APPEAL NO. 980003

Following a contested case hearing (CCH) held on December 8, 1997, pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act), the hearing officer resolved the disputed issues by determining that the respondent (claimant) had disability beginning on June 16, 1997 (all dates are in 1997 unless otherwise stated) and continuing through June 17th, and beginning on September 5th and continuing through the date of the hearing, and that claimant's average weekly wage (AWW) is $158.13. The appellant (carrier) has appealed the disability issue arguing the insufficiency of the evidence. Claimant filed a response urging the correctness of the challenged findings.

DECISION

Affirmed.

The AWW determination, not having been appealed, has become final. Section 410.169. The parties stipulated that claimant sustained a compensable back injury on _____.

Claimant testified that he commenced employment with (employer) on June 11th, that he was assigned to work at the ice plant, and that on _____, he injured his low back dumping ice from a gondola. He said that his first treating doctor, (Dr. B), whom he first saw on June 16th, prescribed medications and certain restrictions and released him for light duty within the restrictions; that he commenced light duty in the employer's offices on June 18th; that on August 12th, he left the office before noon for an MRI and went home after the MRI; and that later that day, he was called by (Ms. M), who informed him that his employment was terminated due to repeated disruptions of the office and for failure to return to work after the MRI. Claimant further testified that after Dr. B treated him unprofessionally (Dr. B told claimant he was "full of s---" after claimant complained that a medication constipated him), he changed treating doctors to (Dr. R), apparently after having been referred to (Dr. D); that both Dr. D and Dr. R gave him similar work restrictions and advised him that if no light duty was available, he should not work; and that from the time his employment was terminated until Dr. R took him off work on November 24th, he looked for light-duty work in job fields in which he had some experience, such as security guard and law enforcement work, but that none of the employers had light duty available. Claimant stated that Dr. R took him off work on November 24th so that he could concentrate on physical therapy and rehabilitation and that he has not returned to work. Asked on cross-examination whether his condition had remained about the same from June 18th to November 24th, claimant stated that it "got a little worse . . . . "

Ms. M testified that claimant had been hired on June 11th for general labor. She also testified and the carrier adduced documentary evidence concerning the frequency and

nature of various confrontations over claimant's unacceptable office behavior during the time he performed light duty in the employer's offices including an incident on the morning of August 12th over his use of a phone. She also mentioned his failure to either return from his medical appointment on the date his employment was terminated or call in. Ms. M also stated that claimant could have continued working at light duty for the employer had his employment not been terminated for cause.

Dr. B's record of June 16th stated that claimant was to return to limited duty for one week and return in one week. Dr. B's return to work-duty status form reflected restrictions against prolonged standing, walking and sitting, heavy lifting, bending, squatting, kneeling, twisting, stooping, and working overhead. These restrictions were continued on June 30th.

Dr. D reported on August 29th that he felt claimant "is disabled for prolonged sitting, bending, and lifting" and that "if there is not light-duty work available (which does not include sitting)," then claimant "is currently disabled for work."

Dr. R's new patient evaluation report of September 5th stated that claimant was 42 years of age with new onset of low back pain and left lower extremity pain and that the most likely etiology is left-sided L5 radiculitis secondary to degenerative disc disease. Dr. R also commented that claimant was considering further schooling for job placement. Claimant testified that on November 24th, Dr. R took him off work so that he could concentrate on his therapy although there was no record of Dr. R to that effect in evidence.

The hearing officer found that as a result of his compensable injury claimant was unable to work on the Monday and Tuesday following his injury and commenced light duty with the employer on June 18th; that he was terminated by the employer on August 12th as a result of an argument with a coworker and his failure to inform the employer he would not return following his MRI on that date; that on or before September 5th, claimant sought employment which would fit within the light-duty restrictions imposed by his doctor but has not obtained employment; that claimant continues to be on light duty as of the date of the hearing; and that as a result of his compensable injury, claimant was unable to obtain and retain employment at wages equivalent to his preinjury wage beginning on June 16th and continuing through June 17th, and beginning on September 5th and continuing through the date of the hearing. The hearing officer's discussion comments that although claimant did not say when he began his job search, he did say it was before he saw Dr. R and that he first saw Dr. R on September 5th.

