

APPEAL NO. 990917

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 29, 1999. She determined that the respondent (claimant) had disability, as a result of a _____, compensable cervical spine injury, from December 7, 1998, through the date of the CCH. The appellant (carrier) appeals this determination, contending that it is contrary to the great weight and preponderance of the evidence. The claimant replies that the decision is correct, supported by sufficient evidence, and should be affirmed.

DECISION

Affirmed.

Important background facts are not in dispute. The claimant worked as a machinist. He sustained a compensable cervical spine injury on _____, but did not lose time from work, except perhaps for part of one day. He continued working at his preinjury wage, doing office-type duties. He accepted his employer's incentive for early retirement made to all hourly employees and retired with a reduced pension on November 1, 1996. By then, he said, he was bored with his job. He also said that, were he not injured and still doing machinist work, he would never have retired. At least for the period beginning some nine months after the injury, he said, he was released to normal duty, but continued his office work.

He did nothing for the first year after his retirement except for perhaps an odd job or two. In November 1998 he took a job one day a week at a golf course for no pay, but free play. Over time after his retirement, his symptoms, including a trigger finger, became worse. On December 7, 1998, he underwent a three-level cervical fusion. Since the surgery he has undergone rehabilitation and, he said, has gradually improved. He seeks disability only from the date of the surgery through the date of the CCH.

The sole issue in this case was disability, which is defined as "the inability to obtain and retain employment at wages equivalent to the preinjury wage." Section 401.011(16). We have noted in the past that this is somewhat of an "economic concept." Texas Workers' Compensation Commission Appeal No. 941689, decided February 1, 1995. We have also held that disability is not necessarily a continuing status, but there may be discrete periods of disability interspersed with periods of nondisability. Texas Workers' Compensation Commission Appeal No. 93953, decided December 7, 1993. The compensable injury need only be a cause not the sole cause of disability, Texas Workers' Compensation Commission Appeal No. 931117, decided January 21, 1994, and a claimant's voluntary retirement is a factor for the hearing officer to consider, but is not necessarily controlling on the issue of disability. In this case, the claimant testified that he would not have retired early had he been able to do his preinjury job. This testimony by the claimant, which the hearing officer found credible, was sufficient to support her finding of

disability. Texas Workers' Compensation Commission Appeal No. 93560, decided August 19, 1993. Under our standard of review of factual determinations of hearing officers, we decline to reverse that determination. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986). We would further note that even if, as the carrier suggests on appeal, the claimant's retirement pay was to be considered wages for purposes of determining disability, a proposition on which there was essentially no evidence and which is doubtful at best, see Section 401.011(43) for the definition of wages, these "wages" would not be commensurate with the preinjury wage, according to the claimant's testimony. Therefore, we see no merit in this assertion on appeal with regard to disability.

Although disability was the sole stated issue in this case, the heart of the dispute was the claimant's assertion that he was entitled to temporary income benefits (TIBS) for the period beginning December 7, 1998. Section 408.101 provides that an employee is entitled to TIBS if the employee has disability and has not reached maximum medical improvement (MMI). In her order, the hearing officer directed TIBS to be paid until disability ends or MMI is reached. Any dispute over MMI should be addressed in the dispute resolution process.

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

Alan C. Ernst
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Thomas A. Knapp
Appeals Judge