APPEAL NO. 990817

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 April 1, 1999. She (hearing officer) determined that the appellant/cross-respondent (claimant) had disability as a result of a Injury 2, compensable injury on Injury 1 day 1 and injury 1 day 2, and since February 16, 1999, through the date of the CCH. The claimant appeals this determination to the extent that disability was not found to begin on the day her employment was terminated by the respondent/cross-appellant (self-insured), contending that that portion of the decision was against the great weight of the evidence. The self-insured, likewise, appeals that portion of the decision which found disability. Each party responds that so much of the decision that was in their favor is supported by the evidence and should be affirmed.

DECISION

Affirmed.

The claimant started working as a temporary hire for the self-insured in January 1998. On or about June 1, 1998, she transferred to a permanent, full-time position in another section of the self-insured. The hearing officer found, and it was not disputed, that she sustained a low back injury on Injury 2, while lifting a box. She continued working the entire month of July 1998, and, except for two days during the first week of August 1998 when she received medical attention, until August 10, 1998. On the morning of August 8, 1998, she said she reported to Mr. M, the risk manager, that she wanted to formally file a claim for her Injury 2, injury because she could no longer afford to pay the associated medical bills on her own and her injury was more serious than she originally thought. The claimant further testified that she received a performance evaluation as a probationary employee about 11:00 a.m. that same day, which in several areas was below standard, and was told that she would be terminated unless she could be rehired as a temporary employee in the section where she originally started. The next day, she said, she was asked if she was willing to return to the job she was performing when injured. On August 12, 1998, the claimant testified, she saw Dr. L, who told her she could not work, but did not give the claimant a written off-work slip. According to the claimant, she was called on August 12, 1998, by the self-insured and told she was terminated. Various supervisors testified that the self-insured could have accommodated her restrictions and that the termination had nothing to do with either her injury or those restrictions.

The claimant had been receiving medical care for a preinjury history of low back pain. In an undated letter, Dr. L wrote that he had been treating her since 1995 and that her condition when the letter was written was "much more severe." He concluded she was "unable to work." Dr. L referred the claimant to a university medical center where on January 12, 1999, she was diagnosed with a likely lumbar herniation. An MRI on February 9, 1999, showed diffuse bulging at L5-S1. This was apparently read and confirmed by

discogram as a herniation. In a visit of February 16, 1999, Dr. M clinically confirmed the MRI results.

Section 401.011(16) defines disability as an "inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage." The claimant has the burden of proving disability. Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). Whether disability exists is a question of fact for the hearing officer to decide and can be proved by the testimony of the claimant alone if found credible. Texas Workers' Compensation Commission Appeal No. 93560, decided August 19, 1993. We have also observed that disability may recur after a period of nondisability and that termination for cause does not necessarily preclude a finding of disability after the determination if a reason why the claimant is unable to earn the preinjury wage is the compensable injury. Texas Workers' Compensation Commission Appeal No. 93953, decided December 7, 1993; Texas Workers' Compensation Commission Appeal No. 92282, decided August 12, 1992. The hearing officer found disability on Injury 1 day 1 and injury 1 day 2, and beginning again on February 16, 1999, and continuing through the date of the CCH and explained her rationale for this determination as follows:

> . . . although the record of the [CCH] does establish that Claimant suffers from significant pathology in her low back, and has been placed in an off-work status as a result of the injury made the basis of this case, the documents which specifically mention Claimant's off-work status are undated, a circumstance which renders it difficult, at best, to determine the point in time at which Claimant's unemployment became due to her compensable injury as opposed to her termination for cause. However, reference to Claimant's records from the [university medical center] reveals that although, during her visit of January 12, 1999, many of her findings were within normal limits, Claimant subsequently underwent an MRI, which, during Claimant's visit of February 16, 1999, was noted to reveal significant findings meriting further investigation and testing. Therefore, even though these records do not specifically indicate that Claimant was in an off-work status as of that date, they do fix a time frame during which Claimant's medical condition was diagnosed as being sufficiently severe that one might expect it to result in an off-work status . . . . [T]he Hearing Officer is not of the opinion that Claimant satisfied her burden of proof to demonstrate that disability began at the time Claimant has alleged.

The claimant, in appealing the determination that disability did not begin earlier than February 16, 1999, argues that the MRI in February 1999 disclosed the existence of a condition that predated the MRI, and there was no evidence that her condition worsened on that day significantly more than the day before such as to support a finding of disability. We agree that it is not logical to assume that the MRI showed a condition more or less contemporaneous with the date of the MRI. Much more likely is that the MRI reflected a condition that existed for some time prior. Such a common-sense analysis does not

mandate a finding of disability earlier because there was other evidence from the claimant that her condition had worsened over time and she, in fact, worked some six weeks after the injury. There was further conflicting testimony from the claimant that she could not continue working after August 10, 1998, and that she could, presumably, with accommodation or because the job duties did not exceed her restrictions. Given this history, the hearing officer was not content to rely solely on the testimony of the claimant to resolve the disability issue. Rather, she looked to other evidence, or lack of evidence, from the claimant on this issue, and concluded that disability only began on February 16, 1999 (with the exception of two days in August 1998). We will reverse a factual determination of a hearing officer only if that determination is so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986). Applying this standard of review to the record of this case, we find the evidence sufficient to support the determination that disability did not begin before February 16, 1999.

The self-insured's appeal of the finding of disability mirrors the claimant's in that it argues that if the claimant did not have disability before February 16, 1999, there was not sufficient evidence to establish that her physical condition changed significantly on this date to create disability. It further argues that the claimant would have continued working had she not been terminated. The logical appeal of the self-insured's argument that there was no physical change on February 16, 1999, is undeniable. The hearing officer, however, concluded that the medical evidence reflected a fixed time frame when the medical condition was shown to result in disability. Under our standard of review, we affirm that determination. With regard to the effect of the termination, we note that the compensable injury need only be a cause of the later unemployment, not the only cause. The hearing officer obviously believed that, while the termination played some role in the unemployment, it was not the only cause of the unemployment. *See* Texas Workers' Compensation Commission Appeal No. 931117, decided January 21, 1994.

For the foregoing reasons, we affirm the decision and order of the hearing officer.

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Alan C. Ernst
Appeals Judge

CONCUR:

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Stark O. Sanders, Jr.
Chief Appeals Judge

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Robert W. Potts
Appeals Judge