APPEAL NO. 991333

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 June 1, 1999. The sole issue was whether the appellant/cross-respondent (claimant) had disability due to a compensable injury that occurred on _____.

The hearing officer determined that the claimant first had disability from his injury beginning on December 20, 1998, and continuing to the date of the CCH. He determined that because the claimant had been dismissed for cause on January 15, 1998, and would otherwise have stayed employed by his employer, he did not have disability after his termination.

The claimant has appealed (personally and through his attorney) the hearing officer's holding that he did not have disability after January 15 and prior to December 20, 1998. The claimant complains of the hearing officer's determination regarding the justification for his termination, pointing out that the hearing officer repeatedly cut off presentation of evidence on the reasons for the termination. The claimant recites evidence that he believes supports a longer period of disability. The respondent/cross-appellant (self-insured) argues that the decision is correct. The self-insured filed a conditional appeal prior to claimant's appeal, arguing that there was fundamental error in exclusion of any representatives of the employer from the hearing when the rule for exclusion of witnesses was invoked. There is no appeal of the hearing officer's determination that the claimant had disability beginning on December 20, 1998, and continuing through the date of the CCH.

DECISION

Reversed and remanded.

The claimant was employed as a laborer by the (employer) at the time of his injury on _____. He said that he was working with Mr. T, who could not lift heavy items. The claimant said he was pushing a dolly of heavy items and, when he pulled the dolly off the elevator, the wheels turned and fell into the "slot" between the elevator and floor. He said he "jerked" the dolly over the slot, dislocated his left shoulder in this process, and was in considerable pain. Mr. T advised him to report the injury, which he was disinclined to do. The reason he gave was that during the course of his 12-year employment, he sustained work-related injuries, but was never given the opportunity to work light duty.

Claimant said he again sustained injury to his arm on or around January 8, 1998. He and Mr. T had picked up heavy crates that had been loaded by a forklift. Claimant said he tried to pull the crates to the end of a tailgate for loading on a dolly and, as he did so, he hurt his arm. Claimant did report this incident and subsequently sought medical treatment from Dr. P. Dr. P restricted him from using his left arm and released him to light duty. When the arm did not get better, claimant was ultimately referred to a surgeon, Dr. SL. In

the interim, he was treated by Dr. C, who maintained his light-duty restrictions. The claimant said that there was a mass on his neck and Dr. SL, who had recommended surgery, wanted to explore the nature of the mass first and coverage was denied, apparently due to "cat scratch fever." He agreed that the neck mass was not part of his injury. Claimant testified as to treatment by other doctors after Dr. SL. Claimant eventually had surgery performed by Dr. CU. He had surgery on December 20, 1998.

The claimant said he worked one day light duty after his release and then an argument broke out with the employer over whether there was "light duty" available. He said he was allowed to go home until the employer made a "decision." He said he was called the next day and then worked two days, until he was terminated on January 15th. After the claimant's termination, he did not immediately seek other employment because he thought he would start getting workers' compensation and was going to therapy two times a week. He worked jobs for a small construction company from March through the first week of May, when he cashed out his accrued retirement benefits. He made about $550.00 during the period he worked for the construction company.

Claimant maintained his pain was worse and he never got better. It was his opinion that his arm kept him from obtaining and retaining employment at wages equivalent to those he made at the time of his injury. He agreed that on January 8th he was aware that there were problems with his employment, in the opinion of his employer.

At the beginning of the CCH, there were two representatives for the self-insured and the employer present, Ms. W and Ms. B. The claimant's attorney moved to have them excluded under the "rule" when the attorney for the self-insured, an attorney from the Attorney General's office, said that they might be called as witnesses. Although the attorney argued that Ms. W should remain as her designated representative, and pursuant to the Employer's Bill of Rights, the hearing officer announced that because the self-insured and the carrier were "one and the same," and because the Attorney General was there as "representative" for the self-insured, everyone but the attorney would be subject to exclusion. He rejected the self-insured's argument that, by this reasoning, the claimant should also be excluded because he was "represented" by his own attorney. The hearing officer also more than once cautioned the parties that he would not be hearing a matter of employment law and did not regard the reasons for the termination as pertinent to the issues he had to decide. The claimant's testimony was limited, on both direct and cross-examination, concerning matters relating to his termination.

The medical evidence in this case concerning claimant's ability to work and any restrictions is briefly summarized as follows:

1. Dr. P, on January 21st, stated that claimant could not perform overhead work or lift more than 10 pounds, and he released the claimant to modified duty.

2. The referral doctor, Dr. C, wrote on January 29th that claimant had a

functional shoulder instability, and no evidence of actual dislocation, notwithstanding a sincere belief that this was the nature of his injury. He found full range of motion in the shoulder, and mild tenderness. However, he suggested a 15-pound lifting limit and no overhead work pending two weeks of therapy.

3. On April 3, 1998, Dr. C wrote that although claimant had had three months of rehabilitation, he had failed to recover to the point that would allow him to return to work. Dr. C noted, however, some inconsistencies in a pain sign in the sitting and supine positions (when the same motion was repeated with no sign of pain). He nevertheless ordered an MRI to rule out interarticular or capsular pathology.

