APPEAL NO. 990827

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 26, 1999. The issue at the CCH was whether the appellant (claimant) had disability resulting from the injury sustained on _____, and if so, for what periods. The hearing officer determined that the claimant did not have disability from the injury sustained on _____. The claimant appeals, urging that he had disability from February 17, 1998, through February 25, 1999. The respondent (self-insured) urges the hearing officer's decision is not against the great weight and preponderance of the evidence and should be affirmed.

DECISION

Reversed and remanded.

The parties stipulated that on _____, the claimant sustained a compensable injury in the course and scope of employment. On _____, the claimant was working as a zookeeper in the elephant area, cleaning the exhibits, and lifted a trash container, injuring his lower back. The claimant testified that his job duties as a zookeeper required him to feed the animals, fix things broken by the animals, care for the animals, and lift heavy things. The claimant sought medical treatment with Dr. C on February 17, 1998. The claimant stated that Dr. C took him off work and did not release him to return to work until March 2, 1999. The claimant testified that in September 1998, Dr. C verbally told him that he could return to light-duty work. The claimant stated that he told his employer he had been released to light duty, but was told he had to have a full-duty release before he could return to work.

The claimant testified that he has had a veterinary license in (Country) since 1988 and he opened a veterinary practice in (City 1), (Country) in 1994. The claimant stated that his practice has been advertising in the (City 1) telephone book since 1994. The claimant testified that his veterinary practice is small, involves all types of animals, and he performs examinations and vaccinations. The claimant testified he continued his veterinary practice after his compensable injury on _____. According to the claimant, he charges $8.00 a vaccination and he performs approximately eight vaccinations a month. The claimant testified that the veterinary work was much lighter than the zookeeper work, which required him to lift things.

The self-insured presented the testimony of Mr. G, an investigator. Mr. G testified that on December 4, 1998, he brought a parakeet to the claimant's veterinary practice, and the claimant examined and treated the bird for $20.00.

Dr. C diagnosed the claimant with lumbosacral sprain/strain and lumbar disc syndrome. Dr. C's medical records indicate that the claimant was unable to work beginning February 17, 1998. Although the claimant testified that Dr. C verbally released him to

return to light duty in September 1998, Dr. C's letter dated September 15, 1998, indicated the claimant was off work and would not be released to return to work until he could return to work without pain and risk of reinjury. On December 18, 1998, when asked if the claimant could return to his job as a zookeeper, Dr. C indicated that he believed the claimant would not be able to resume these duties.

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). To prove disability, a claimant need not prove that he either looked for work or that he is totally unable to do any kind of work at all. As we have previously noted "a restricted release to work, as opposed to an unrestricted release, is evidence that the effects of the injury remain, and disability continues." Texas Workers' Compensation Commission Appeal No. 92432, decided October 5, 1992. We have also stated that "an employee under a conditional work release does not have the burden of proving inability to work." Texas Workers' Compensation Commission Appeal No. 941566, decided January 4, 1995 (quoting Texas Workers' Compensation Commission Appeal No. 93953, decided December 7, 1993). Additionally, we have noted that where the claimant is released to return to work light duty, there is no requirement that the claimant look for work. Texas Workers' Compensation Commission Appeal No. 941092, decided September 28, 1994.

The Appeals Panel has addressed situations where the claimant has concurrent employment. In Texas Workers' Compensation Appeal No. 93343, decided June 14, 1993, we held:

> Absent Commission [Texas Workers' Compensation Commission] rules offering guidance on how concurrent wages should be considered, we will interpret the 1989 Act as an integrated whole. We conclude that if concurrent wages earned from an employment held on the date of injury are not used to compute AWW [average weekly wage], then it would be inconsistent to allow such concurrent wages to be deducted as weekly earnings after an injury under Article 8308-4.23(c) or (d) [since codified as Sections 408.101 through 408.103].

In this case, the claimant had concurrent employment. The wages from his veterinary job are not counted in determining his AWW for the job on which he was injured, and the claimant's return to the veterinary job does not affect disability. Texas Workers' Compensation Commission Appeal No. 981568, decided August 26, 1998. We note there was no evidence that the claimant increased the amount he made from the veterinary job after the injury. Appeal No. 93343, *supra*; Texas Workers' Compensation Commission Appeal No. 961849, decided November 4, 1996.

The hearing officer's findings of fact and conclusions of law include the following:

FINDINGS OF FACT

2. The Claimant's testimony was inconsistent and non persuasive.

3. On September 4, 1998, the Claimant approached his treating doctor and requested a release to return to work.

4. As of September 4, 1998, the Claimant could return to his work activities.

5. As of _____, the Claimant continued to work in his veterinary practice in (Country) and he failed to report earnings to the Self Insured as required by rule 129.3(2).

CONCLUSION OF LAW

2. The Claimant did not have disability resulting from the injury sustained on _____.

The issue at the CCH was broadly phrased: "Did the Claimant have disability resulting from the injury sustained on _____, and if so, for what periods?" If the parties were attempting to litigate only a particular period of disability, it is unclear from the record. The claimant testified that he had disability from _____, through February 25, 1999. The benefit review conference report states the self-insured's position was that disability ceased to exist on December 4, 1998. The hearing officer's findings focus on September 4, 1998, the date he found the claimant requested a release to return to work and could return to work; however, there are no findings of fact which indicate whether the claimant was able or unable to obtain and retain employment at wages equivalent to the preinjury wages. While the hearing officer references Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 129.3(2) (Rule 129.3(2)), we note that Rule 129.3(2) does not apply to income from concurrent employment as long as the concurrent employment income is not increased due to additional efforts by the claimant. The findings of fact are insufficient to support the determination that the claimant did not have disability resulting from his injury sustained on _____.

We reverse the hearing officer's decision and order that states that claimant did not have disability resulting from the injury sustained on _____. We remand the disability issue to the hearing officer for reconsideration of the disability issue consistent with this decision, and for specific findings of fact to support his conclusion of law. 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.

_____
Dorian E. Ramirez
Appeals Judge

CONCUR:

_____
Thomas A. Knapp
Appeals Judge

_____
Gary L. Kilgore
Appeals Judge