At the hearing, the carrier contended that claimant did not have disability because had his employment not been terminated for cause, he could still be working at light duty for the employer. On appeal, the carrier further contends that if an injured employee returns to work in a restricted-duty position at his or her preinjury wage, the employee cannot establish disability while he or she works in the restricted-duty position; that once a claimant returns to work in a restricted-duty position, the claimant may not establish disability after the employment has been terminated for reasons unrelated to the

compensable injury; and that the employee must demonstrate that his or her condition has changed to the extent that he or she is rendered unable to continue working as the result of the compensable injury. The carrier cites Texas Workers' Compensation Commission Appeal No. 91027, decided October 24, 1991, Texas Workers' Compensation Commission Appeal No. 93707, decided September 17, 1993, and Texas Workers' Compensation Commission Appeal No. 950266, decided March 31, 1995, in support of these propositions. Further, an employee can have recurring periods of disability so long as all the statutory prerequisites are met. Appeal No. 91027, *supra.*

Disability is defined as the "inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage." Section 401.011(16). A claimant has the burden of proving that he or she 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. Also, it is well settled that a conditional or light-duty release is evidence that disability continues and 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. *See* Texas Workers' Compensation Commission Appeal No. 970597, decided May 19, 1997, and cases cited therein.

In Texas Workers' Compensation Commission Appeal No. 91027, *supra*, the injured worker, a nurse's aide working in a hospital, injured her back transferring a patient, was taken off work by her doctor for three weeks, was returned to light duty, and resumed working at the hospital performing light duty for her preinjury wages until she was dismissed for dishonesty about six weeks later. The Appeals Panel stated the following:

> It is our opinion that 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 result of the injury remains 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 of workers' compensation, and is fairer to all parties.
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> * * * *
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> If and when an injured employee, who is terminated for cause, can sufficiently establish that the work-related injury is precluding him or her from

> obtaining and retaining new employment at preinjury wage levels, temporary income benefits [TIBS] once again become payable.

The Appeals Panel held in that case that the employee's inability to obtain and retain employment on the date of her termination for cause was due to her misconduct and not because of a compensable injury; that there was no evidence to establish that the employee's compensable injury resulted in her inability to obtain and retain employment up to August 12, 1991, when she was seen in the emergency room; and that the evidence was sufficient at the time of the hearing to support the conclusion that claimant is no longer able to obtain and retain employment because of the compensable injury.

In Texas Workers' Compensation Commission Appeal No. 92282, decided August 12, 1992, the Appeals Panel affirmed the hearing officer's decision which determined that the employee could only perform light-duty work, that she was terminated from her job, that she sought employment but her lifting restriction has made her ineligible to obtain employment at her preinjury wages, and that she has disability after November 19, 1991. The Appeals Panel stated that "despite any termination for just cause, respondent may still be entitled to [TIBS] if she can show that her disability was in some way caused by her compensable injury."

In Appeal No. 93707, *supra,* a case relied on by the carrier, the Appeals Panel reversed the hearing officer's decision finding no disability until March 31, 1993, but finding disability thereafter, and rendered a new decision that the employee did not have disability beginning on April 1, 1993. The Appeals Panel found sufficient evidence to support no disability up to March 31st but not thereafter noting that the evidence did not show that any significant thing happened on March 31st, and that the medical evidence showed that the employee's physical condition remained virtually the same before and after March 31st and that he was employed in the same position before and after that date. Citing Appeal No. 91027, *supra,* the decision stated that the Appeals Panel has held that "where an injured employee is retained in a working position by the employer but is subsequently terminated for good cause, and there is no changed condition regarding the injury or medical problem, disability does not necessarily thereby recur since the reason for the inability to obtain and retain employment at the preinjury wage is no longer resulting from the compensable injury."

