

APPEAL NO. 980433

On February 6, 1998, a contested case hearing (CCH) was held with Huchton as the hearing officer. The issue at the CCH was whether the appellant (claimant) had disability from November 12, 1997, "to the present" resulting from the injury sustained on _____. The claimant requests review and reversal of the hearing officer's decision that he did not have disability from November 12, 1997, through the date of the CCH resulting from the compensable injury sustained on _____. The respondent (carrier) requests affirmance.

DECISION

Affirmed.

The employer builds communication towers. The claimant, who is 34 years of age and went to the 10th grade in high school, said that he was hired to work on the towers and thus had to climb the towers. The claimant sustained a compensable injury to his left ankle on _____, when a metal platform hit his ankle. He had worked for the employer for about nine months prior to his injury. The claimant was diagnosed as having a left ankle fracture and underwent surgery for the fracture with internal fixation on November 13, 1996.

On January 8, 1997, (Dr. B), who performed the surgery, wrote that the claimant could go back to sedentary labor. The claimant started treating with (Dr. S) and in January 1997 Dr. S wrote that the claimant could return to light-duty work with no climbing, jumping, or heavy lifting. The claimant said that he returned to a light-duty position with the employer, but that he worked in extreme pain. He said that some weeks he did not make as much money as he did prior to his injury and that the carrier paid him workers' compensation benefits. In February 1997 Dr. S wrote that the claimant lacked dorsiflexion in his left ankle, but that he was able to work up to 80 hours a week at light duty. Apparently, there is a lot of overtime work when the employer is erecting a tower.

In August 1997 Dr. S wrote that the claimant was at full-time work, except that he could not climb towers. The screws that had been placed in the claimant's left ankle during the October 1996 surgery were removed by Dr. S in August 1997. On September 9, 1997, Dr. S wrote that the claimant may not be able to climb towers, but that he was going to try. Dr. S noted that he did not think that it would be feasible for the claimant to climb towers. The claimant said that he returned to a light-duty job with the employer following his August 1997 surgery for removal of the screws and that he was not able to climb towers or carry heavy items due to his ankle injury.

The claimant said that during the time he was not working for the employer because of his ankle injury, he obtained a commercial driver's license at the employer's request and that when he returned to work he was able to operate a crane and drive large trucks. He said that he was physically able to perform his light-duty job with the employer and that he worked full-time with overtime hours. The employer puts its crews up at motels while the

crews are erecting the towers and two employees are assigned to each motel room. The claimant was fired on November 12, 1997. The claimant said that after work the day before he was fired he went out to two clubs, had no more than six beers, and returned to his motel room at about 11:00 p.m. He said that he did not get drunk that evening and that he was never intoxicated while working. He said that the next morning he went to work and was fired by his brother-in-law, (DP), who is a foreman for the employer. The claimant said that if he had not been fired, he would probably still be working for the employer.

Dr. S wrote on December 3, 1997, that the claimant told him that he could not climb because of ankle pain, that he had difficulty walking for an extended time in the mud, that his ankle was painful and swollen, and that "he apparently was then terminated." Dr. S wrote that he felt that it would be feasible for the claimant to "do some sedentary type of work at this time but I do not see how he can climb towers." Dr. S did not explain why, if the claimant was able to perform a light-duty job with the employer prior to being terminated, he could only perform sedentary work after being terminated. The claimant said that at Dr. S's recommendation he contacted the Texas Rehabilitation Commission (TRC) to try and further his education so that he could get a sedentary-type job. A TRC counselor wrote in January 1998 that the claimant had contacted that agency about training services.

The president of the employer stated in a written statement that the claimant was terminated from employment for alcohol abuse, that the claimant had been found drinking beer in a company vehicle in route to the job site, that the claimant was extremely intoxicated the night before he was fired, that the next morning the claimant was not capable of performing his job duties, and that coworkers refused to work with the claimant because of safety concerns. The president of the employer also wrote that after the claimant returned to work, the claimant told him he could complete all job tasks, including climbing towers, that the claimant did climb, and that the claimant told him that his ankle was fine. He also wrote that after the claimant was injured the claimant received a pay raise.

DP stated in a written statement that he fired the claimant because of the claimant's alcohol abuse, that he had previously warned the claimant about his drinking, that the claimant's main problem with alcohol abuse was after work, that after work the claimant would drink and become very irritating to whoever roomed with him in the motel, and that the evening before he fired the claimant, the claimant went out drinking alone and came back to the motel room loud and belligerent, causing the crew member who roomed with him to lose a night's sleep, which he said, had happened before.

Another foreman wrote that most of the time the claimant was hungover in the morning; that no one wanted to room with the claimant because the claimant would get drunk, become obnoxious, curse and threaten his roommate, and keep his roommate up all night; that everyone thought that the claimant was unsafe because of his drinking at night; and that the claimant had been caught drinking in a company truck while on the clock.

Another foreman wrote that the claimant has an alcohol problem that was affecting the safety of the crew members and that his drinking made it impossible for his crew-member roommate to get any rest.

"Disability" means the inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage. Section 401.011(16). In Texas Workers' Compensation Commission Appeal No. 91045, decided November 21, 1991, we stated 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 the preinjury wages." In the present case, it is undisputed that the claimant returned to light-duty work with the employer, and there is evidence that Dr. S believed that the claimant could work full-time with overtime hours and that the claimant received a pay raise after his injury. The Appeals Panel decisions cited by the claimant generally stand for the proposition that whether a claimant has disability, as defined by the 1989 Act, following termination from employment is a fact question for the hearing officer to determine from the evidence presented. The hearing officer found that prior to November 12, 1997, the claimant had returned to modified duty at his regular rate of pay; that on November 12, 1997, the claimant was terminated from employment for reasons unrelated to his injury; that had the claimant not been terminated, he would have been able to continue in his employment with the employer at modified duty; and that the claimant's inability to obtain and retain employment at wages equivalent to his preinjury wage beginning on November 12, 1997, and continuing through the date of the CCH is not a result of the claimant's compensable injury. The hearing officer concluded that the claimant did not have disability from November 12, 1997, to the date of the CCH resulting from his compensable injury of _____. The hearing officer is the judge of the weight and credibility of the evidence. Section 410.165(a). As the trier of fact the hearing officer resolves conflicts in the evidence and may believe all, part, or none of the testimony of any witness. When reviewing a hearing officer's decision to determine the factual sufficiency of the evidence, we should set aside the decision only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Texas Workers' Compensation Commission Appeal No. 950084, decided February 28, 1995. 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.

The hearing officer's decision and order are affirmed.

Robert W. Potts
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Christopher L. Rhodes
Appeals Judge