

APPEAL NO. 990092

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 November 25, 1998. On the single issue before him, the hearing officer decided that the appellant (claimant) has not had disability. The claimant appeals, urging that the decision is so against the great weight of the evidence as to be manifestly unjust. The respondent (carrier) urges that there is sufficient evidence to support the determination of the hearing officer and asks that the decision be affirmed.

DECISION

Reversed and remanded for further consideration and underlying findings of fact based on the evidence.

Aside from the generic stipulations by the parties, the hearing officer made a single conclusory finding of fact: "Claimant's inability to obtain and retain employment at wages equivalent to his preinjury wages at any time since _____, is because of something other than his compensable injury." The record indicates that the carrier paid temporary income benefits for some undefined period of time. The parties stipulated that the claimant sustained a compensable injury on _____. Regarding any disability, we are significantly hampered by the absence of specific findings of fact, based on the evidence or lack of evidence, which address any underlying facts or particulars as to any disability, although there was extensive evidence on the issue. It is elementary that conclusions of law are to be based upon appropriate findings of fact and that a hearing officer, under Section 410.168(a), shall issue a written decision that includes findings of fact. Texas Workers' Compensation Commission Appeal No. 980549, decided May 4, 1998. See *also* Texas Workers' Compensation Commission Appeal No. 952082, decided January 10, 1996.

The evidence shows that the claimant sustained an injury to his back on _____, in a lifting incident involving the unloading of very heavy rolls of paper. Claimant testified that he went to a hospital within the hour and was subsequently referred to a company doctor. He was prescribed pain medication and returned to work, but was not able to do the work. He underwent physical therapy that did not relieve his pain, was placed on light duty and eventually went to Dr. M. In a report of June 26, 1997, Dr. M listed a clinical impression of sprained back, recommended an MRI, and listed physical restrictions. An MRI of June 27th showed a small disc herniation at L5-S1 but did not produce nerve root entrapment or thecal sac impingement. The claimant continued to have pain and saw Dr. W in September 1997 and he diagnosed lumbar facet syndrome. Claimant subsequently underwent lumbar facet steroid injections at the L5-S1 area. A report of Medical History and Physical Exam by Dr. R in November 1997 shows a diagnosis of ruptured disc with minimal protrusion at L5-S1, with a comment of the MRI that it produces no nerve root entrapment or thecal sac effacement but that the patient continues to have fairly severe pain and fairly limiting symptoms, although he thinks there are some components of symptom magnification. Bilateral lumbar facet injections were also undertaken in October 1997. In December 1997

and January 1998, with a diagnosis of lumbar disc protrusion at L5-S1, lumbar epidural steroid injections were performed at L5-S1. In January 1998, a muscle stimulator was prescribed which, according to a follow-up exam on February 3, 1998, was helpful in reducing the pain by about 60%. The claimant was also continued on pain medication. The claimant was seen on consultation by Dr. G in December 1997, whose report indicated the claimant has increasing low back pain and notes that his MRI reveals "a disc degeneration and a dark degenerated disc at L5-S1," and what appears to be a small subligamentous herniation. In February 1998 Dr. G recommended a discogram.

In a March 4, 1998, progress note, Dr. G states he reviewed the discogram, noted concordant pain at the L5-S1 area, and recommended an interbody fusion of L5-S1. Subsequently, the second opinion spinal surgery process was undertaken which resulted in one opinion concurring with Dr. G and one opinion nonconcurring. A Medical Review Division letter of September 4, 1998, indicated, based on the two-to-one recommendation, the spinal surgery was approved. The carrier appealed this determination and a subsequent CCH on the issue resulted in a decision that the great weight of the medical evidence was contrary to the recommendation for spinal surgery. The decision was upheld on appeal. Texas Workers' Compensation Commission Appeal No. 982666, decided December 30, 1998.

As indicated, there was evidence that the claimant continued working light duty for the employer. He was terminated from his employment on May 29, 1998, as a result of a theft investigation which subsequently resulted in claimant being placed on probation for receiving stolen property. He was not incarcerated except for a 24-hour period. Also in evidence were two video surveillance tapes taken in early and mid February 1998, which showed the claimant in activities of riding a bicycle, carrying boxes and other items, walking and leaping up on steps, and other normal activity. The claimant stated that he was on the electrical muscle stimulator at that time, as shown in the medical records.

In his abbreviated discussion, the hearing officer mentions the claimant's termination for receiving stolen property, the videotapes, medical evidence opining symptom magnification, and stated that the claimant "is not credible that he has had disability." Other than the single, conclusory finding mentioned above, there are no underlying findings of fact, particularly regarding the extensive medical evidence showing the nature of the injury, as indicated in the diagnostic test; the lengthy and varied methods of treatment and results of such treatment, including a number of epidural injections; the recommendations for spinal surgery, albeit not ultimately approved; and how they factually relate to disability. A compensable back injury having been accepted, underlying specific findings of fact as to the issue of disability are necessary.

The hearing officer's discussion notes that the claimant was terminated in May 1998 in connection with a theft investigation. While the reason for a termination may be a factor in the consideration of disability, the focus of an inquiry into disability is on the inability to obtain and retain employment at equivalent wages, and the fact the termination may have been for cause does not, in and of itself, foreclose the existence of disability. Texas

Workers' Compensation Commission Appeal No. 92200, decided July 2, 1992; *compare* Texas Workers' Compensation Commission Appeal No. 971983, decided November 6, 1997 (Unpublished). However, the Appeals Panel has upheld the determination of no disability where the cause of an inability to obtain and retain employment at equivalent wages is directly related to matters such as incarceration or an undocumented alien status. Texas Workers' Compensation Commission Appeal No. 971910, decided November 3, 1997; Texas Workers' Compensation Commission Appeal No. 951209, decided September 7, 1995. We have also stated that disability is not necessarily a continuing or static matter, that is, that an injured employee may have disability for a period, followed by a period of no disability, only to have disability recur. Texas Workers' Compensation Commission Appeal No. 91122, decided February 6, 1992. *See also* Texas Workers' Compensation Commission Appeal No. 91045, decided November 21, 1991, for a discussion of disability where the injured worker cannot return to work for the employer for other reasons and which does not preclude disability.

Without any underlying findings of fact regarding disability, particularly in view of the significant medical evidence and course of the compensable injury and treatment therefore, we are unable to appropriately and adequately review the decision that the "claimant has not had disability." Just as in Appeal No. 92200, *supra*, with the single conclusory finding, we cannot determine if the decision was factually and legally correct. Texas Workers' Compensation Commission Appeal No. 961357, decided August 16, 1996. Accordingly, the decision is reversed and the case remanded for further consideration and findings of fact underlying the decision that the claimant has not had disability.

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.

Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Elaine M. Chaneyx
Appeals Judge