APPEAL NO. 991306

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing (CCH) was held on May 24, 1999. With regard to the only issue before her, the hearing officer determined that respondent (claimant) had disability "after January 4, 1999," as compelled by a prior Appeals Panel decision.

Appellant (carrier) appeals, pointing out changed circumstances and facts and that the hearing officer "felt compelled to issue a finding in the claimant's favor based simply on the fact that the Appeals Panel had reversed her previous determination." Carrier requests that we (again) reverse the hearing officer's decision and render a decision in its favor. Claimant responds, pointing to testimony and evidence supporting his position and urges affirmance.

DECISION

Reversed and remanded.

This case requires a brief review of the background and its relationship to Texas Workers' Compensation Commission Appeal No. 982536, decided December 14, 1998, to be put in proper context. Claimant was employed by (Employer 1), a waste disposal company. On _____, claimant was pulling on a rachet device on a dumpster, the rachet came loose, and claimant fell backward against a steel pipe before he hit the ground. Subsequent events are summarized and recited in Appeal No. 982536, of which the hearing officer took official notice in this case. In that case, although the hearing officer commented that the claimant "*may* have injured his low back as a result of the accident" (in addition to his mid back), the hearing officer was not of the opinion "that he *did* injure his low back in this fashion." (Emphasis in the original.) The hearing officer's decision, finding that claimant had not suffered a compensable low back injury and therefore did not have disability, was issued on October 8, 1998. That decision was timely appealed to the Appeals Panel, which resulted in Appeal No. 982536, *supra*, where we reversed the hearing officer's decision, stating:

> The mechanism of the fall claimant had is consistent with such an injury, regardless of where contusions were visible. Objective evidence substantiated the existence of a herniated disc. Because of the hearing officer's apparent reliance on medical treatises not made part of the record and the fact that the great weight and preponderance of the evidence, testimonial and medical, shows that claimant injured his lower back on _____, we reverse and render a decision that claimant's injury to his back includes the lumbar spine. As the hearing officer agreed that this injury caused the inability to obtain and retain employment equivalent to his preinjury wage, we render the further decision that claimant had disability from his injury for periods based on his undisputed testimony from April 18th

through May 31st, and June 18th through the date of the CCH [of October 5, 1998].

In the meantime, after claimant received the hearing officer's decision (and while the case was on appeal), it is undisputed that claimant applied for a job with another (Employer 2) on October 21, 1998. Claimant testified that, since the hearing officer's decision had been adverse to him, he "had no choice" but to go to work to provide for his family and "pay our bills." In evidence is a preemployment physical, where claimant left blank an entry asking about spinal injuries, finding claimant qualified for employment. Claimant, at the CCH, points out that the physical states he has 20/20 vision without correction when he, in fact, wears glasses. (The hearing officer and carrier's attorney noted they wear contact lenses.) It is undisputed that claimant began work for Employer 2 on October 22nd, doing essentially his preinjury job at essentially his preinjury wage. Claimant testified that he was in pain, that the pain got progressively worse, and that, because the hearing officer had found that he did not have a compensable injury, he could not afford to see a doctor or get medical care.

The Appeals Panel rendered its decision reversing the hearing officer in Appeal No. 982536, *supra*, on December 14, 1998. Claimant testified that, since he was then entitled to medical care, he returned to his treating doctor, Dr. G, on January 4, 1999, and that Dr. G said that "it would be in mine and his best interest that I stop working." Claimant then went to Employer 2 and resigned, giving as his reason that he "had some personal problems to handle." Employer 2's exit interview form indicates that claimant was an "outstanding" employee and that he was eligible for rehire.

In evidence are a number of medical reports from Dr. G during the period from July 16 through October 12, 1998, diagnosing claimant with a "herniated nucleus pulposus L4-5, L5-S1." The October 12th report indicates claimant "continues to be symptomatic" with "ongoing pain" and that his "past history is unchanged from the previous visit." It is undisputed that claimant did not seek any medical attention between October 12, 1998, and January 4, 1999. Dr. G's January 4, 1999, report states that claimant "continues to be symptomatic" with "constant back pain" and that claimant's "past history is unchanged from the previous visit" (even though claimant testified that he told Dr. G that he had been working the last two months or so and that his back pain had gotten progressively worse). There are two other reports dated January 27 and February 17, 1999, which have essentially the same information as the prior reports. In evidence is an off-work slip dated January 4, 1999, taking claimant off work until January 25, 1999. Dr. G's reports suggest, and claimant testified, that claimant may eventually require spinal surgery and, although Dr. G has recommended surgery, the second opinion surgery process has not been initiated. Claimant testified that his pain has stayed about the same as when he quit work.

Carrier contends that claimant quit his job with Employer 2 in order to draw temporary income benefits, citing evidence which might support that inference. The hearing officer summarized the evidence and, in her discussion, commented on the Appeals Panel's prior decision (Appeal No. 982536, *supra*), stating that:

> . . . since the evidence in this case indicates that the condition of Claimant's low back, the questioned extent of injury, continues to prevent Claimant from earning his preinjury wage, the only possible decision in this case is in Claimant's favor.
>
> Although Carrier has made some excellent points regarding Claimant's ability to work at a similar job and the timing of his resignation from that employment, the Hearing Officer is of the opinion that the previously rendered decision of the Appeals Panel compels a decision that Claimant has sustained disability since January 4, 1999.

We strongly disagree that the previous decision so "compels" the hearing officer and, accordingly, reverse the hearing officer's decision. Our reversal and rendering of our decision in Appeal No. 982536 on the issue of disability to October 5, 1998, was predicated on the undisputed and uncontroverted evidence that claimant was then unable to work due to his low back injury.

Disability is defined as the inability because of a compensable injury to obtain and retain employment at the preinjury wage (Section 401.011(16)). In Appeal No. 982536, *supra*, the only evidence was that claimant's inability to obtain and retain employment was due to the compensable low back injury. The circumstances have substantially changed since that time and claimant has, in fact, demonstrated an ability to obtain and retain employment substantially similar to his preinjury job at substantially his preinjury wage. The circumstances of why he quit that job, whether due to pain from his injury or "personal reasons" are determinations that the hearing officer must make, earlier decision notwithstanding. Nothing in our opinion in Appeal No. 982536 dictates (or compels a finding) that the hearing officer must forever find that any pain related to claimant's low back injury amounts to disability as defined in Section 401.011(16) during a subsequent period of time. We would also note that nothing in that definition requires an employee be entirely pain free before obtaining and retaining employment. Claimant's argument, at the CCH, was that now that he has a compensable injury, it is "not practical for him to work. It doesn't help him to work; it hurts him to work." The hearing officer must determine whether that amounts to disability as defined in Section 401.011(16).

Accordingly, we remand the case for the hearing officer to make findings on the issue of disability based on the evidence presented at the hearing. The hearing officer may consider the facts that claimant applied for employment with Employer 2, the preemployment physical, claimant's testimony that he did not remember the physical, the timing of claimant's resignation, claimant's testimony about working in pain, the reasons that claimant sought employment, and Dr. G's various medical reports as well as other medical evidence. If the hearing officer finds disability, which is not to suggest that she do so, or not do so, then the hearing officer is to specify a beginning and an ending date of such disability. No further evidentiary hearing on remand is necessary. The hearing officer, at her discretion, may or may not request additional oral and/or written argument on disability after January 4, 1999.

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.

Thomas A. Knapp
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Susan M. Kelley
Appeals Judge