

APPEAL NO. 990733

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On March 17, 1999, a contested case hearing was held. The record was closed on March 19, 1999. With regard to the only issue before him, the hearing officer determined that respondent (claimant) had disability due to a compensable injury of _____, from November 19, 1996, to May 19, 1997.

Appellant (carrier) contends that the hearing officer's decision is insufficiently supported by the evidence. Carrier requests that we reverse the hearing officer's decision and render a decision in its favor. The file does not contain a response from the claimant.

DECISION

Affirmed.

The pertinent facts are not much in dispute. Claimant was employed as a customer service representative, who worked using a telephone and a computer, for a large communications company (employer). It is undisputed that on the morning of _____, claimant slipped and fell on a ramp at work, injuring her right leg (as well as other injuries not pertinent here). Although there is some disagreement as to who said what to whom, it is undisputed that the employer sent claimant to a (P Clinic), which eventually referred her to Dr. Mc. Dr. Mc noted right knee problems, that claimant had a sedentary job, prescribed a "3-D boot" and crutches, and released claimant to her regular preinjury duties. Claimant continued treatment with Dr. Mc, with the employer accommodating claimant's visits to the doctor. Claimant continued working until November 18, 1996, when she was terminated, presumably for attendance and tardiness difficulties. Claimant subsequently consulted an attorney who referred claimant to a chiropractic clinic where claimant was taken off work and received conservative treatment. In April 1997, claimant was referred to Dr. O, who performed surgery for a torn right lateral meniscus on May 15, 1997. Claimant returned to work for a different employer on May 19, 1997.

The medical evidence includes an August 29, 1996, report from Dr. Mc who diagnosed, among other things, a "right mid foot sprain, acute," and comments:

The patient will be placed in a 3-D boot for her right foot complaints. She will continue to use crutches as an as-needed basis to normalize her gait.

The testimony was that a 3-D boot was a ski boot type device coming up to claimant's knee. Dr. Mc goes on in his report to state, "The patient feels that she is capable of returning of [sic to] her preinjury work and will be given a full-work release effective today." Carrier relies on that statement as showing a full duty release even though claimant was in a 3-D boot and on crutches. In a note dated September 3, 1996, Dr. Mc notes that claimant drives 40 miles to work and gives claimant "a work release until she is seen here in follow up." A follow-up report dated September 12, 1996, notes continued complaints,

that claimant is receiving physical therapy, and that claimant "has a work release." Subsequent reports dated September 19, October 7, and November 18, 1996, say much the same, including that claimant "has a full work release." Claimant still was wearing the 3-D boot and using crutches when she was terminated on November 18, 1996.

A report dated February 21, 1997, from Dr. M at the (C Clinic) diagnosed, among other things, "internal derangement of the knee," keeps claimant off work and prescribes continued physical therapy. Dr. O, in a letter dated September 30, 1998, sums up his treatment of claimant as follows:

At the time I first saw [claimant] on 4/7/97 she was under treatment for injuries that occurred (incorrect date of injury) [sic _____]. She was having significant difficulties with her right knee to the point that at that point it would seem reasonable for her to have been kept off of work. She underwent Arthroscopic surgery and was subsequently able to return to some office work by 6/97. [Claimant actually returned to work May 19, 1997.]

The hearing officer, in his discussion, cites Texas Workers' Compensation Commission Appeal No. 91045, decided November 21, 1991, for the proposition that "an unconditional medical release to return to full duty does not, in and of itself, end disability" (the hearing officer obviously means a conditional medical release) and concludes:

I find that based on the medical, as well as the Claimant's testimony, that although the Claimant was working at a sedentary job level up until the date she was terminated, she nevertheless was suffering from lingering effects of the injury, which ultimately resulted in an operation to her knee. The Claimant stated she was in pain, and was wearing a 'boot,' as well as the Claimant was on crutches during the entire period she was back at work before her termination. She also had difficulty driving.

Carrier, in its appeal, emphasizes claimant's "attendance and tardiness difficulties," both before and after the injury, claimant's failure to return to work after doctor's visits (denied by claimant), and that claimant never indicated that "she was physically unable to continue working." Carrier charges that claimant "largely relies upon the medical reports from the chiropractor selected by the lawyer" to establish disability. (That statement is, at best, a mischaracterization.) Carrier argues that "only after claimant was terminated that she saw a lawyer who sent her to a chiropractor who took her off work" and that evidence of disability "is unpersuasive as a matter of law." We reject carrier's arguments.

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). The determination as to an employee's disability is a question of fact for the hearing officer. Texas Workers' Compensation Commission Appeal No. 92147, decided May 29, 1992. When an employee sustains a compensable injury, receives a light-duty release, returns to her employer at light duty and then is terminated by the employer, we must consider

whether her termination was for cause. Texas Workers' Compensation Commission Appeal No. 91027, decided October 24, 1991. If the termination was for cause, the employee must establish her disability after the termination by credible evidence. *Id.* In this case, although claimant was returned to full duty rather than light duty, it was undisputed that she was wearing a "boot" and using crutches. As such, Dr. Mc's full release to duty was, in fact, only a conditional release, provided that she could perform her duties wearing the boot and using crutches. We find no error in the hearing officer's rationale and findings, other than the reference to an "unconditional medical release."

Upon review of the record submitted, we find no reversible error and we will not disturb the hearing officer's determinations unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). We do not so find and, consequently, the decision and order of the hearing officer are affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Judy L. Stephens
Appeals Judge