

APPEAL NO. 990806

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 March 16, 1999. The issue at the CCH was whether respondent (claimant) had disability due to his _____, compensable injury. The hearing officer determined that claimant had disability from August 27, 1998, to the date of the CCH, from which determination appellant (carrier) appeals on sufficiency grounds. Claimant responds that the Appeals Panel should affirm the hearing officer's decision and order.

DECISION

We affirm.

Carrier contends the hearing officer erred in determining that claimant had disability from August 27, 1998, to the date of the CCH. Carrier asserts that: (1) claimant was not a credible witness; (2) videotape evidence depicts claimant working and shows that he is able to earn his preinjury wage; (3) claimant pursued a claim to retaliate because his employer placed him in a light-duty job he did not like; (4) a hearing officer in a prior decision determined that claimant's disability ended on July 13, 1998, because his newspaper delivery work showed he could earn his preinjury wage and no new evidence has been provided by claimant since then; (5) claimant stopped working at his light-duty job for employer due to personal reasons; and (6) any inability to obtain or retain employment at claimant's preinjury wage was due to a subsequent, (alleged date of injury), work injury, at the same employer, that was to the same area of the back.

Disability is defined as the "inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage." Section 401.011(16). A claimant has the burden of proving that he or she has disability. Texas Workers' Compensation Commission Appeal No. 941566, decided January 4, 1995. The compensable injury need not be the sole cause of the disability. Texas Workers' Compensation Commission Appeal No. 960054, decided February 21, 1996; Texas Workers' Compensation Commission Appeal No. 941012, decided September 14, 1994. A hearing officer may determine that a conditional or light-duty release is evidence that disability continues and a claimant under a light-duty release may not have the obligation to look for work or to show that work was not available to him. See Texas Workers' Compensation Commission Appeal No. 970597, decided May 19, 1997. An employee can have recurring periods of disability so long as all the statutory prerequisites are met. Texas Workers' Compensation Commission Appeal No. 91027, decided October 24, 1991. If an employee voluntarily resigns from work, that does not mean there can be no disability as a matter of law. Instead, this merely presents a factor for the hearing officer to consider in deciding the disability issue. Texas Workers' Compensation Commission Appeal No. 94238, decided April 11, 1994. The fact that one hearing officer has determined that disability ended does not mean that a claimant may not have recurring disability.

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 overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Texas Workers' Compensation Commission Appeal No. 950456, decided May 9, 1995.

Claimant testified that on _____, he was working as a driver for (employer). He testified that he was strapping down a load on his truck when he felt a stinging sensation in his back. He said other people had to unload for him because of back pain. Claimant testified that his pain worsened so he went to the emergency room, where doctors diagnosed a strain. Claimant said he missed seven days of work, that Dr. E gave him a full-duty release, that he went back to full duty but for reduced hours, and that he hurt his back again at work on (alleged date of injury). Claimant said he went to the doctor and was taken off work again. He said he had an MRI, that Dr. E eventually diagnosed a herniated thoracic disc, and that Dr. E gave him a light-duty release. Claimant said he went back to work for employer at light duty for a few hours per day, but that he stopped working around July 13, 1998, when he had a gall bladder problem. Claimant said he did not come back to work after that because of "personal reasons" regarding the way he was treated. Claimant said that employer had a job for him and that he was capable of performing it.

Claimant said he had a second job delivering newspapers that he had performed off and on for many years. He testified that he did not work delivering newspapers for about two months after July 1998, and then he began doing weekday deliveries again. He said he was able to do that work because he was not doing the heavier work. He testified that the videotape depicts him carrying newspapers but he said it was not a heavy load. He said he is unable to deliver the weekend newspapers because of the weight of the papers and because there was "no way to get around the heavy work." Employer's human resources director testified that claimant was offered a light-duty job that met all of his restrictions, for full pay, and that claimant came back to work for a short period, but that claimant voluntarily decided not to come back to work after that period.

A March 2, 1998, medical report from Dr. E states that claimant sustained a work injury on _____, that he has a thoracic strain injury, that he should remain off work for one day, and that he may return to his prior work duty level after that. A March 23, 1998, report from Dr. E states that claimant "reaggravated" his injury lifting at work on (alleged date of injury), that an MRI report shows a 3.0 mm disc thoracic herniation, and that claimant will be on an off-duty work status until an evaluation by Dr. M. In a July 1, 1998, report, Dr. E states that claimant injured himself _____; that he continues to have pain "ever since his work related injury"; and that claimant may perform light work no more than two hours per day. In an August 17, 1998, report, Dr. M states that claimant should have a CT/myelogram and that he "should be on an off work status until we define what would be the next step in his management." In a September 30, 1998, report, Dr. M states that he reviewed the videotape of claimant working on a car and delivering newspapers, that claimant is more functional than originally thought, that it is possible that claimant may require surgery, and that it is impossible to say "which accident" created the disc herniation. Dr. M did not say anything about whether claimant was released to return to any form of work.

In a prior decision and order, another hearing officer determined that claimant sustained a compensable injury on _____, and that he had disability until July 13, 1998. The hearing officer found that disability ended on that date and that claimant showed his ability to earn his preinjury wage because he was able to deliver newspapers. In another decision and order, the same hearing officer determined that claimant did not sustain a compensable injury on (alleged date of injury), while working for employer.

The hearing officer determined that: (1) claimant sustained a compensable injury on _____; (2) prior to the compensable injury, claimant worked an additional job delivering newspapers; (3) on, and after, August 27, 1998, claimant's wages were never equivalent to his preinjury wage; (4) claimant returned to work with employer for less than his preinjury wage and then voluntarily stopped working; (5) on August 17, 1998, claimant was taken off work due to his compensable injury and was never returned to full-duty status; and (6) claimant has been unable to obtain and retain employment at wages equivalent to his preinjury wage beginning August 27, 1998, due, at least in part, to the compensable injury.

In this case, the issue of whether claimant had recurring disability starting on August 27, 1998, was a fact issue for the hearing officer to consider. The fact that a prior hearing officer determined that disability ended did not mean that this issue of disability could never again be raised. The hearing officer in the prior case did not have before him Dr. M's opinion that claimant should be off work. The hearing officer could determine from claimant's testimony and the medical evidence that claimant had disability for the stated period. The fact that claimant was able to do some work or that he did not return to his light-duty position were factors for the hearing officer to consider in making his determinations. We would note that whether claimant was credible, whether he sought to retaliate against his employer, and whether the videotape showed that he could work were facts for the hearing officer to consider in making his disability determination. We conclude that the hearing officer's disability determination is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain, *supra*. We would note that the fact that claimant filed a petition in district court and is claiming disability regarding his alleged (alleged date of injury), work injury does not preclude the hearing officer from finding disability in this case.

We affirm the hearing officer's decision and order.

Judy Stephens
Appeals Judge

CONCUR IN RESULT:

Robert W. Potts
Appeals Judge

Tommy W. Lueders
Appeals Judge