In Texas Workers' Compensation Commission Appeal No. 94238, decided April 11, 1994, the injured employee returned to restricted duty after having been taken off work following his neck injury. He then voluntarily resigned to take a higher paying job which was within his restrictions and worked in the new position for less than a month when his new employment was terminated for cause. In affirming the hearing officer's finding of disability, the Appeals Panel stated that the employee's voluntary resignation from one job and termination for good cause from another were "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 decision

cited cases for the proposition 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.

In Texas Workers' Compensation Commission Appeal No. 94697, decided July 13, 1994, the Appeals Panel affirmed the hearing officer's determination that the employee had disability in circumstances where the employee returned to light-duty work within her restrictions following right carpal tunnel surgery until she was discharged following a dispute over bereavement leave. Claimant testified that she had right hand and arm pain, that the doctor had instructed her not use her right upper extremity, and that she had been offered jobs at a store and a bar but felt she could not do the work. The hearing officer determined that claimant reestablished disability as a result of her compensable injury from February 25, 1994, the date of her termination, to the date of the hearing. The carrier contended that the termination was the sole cause for her inability to work. The Appeals Panel noted that there was no medical evidence that the employee was released to full duty, that she was terminated from a light-duty position, not from regular duty, that she testified she could not perform regular duty, and that, consequently, it became a factual determination as to whether the employee could obtain and retain regular employment. The Appeals Panel cited cases for the proposition that while involuntary termination can be a factor, it is not necessarily controlling, and that the focus is on the ability to obtain and retain employment. The decision stated that even if employment termination may have been for cause, that fact does not, in and of itself, foreclose the existence of disability and that the hearing officer must look to see if the inability to obtain and retain employment is due to the termination or to the continuing effect of the injury.

In Texas Workers' Compensation Commission Appeal No. 950266, decided March 31, 1995, another case relied on by the carrier, the Appeals Panel affirmed the hearing officer's determination that the employee was not intoxicated when injured but reversed the decision that the employee had disability from May 26 through June 21, 1994. After the injury, the employee was given light duty by the employer but was terminated on May 26th upon the employer's receipt of the positive drug test. The employee was diagnosed on July 12th with a right hand crush injury and the doctor's treatment plan stated that he was to be off work. The Appeals Panel stated that it agreed with the carrier's contention that the overwhelming weight of the evidence established that the only reason the employee stopped working was because of the positive drug test. The Appeals Panel further stated that the employee could point to no change in his condition or assigned light duties that rendered him unable to continue working because of his injuries, and that given the vagueness of the employee's testimony about his doctor's release and the uncontradicted evidence that he worked up to the time of his termination, the hearing officer's determination that the claimant had disability was against the great weight of the evidence.

We find the facts in the case we consider more analogous to those in Appeal No. 94697, *supra,* and view the evidence as sufficient, under our standard of review, to support the hearing officer's factual findings and legal conclusions regarding disability. Cain v.

Bain, 709 S.W.2d 175, 176 (Tex. 1986); In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). The hearing officer could consider that claimant was only released to and was working light duty within his physical restrictions when his employment was terminated for cause, and that his testimony was not refuted that Dr. R continued his restrictions from and after September 5th and then took him off work on November 24th. While the decision in Appeal No. 93707, *supra*, does mention the notion of a change in medical condition and the decision in Appeal No. 950266, *supra*, mentions both change in condition and in the light duties, we do not regard those cases as stating a legal requirement that disability cannot be established after the employment of an injured employee, who has been working within medical restrictions, is terminated for just cause unless a changed medical condition after the termination is established. Rather, the presence or absence of a change in the medical condition or in the assigned duties are factors to be considered by the hearing officer, along with all the other factors, in determining disability.

The decision and order of the hearing officer are affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Tommy W. Lueders
Appeals Judge