APPEAL NO. 991140

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). In Texas Workers' Compensation Commission Appeal No. 990389, decided April 12, 1999, the Appeals Panel affirmed the determinations of the hearing officer that the Texas Workers' Compensation Commission did not abuse its discretion in denying the respondent's (claimant) request to change treating doctors and that the employer did not tender the claimant a bona fide offer of employment. The determination that the claimant's disability from his _____, injury beginning on July 8, 1998, ended on August 9, 1998, was appealed by the claimant. The Appeals Panel reversed and remanded the determination of when this period of disability ended. In a decision and order on remand, the hearing officer, found that the claimant had disability from July 8, 1998, through August 2, 1998, and again beginning on August 6, 1998, and continuing through the date of the contested case hearing (CCH). The appellant (carrier) appeals the disability determination, contending that it is contrary to the great weight and preponderance of the evidence. The claimant replies that the decision is correct and should be affirmed, but asks for another remand to address a new issue of average weekly wage (AWW).

DECISION

Affirmed.

An issue of AWW was not before the hearing officer below and will not be addressed by the Appeals Panel.

Our decision in Appeal No. 990389 sets out the important facts of this case, which need not be repeated here. The hearing officer correctly noted that our concern on remand was to insure that the impact on disability of a termination from employment for cause on disability be properly addressed along with general principles of disability applicable in cases where the claimant, as here, was released to limited duty. Briefly stated, termination with or without cause does not, as a matter of law, end disability, but is a factor to be considered in resolving why a claimant is unable to earn preinjury wages. Texas Workers' Compensation Commission Appeal No. 980003, decided February 11, 1998.

The claimant's employment was terminated on August 3, 1998. In Finding of Fact No. 8, the hearing officer found that the claimant's inability to earn his preinjury wages "beginning on August 3, 1998 was a result of his termination for cause and not his compensable injury." On August 9, 1998, the claimant applied for unemployment benefits. He was initially denied these benefits. In Finding of Fact No. 10, the hearing officer found that by applying for unemployment benefits, the "Claimant represented that he was ready, willing, and able to work and accept employment at a position which would comport with his doctor's light duty restrictions." The hearing officer then found in Finding of Fact No. 11 that beginning on August 9, 1998, the claimant's inability to earn his preinjury wage "was a result of his compensable injury." In Finding of Fact No. 12 and Conclusion of Law No. 3,

the hearing officer determined that the claimant had disability from July 8, 1998, through August 2, 1998, and again from August 6, 1998, through the date of the hearing.

In its appeal, the carrier argues that when the claimant sought unemployment benefits, he held himself out as able to work without restrictions. This is confirmed by the transcript of his testimony at the CCH, in which he states that he told officials he was able to work, but then adds that he did this because this was the only way he would obtain unemployment benefits. To the extent that Finding of Fact No. 10 can be read as finding that the claimant represented only that he could work with restrictions, we believe the finding is contrary to the great weight of the evidence. Such error is not prejudicial in this case because it did not foreclose the more important consideration of whether the compensable injury played some, albeit not exclusive, causative role in the claimant's inability to earn his preinjury wage after his termination from employment or at least as of the date he applied for unemployment benefits. On this crucial point, the hearing officer clearly found in Finding of Fact No. 11 that the injury played some causative role in disability as of August 9, 1998. We believe that the medical evidence, which reflects that the claimant was in a limited duty status on this date, and the claimant's testimony that he made representations about his ability to work only to obtain unemployment benefits provides sufficient support for the determination of the hearing officer that the claimant's termination was not the sole cause of his inability to earn his preinjury wage as of August 9, 1998.

The situation becomes somewhat muddled in Finding of Fact No. 12, which finds that the claimant had the inability to earn his preinjury wage from July 8, 1998, through August 2, 1998, and again beginning on August 6, 1998, through the date of the CCH. The carrier requests in its appeal that "[a]t the very least" we reform Finding of Fact No. 12 and Conclusion of Law No. 3 to reflect that the second period of disability began on August 9, 1998, which would be consistent with the other findings of fact. We are hard-pressed to determine how the hearing officer settled on August 6, 1998, as the date to begin the second period of disability and find no ready support for this in the record. The claimant does little to resolve this matter in his response to this appeal, observing simply that "[w]hether 'August 6, 1998' was mentioned at the CCH, this date was concluded from such evidence and discussion regarding other dates and a second beginning of disability on August 6, 1998, is proper . . . ."

The most logical explanation may be that August 6, 1998, is simply a typographical error and that the hearing officer intended to write August 9, 1998. We are unwilling, however, to "reform " the decision on this theory because we are unsure that this was the intent of the hearing officer. More importantly, we question why there was any break in the claimant's disability. As pointed out above, the fact of employment termination does not, as a matter of law, end disability. And the date one applies for unemployment benefits, without some supporting rationale, does not appear to have a bearing on when disability, if previously ended, begins again. We have no authority to remand this case for further clarification of this period of intermittent nondisability. The claimant does not appeal the finding that the first period of disability ended on August 3, 1998, and accepts the

determination that a new period began on August 6, 1998. In the absence of an appeal by the claimant, we will not pursue a question of whether the evidence was sufficient to support the determination that there was some period of nondisability between the two periods of disability found. In the absence of evidence that August 9, 1998, was the only proper date on which to find disability began again, we affirm the disability determination of the hearing officer.

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

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Alan C. Ernst
Appeals Judge

CONCUR:

_____
Philip F. O'Neill
Appeals Judge

_____
Gary L. Kilgore
Appeals Judge