APPEAL NO. 980296
FILED MARCH 25, 1998

On January 21, 1998, a contested case hearing (CCH) was held in (City), Texas, with (hearing officer) presiding as the hearing officer. The CCH was held under the provisions of the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 et seq. (1989 Act). The issues at the CCH were: (1) whether the respondent (claimant) sustained a compensable injury on _____, while in the course and scope of employment; and (2) whether the claimant has had disability. The appellant (carrier) requests review and reversal of the hearing officer's decision that the claimant has had disability from _____, through the date of the CCH. The claimant requests affirmance. There is no appeal of the hearing officer's decision that the claimant sustained a compensable injury on _____, and thus the injury determination is final under Section 410.169.

DECISION

Affirmed.

The claimant, who is 37 years of age, worked for the employer for several years prior to his claimed injury of _____. The claimant described his warehouse job for the employer as heavy work requiring loading and unloading of 50- and 100-pound bags of chemicals. He said that the employer paid him $9.80 an hour and that he worked more than 50 hours a week for the employer. The parties did not stipulate to the claimant's average weekly wage (AWW); however, the claimant said that the $671.72 AWW stated on the Employer's Wage Statement (TWCC-3) seemed to be right.

The employer has an alcohol and drug abuse policy for safety-sensitive jobs, which provides for random drug testing of employees and states that refusal to submit to a drug test will constitute a positive result and will subject the employee to further discipline or termination. The claimant said that he had a safety-sensitive job. On October 2, 1996, a drug screen was performed on the claimant's urine and the results were reported as negative. However the drug screen report also stated that the urine specimen was very diluted and suggested a repeat drug screen with a new specimen. On October 15, 1996, a second drug screen was done on the claimant's urine, apparently under the direction of Dr. M, and the report of that drug screen reflects that the claimant tested positive for cocaine metabolites. However, the report also states that the claimant's urine specimen was received "without chain of custody and may not have been handled as a legal specimen." The report goes on to state that the results of the drug screen should be used for medical purposes only and not for any legal or employment evaluative purposes. The claimant said that Dr. M did not turn the October 15th drug screen report in to the employer because of the mishandling of the urine specimen.

The claimant testified that on _____, he injured his back at work while lifting 70-pound pails of chemicals and that since then he has had low back pain which radiates down to his legs. There is no appeal of the hearing officer's finding that on _____, the claimant injured his lower back while at work lifting heavy pails of chemical products. The claimant went to Dr. M, whom he described as his primary HMO physician, on November 4, 1996, complaining of back pain, and Dr. M diagnosed the claimant as having an acute lumbar strain, recommended medications and physical therapy, and wrote in regard to the claimant's work status "no work." The claimant said that Dr. M took him off work.

The claimant testified that he reported his work injury to the employer's safety director, LP, on November 5, 1996. The Employer's First Report of Injury or Illness (TWCC-1) reflects that the claimant reported to the employer on November 5, 1996, that he injured his back at work on _____. The claimant said that after his injury of _____ he tried to work for the employer for one day but was unable to and went home. He said that since his injury he has not been able to do the type of work he did for the employer.

The claimant said that he called LP about being reimbursed for copayments he had to make for medical services and prescriptions for his work injury and that LP told him to bring the medical receipts to the employer and that he would be reimbursed. The claimant said that he went to the employer's plant on November 13, 1996, to be reimbursed for his medical expenses, that he was still on an off-work status at that time, that he did not go to the employer on November 13th to work, and that he was not paid to work that day. He said he turned in his medical receipts for reimbursement and that FC, the employer's vice president, asked him to take a drug test. The claimant said that his father was in the car that had taken him to the employer's; that his father had to leave; that the employer would not provide him transportation to his home, which was about 40 miles away; that he would have no way of getting home if he went for the drug test and if his father left; and that he did not go with LP to take the drug test. The claimant said that he did not take the requested drug test on November 13th but that he did not refuse to take it. He also said that he did not believe that the employer has the right to request a drug test while he was on medical leave and not working.

According to a letter dated November 14, 1996, to the claimant from the president of the employer, on November 13, 1996, FC recognized that the claimant had some possible symptoms of drug use and told the claimant to take a suspicion-based drug test; that FC told the claimant that LP would take him to the clinic for the test; that the claimant did not allow LP to take him to the clinic and left the premises; that thereby the claimant refused to submit to the test; and that the claimant's employment was terminated effective November 13, 1996, due to his refusal to follow FC's instructions to go with LP to be tested for drugs and for a positive drug test by way of refusing to submit to a drug test. A memo signed by FC and LP and dated November 13, 1996, states that the claimant protested having LP take him to the clinic to be tested and said

that his father would take him, but that the claimant left the employer's plant and did not go to the clinic.

According to a report of Dr. M, the claimant did not have relief of back pain after a week of physical therapy and he referred the claimant to Dr. W. Dr. W saw the claimant on November 25, 1996, and diagnosed the claimant as having a probable disc disruption at L5-S1. Dr. W wrote that the claimant should avoid repetitive bending and heavy lifting, that the claimant should be able to do light-duty work, that he predicted that the claimant would be able to do light-medium or medium work in several weeks, and that he would see the claimant for a recheck in one month. The claimant said that the employer did not offer him light-duty work. The claimant said that the carrier denied his claim and that Drs. M and W will not see him because they are not getting paid for their medical services. He said that his health insurance ran out toward the end of November 1996. The claimant was examined by Dr. B at the carrier's request on December 16, 1997, and Dr. B reported that the claimant had reached maximum medical improvement (MMI) on December 17, 1997, with a five percent impairment rating. Dr. B also wrote that he reviewed a videotape of the claimant doing yard work and lifting a lawnmower into a trunk and that it was his opinion that the claimant could perform regular employment without any limitations. The videotape was not in evidence.

