Appeals Panel reversed a hearing officer's determination that a claimant did not have disability during the period of time that he was released to light duty and rendered a new decision that the claimant had disability for that period. In so doing, Appeal No. 950246 stated:

As we have previously noted "a restricted release to work, as opposed to an unrestricted release, is evidence that the effects of the injury remain, and disability continues." Texas Workers' Compensation Commission Appeal No. 92432, decided October 2, 1992. *See also* Texas Workers' Compensation Commission Appeal No. 91045, decided November 21, 1991 ("Where the medical release is conditional and not a return to full duty status because of the compensable injury, disability, by definition, has not ended unless the employee is able to obtain and retain employment at wages equivalent to his preinjury wage."). In addition, we have stated that "an employee under a conditional work release does not have the burden of proving inability to work." Appeal No. 941566, *supra* (quoting Texas Workers' Compensation Commission Appeal No. 93953, decided December 7, 1993). Finally, we have noted that where claimant is released to return to work light duty, there is no requirement that the claimant look for work. Texas Workers' Compensation Commission Appeal No. 941092, decided September 28, 1994; Appeal No. 91045, *supra*. That is, "an employee under a conditional medical release [does] not have to show that work was not available." Texas Workers' Compensation Commission Appeal No. 941261, decided November 2, 1994.

See also Texas Workers' Compensation Commission Appeal No. 960139, decided March 1, 1996; Texas Workers' Compensation Commission Appeal No. 951980, decided January 8, 1996; Texas Workers' Compensation Commission Appeal No. 951278, decided September 13, 1995; Texas Workers' Compensation Commission Appeal No. 950872, decided July 10, 1995; Texas Workers' Compensation Commission Appeal No. 950568, decided May 16, 1995.

In this instance, we believe that the language quoted from the hearing officer's decision indicates that he erroneously determined that the claimant did not establish disability because he acknowledged that it was his inability to pay the bus fare to State 1 and not his physical inability to do the light-duty job that kept the claimant from returning back to the light-duty position with the employer after his scheduled unpaid leave. While that may be true, that fact does not resolve the disability issue. On the contrary, as is evidenced by the cases cited above, it is well settled that a conditional or light-duty release is evidence that disability continues. A claimant under a light-duty release does not have the obligation to look for work or to show that work was not available to him. Accordingly, the claimant's purported "failure" to pay his bus fare to take the light-duty position with the employer in State 1, which was determined not to be a bona fide offer under Section 408.103(e) and Rule 129.5, is of little consequence. The hearing officer's determination that the claimant did not have disability in this case is contrary to our prior decisions which have consistently indicated that "an employee under a conditional medical release does not have to show that work is not available and 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. 94820, decided August 9, 1994. Because we believe that the hearing officer applied an incorrect standard in resolving the disability issue, we remand for reconsideration of that issue based on the evidence of record and, if disability is found, the period(s) thereof.

In urging affirmance, the carrier notes that the Appeals Panel has long recognized that disability can be established by the testimony of the claimant alone; thus, it maintains that where, as here, the claimant readily acknowledges that he is able to do the work offered to him by his employer, the hearing officer can rely on the claimant's testimony, to the exclusion of other evidence, in determining that the claimant did not have disability. The carrier's argument might be well taken had the claimant testified in this instance that he was capable of performing the duties of his regular job with the employer. However, all the claimant testified to here is that he was able to perform the duties of a light-duty position. The ability to work in a light-duty position is evidence of continuing disability, not the end of disability. Appeal No. 950246, *supra*.

We reverse the hearing officer's determination that the claimant did not have disability in this case and remand for further consideration of the disability issue. Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Texas Workers' Compensation Commission's division of hearings, pursuant to Section 410.202. *See* Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

_____
Elaine M. Chaney
Appeals Judge

CONCUR:

_____
Philip F. O'Neill
Appeals Judge

_____
Christopher L. Rhodes
Appeals Judge