APPEAL NO. 980487
FILED APRIL 23, 1998

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on February 4, 1998, in [City], Texas, with [hearing officer] presiding as hearing officer. With regard to the issues at the CCH, she determined that respondent (claimant) had disability from the [date of injury], compensable injury from May 1, 1997, to the date of the CCH. Appellant self-insured (carrier herein) appealed, contending that claimant's condition did not change since it had been determined at a prior CCH that she did not have disability, and that the disability determination is not supported by the evidence. Claimant responds that sufficient evidence supports the hearing officer's decision and order.

DECISION

We affirm, as reformed.

Carrier contends the hearing officer erred in determining that claimant had disability. It asserts that claimant did not present new evidence of a change in her condition from which the hearing officer could find that claimant again had disability. Carrier asserts that the reason claimant is unable to earn her preinjury wage is because she was terminated from her employment.

The claimant testified that after she was injured while lifting at work on [date of injury], she first saw [Dr. CA], and then someone from "management organization" took her to see [Dr. PE]. She said she saw Dr. PE two times, that she received therapy three times a week for three weeks, that Dr. PE did not perform any diagnostic testing, that he released her to go back to light-duty work after taking her off work for two weeks, and that he then released her to full-duty work on June 18, 1996, and certified that she had reached maximum medical improvement (MMI) with an impairment rating (IR) of zero percent. Claimant said she returned to work when she was released to go back to work even though she still had pain. Claimant testified that she was terminated at work, that she did not think she was really terminated for time card fraud, that she had believed she had put the correct time on her time card, and that she thought she was actually terminated because she had changed treating doctors. Claimant said she began seeing [Dr. WA] in July 1996, that he has taken her off work, and that he told her that she has a herniated disc.

The parties stipulated that claimant sustained a compensable injury on [date of injury], while working for (employer). In a September 5, 1996, report, [Dr. HE], who stated that he is the designated doctor, said that claimant was injured on [date of injury];

that her then-treating doctor, Dr. PE, discharged her after two months without diagnosing a specific disorder; that her current treating doctor, Dr. WA, recognized that claimant needed further testing to diagnose her injury; and that he does not think Dr. PE had a medical basis "[for] not going with appropriate treatment." Dr. HE diagnosed "myofascitis and a probable spondylosis" and said it is unknown whether claimant has a disc injury because there is a lack of diagnostics. Dr. HE said claimant may be developing a symptom magnification syndrome, which he said would be a natural result of ongoing pain for over two months. The designated doctor further said that "MMI is not appropriate," that comprehensive testing should be allowed as soon as possible, and that "claimant will require a more sedentary care approach." An August 20, 1997, MRI report signed by [Dr. AR] states that claimant has a paracentral/posterolateral disc protrusion L5/S1." In a September 16, 1997, report, [Dr. CA] stated that he performed EMG testing "of both lower extremities and lumbar paraspinal" and said under "impression," "This electrical study shows compression of the L5 nerve root, the right greater than the left." In an October 30, 1997, letter, Dr. WA, claimant's treating doctor, stated that he "curtailed all of [claimant's] work related activity because of her deteriorating back condition," that she began full-time rehabilitation on August 6, 1997, that an MRI confirmed that she has a herniated lumbar disc, and that recent nerve conduction testing "reveals a radiculopathy - lumbar nerve damage." Dr. WA said a neurosurgical evaluation with [Dr. JA] is pending.

The record contains as an exhibit a decision and order from the prior April 30, 1997, CCH, in this case conducted by a different hearing officer on the issue of disability. That hearing officer determined that claimant had disability for her [date of injury], injury from April 10, to April 26, 1996. The Appeals Panel affirmed that determination in Texas Workers' Compensation Commission Appeal No. 971390, decided September 3, 1997

Disability under the 1989 Act is the "inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage." The claimant had the burden of proof on the issue of disability, which can be proved by his testimony alone if deemed credible. Texas Workers' Compensation Commission Appeal No. 93560, decided August 19, 1993. Whether disability exists is generally a question of fact to be determined by the hearing officer. Texas Workers' Compensation Commission Appeal No. 93854, decided November 9, 1993. Disability need not be a continuing state, but there may be intermittent periods of disability between periods of no disability. Texas Workers' Compensation Commission Appeal No. 93953, decided December 7, 1993. Normally, a party seeking a change in status from disability to nondisability or from nondisability to disability must present credible evidence of changed conditions, medical or otherwise, to support the request. See Texas Workers' Compensation Commission Appeal No. 931102, decided January 13, 1994. When an

employee sustains a compensable injury and then is terminated by the employer, the first consideration is whether the termination was for cause. Texas Workers' Compensation Commission Appeal No. 91027, decided October 24, 1991. If the termination was for cause, the employee must reestablish disability after the termination by credible evidence (i.e., was there a continuing effect of the injury on the ability to obtain work). Appeal No. 91027.

The 1989 Act provides that the hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). Where there are conflicts in the evidence, the hearing officer resolves the conflicts and determines what facts the evidence has established. As an appeals body, we will not substitute our judgment for that of the hearing officer when the determination is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Texas Workers' Compensation Commission Appeal No. 950456, decided May 9, 1995.

The hearing officer heard evidence from claimant that she was in pain and was having trouble doing her job before she was terminated. The hearing officer also reviewed medical evidence that claimant's condition was "deteriorating" and that it had been discovered since the prior CCH of April 30, 1997, that claimant had a herniated disc and tested positive for nerve root compression. The designated doctor, Dr. HE, opined that claimant had not been properly treated and that she was not yet at MMI in January 1997. There was also evidence that Dr. WA took claimant off work in August 1996. From this evidence, the hearing officer could find that claimant had disability after May 1, 1997, until the date of the CCH. We will not substitute our judgment for that of the hearing officer because her disability determination is not so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain, *supra*; Appeal No. 950456.

The hearing officer determined that claimant had disability from May 1, 1997, to the date of the CCH, due to her compensable injury of [date of injury]. In the decision and order, the hearing officer did not mention that claimant injured herself again at work on [subsequent date of injury], the date that she was terminated. Various medical records state that there was a "new" injury on [subsequent date of injury], to the same body parts as the [date of injury], injury. Although the hearing officer did not mention this evidence, we will assume that she considered all the evidence and that she determined that claimant had disability concerning the [date of injury].

We also note that in her Finding of Fact No. 2, the hearing officer stated that, "The inability of claimant to obtain and retain employment at wages equivalent to the preinjury wage from *April 1, 1997*, through the date of this hearing on February 4, 1998,

was the result of the injury claimant sustained while working for employer." [Emphasis added.] In the discussion portion of the decision and order and in her Conclusion of Law No. 3, the hearing officer indicated that disability began on May 1, 1997, and not April 1, 1997. It appears that Finding of Fact No. 2 contains a typographical error. Therefore, we reform Finding of Fact No. 2 and replace the date of "April 1, 1997," with the date "May 1, 1997." Claimant asserted at the CCH that disability began on May 1, 1997.

As reformed, we affirm the hearing officer's decision and order.

Judy Stephens
Appeals Judge

CONCUR:

Alan C. Ernst
Appeals Judge

Robert W. Potts
Appeals Judge