The claimant said that after his injury of _____, he bought a pickup truck, a self-propelled lawnmower, and a weed trimmer, all for about $3,000.00, and that from the end of May 1997 to October 1997 he mowed yards and was paid a total of about $1,500.00 for his lawn-maintenance work. He said that his back would hurt when he lifted the lawnmower into the truck. The claimant said that on November 4, 1997, he obtained a job doing telephone collections and repossessions with a company that rents tires; that he was paid about $350.00 a week at that job; that he worked at that job until January 1, 1997, when he was discharged for not being good at telephone collection work; that during his employment with that company he went with another man to repossess two or three sets of tires; and that he did do some lifting of tires during the repossession activity. The claimant said that since his discharge from the tire rental company he has done a little delivery work for a funeral home, that his work is not full-time, and that the week before the CCH he had made $20.00 doing small chores. The claimant said that he has been looking for light-duty work and that he recently went to the Texas Workforce Commission and temporary employment companies looking for work.

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. The carrier appeals the hearing officer's finding that from _____, through the date of the CCH, the claimant has been unable to obtain and retain employment at wages equivalent to his preinjury wage due to his work-related injury and her conclusion that the claimant has had disability from _____, through the date of the CCH. The carrier contends that the hearing officer's finding on the disability

issue is not supported by the evidence, that the reason the claimant is not working is because he was terminated for cause for failing to take a drug test, that the claimant failed to show a causal connection between his injury and his alleged inability to work, that the claimant failed to establish with specificity the dates of disability, and that the claimant has demonstrated an ability to work. The hearing officer is the judge of the weight and credibility of the evidence. Section 410.165(a). As the finder of fact the hearing officer resolves conflicts in the evidence and may believe all, part, or none of the testimony of any witness. We have held that a claimant need not prove that the compensable injury is the sole cause of disability, but only that it is a cause of disability. Texas Workers' Compensation Commission Appeal No. 961059, decided July 10, 1996.

When the claimant was terminated from employment on November 13, 1996, he was on an off-work status due to his work-related back injury per Dr. M's report and it was later reported by Dr. W that the claimant could perform light-duty work. The claimant testified that his warehouse work for the employer was heavy work and that he has been unable to do that type of work since his injury. In Texas Workers' Compensation Commission Appeal No. 91045, decided November 21, 1991, we wrote that "[w]here 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 wages." The wages the claimant testified to having earned after his injury were less than the preinjury AWW shown on the TWCC-3. We note that the $1,500.00 the claimant said he was paid for mowing lawns was over a four-or five-month period.

The claimant in this case was placed off work by his doctor due to his compensable injury at the time of his termination from employment with the employer where he was injured. In Texas Workers' Compensation Commission Appeal No. 92282, decided August 12, 1992, we held that despite a termination for just cause, a claimant may still be entitled to temporary income benefits (TIBS) if he can show that his disability is caused in some way by his compensable injury, and in Texas Workers' Compensation Commission Appeal No. 94697, decided July 13, 1994, we noted that a termination for cause does not, in and of itself, foreclose the existence of disability. In the Findings of Fact section of her decision, the hearing officer did not make a finding regarding the cause for the claimant's termination from the employer on November 13, 1996; however, she noted in the Statement of the Evidence section of her decision that there was conflicting evidence regarding whether the claimant refused to take a drug test and that she found that his termination was not for cause. The hearing officer also stated that even if the claimant's termination were for cause, the claimant would be entitled to TIBS if he could establish that the work-related injury precluded him from obtaining and retaining employment at preinjury wages, which statement is consistent with our decisions. The hearing officer then wrote that she believed that the evidence sufficiently established that from _____, to the date of the CCH, the claimant had been unable to obtain and retain employment at his preinjury wage due to his compensable injury.

We conclude that the hearing officer's decision is supported by sufficient evidence and that it is not so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986).

The hearing officer's decision and order are affirmed.

Robert W. Potts
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

CONCURRING OPINION:

I concur with the majority opinion and write separately to express my view that the cases cited by the majority concerning termination for good cause are not the only grounds upon which the decision of the hearing officer may be upheld. In the present case, the claimant was terminated while still on an off-duty status. Thus, he had not returned to his preinjury employment prior to receiving a restricted release to return to work. This situation seems to me to be controlled by the same rule applicable to any restricted duty release which was summarized by Chief Judge Sanders in Texas Workers' Compensation Commission Appeal No. 91045, decided November 21, 1991, as follows:

> [w]here 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 wages. Evidence to establish this must show there is employment at preinjury wage levels reasonably available to the employee meeting the conditions of the medical release . . . and that the employee has not availed himself of such employment opportunities.

The opinion also noted that a conditional medical release, "does not place any requirement for positive action on the part of the employee to seek out employment" and, further, an employee is not required to "engage in new employment while suffering

some lingering effects of his injury unless such employment is reasonably available and fully compatible with his physical condition and generally within the parameters of his training, experience and qualifications."

Applying this standard, the fact that the claimant remained under restriction and was not working at the preinjury wage was sufficient to support the disability finding regardless of the termination of employment. In my view, the additional requirement to reestablish disability after a good cause termination which takes place subsequent to a return to work does not apply to a case where the employer terminates the employee prior to the employee's returning to work.

Gary L. Kilgore
Appeals Judge