4. Dr. SL, an orthopedic surgeon, stated that the MRI showed a Hills-Sachs fracture, and abnormality in the anterior glenoid with significant bone loss. He stated that claimant had left shoulder instability from traumatic injury. He opined that claimant could have an underlying lesion due to cat scratch fever (a malady indicated in his medical history). On May 18, 1998, Dr. SL stated that claimant could only perform light duty work. He also complained in July 1998 that both claimant's private insurance and workers' compensation were giving him the run around, and that he would pay out of his own pocket for a necessary scan.

5. Dr. CU (referred by a chiropractor who treated claimant in August 1998) wrote on September 29, 1998, that claimant was a candidate for reconstruction that would include repair of a lesion. Dr. CU said that six months rehabilitation would be required after surgery.

Personnel records were presented to show that claimant was counseled concerning call-in policies and tardiness and absenteeism and that after this there were continued "infractions." Some of the absences included as "excessive" on a January 9, 1998, written proposed termination involve personal illness, or staying home with sick children. No sick leave was taken on or after _____, until January 5, 1998, when he left early and asserted he had a sick child. The claimant took 56 unpaid hours from late May 1997 until the date of the notice.

First of all, we agree with the self-insured that the governmental entity/self-insured is not deprived of the right to retain an employer representative "present" at the CCH, and the hearing officer erred by stating that the statutorily-designated attorney (in this case, the Attorney General's office) was the only "representative" who could remain present in the hearing room. Section 502.001 applies to the University of Texas System, consisting of various "institutions" around the state, as that term is defined in Section 503.001(3). Section 503.002 defines the portions of the 1989 Act that will apply to the University of Texas System. The provisions for certified self-insurers in Section 407 are not effective.

However, Section 409 is expressly incorporated. "Employer" is defined as "the institution" in Section 503.002(b). The Employer's Bill of Rights is found at Section 409.011; Section 409.011(b)(1) confers on the employer the right to be "present" at the CCH. Section 503.071 denotes the Attorney General's office as the "legal representative" for the institution. The interpretation of the hearing officer in this case, that the institution was limited only to the presence of its legal representative in the CCH, would effectively read 409.011 out of existence for governmental entities. Even to the extent that the hearing officer announced his opinion that a carrier and self-insured are "one and the same," this analysis still cannot be used to strip the legal representative of the ability to designate a representative for the institution to remain present in the hearing room. The attorney for a self-insured governmental entity does not become its client for purposes of the "rule," and must still be allowed to designate a client representative to remain in the CCH to assist in presentation of the case. Thus, we agree that the hearing officer erred by excluding everyone but the assistant Attorney General from the hearing room when the rule was invoked. The analogy to the situation of a claimant and his legal representative is a good one; we have stated that the claimant has the right to be "present," and have never equated such presence with the presence of the claimant's attorney at the CCH. Although "error" is mitigated by the fact that Ms. W ultimately was not called as a witness, as the matter is being remanded for reconsideration of the disability issue, Ms. W's presence should be permitted.

Second, we also agree with the claimant that the hearing officer should not advise parties that he will not hear testimonial evidence relating to the reasons for the claimant's termination, and then make findings on whether such termination was done for good cause or not, and use that as the basis for essentially eliminating any disability from the undisputed shoulder injury until the date claimant had surgery. At best, given claimant's contention and some evidence right after the termination that he was on a "light duty" status, the termination would have an immediate effect but would not necessarily preclude a finding of disability in the ensuing months. While the hearing officer indicated that he found a lack of corroboration of claimant's testimony in medical records, he recites numerous medical records in his discussion, in the period he found no disability, which put claimant on limited or light-duty work.

What troubles us is that the hearing officer plainly states, at the end of his discussion, that "the Claimant's inability to earn his normal wage was not due to his shoulder injury; it was due to his excessive unexcused absences at work." He thus appears, as the claimant asserts, to consider the termination the sole reason, for the next 11 months, of claimant being off work. We observe that claimant was a laborer by experience and profession, and the medical evidence indicated that after January 12th he was put on modified duty, with a 10-pound lifting limit. It appears undisputed that he could not perform the work of a laborer at this point. There is no evidence that the capability to perform the work of a laborer was restored or that claimant was ever given a full release. He testified that the work he performed for a little over a month earned about $550.00; the hearing officer made no analysis of the wages earned in this position compared to his average weekly wage. The fact that a claimant is released for light duty is evidence that

the effects of the injury continue and disability therefore exists; even a claimant terminated for cause may establish disability thereafter. *See* Texas Workers' Compensation Commission Appeal No. 91027, decided October 24, 1991. As that case stated, it would be a harsh rule to apply a termination to preclude temporary income benefits for all time, and while we acknowledge that the hearing officer has put claimant on the status of disability beginning the day of his surgery, it seems clear to us that at some point leading up to surgery, the shoulder injury should have been evaluated as a factor that reasonably led to disability. We reverse and remand for further consideration and development of the evidence, and in doing so we note that the self-insured never raised an issue as to whether a bona fide offer of employment was made, which is a separate issue from the matter of disability. In our opinion, even considering the termination, it was against the great weight and preponderance of the evidence to give effect to the claimant's termination for a period of 11 months, in light of medical evidence that claimant was maintained on restriction as to the use of his arm and that surgery ultimately resulted.

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.

_____
Susan M. Kelley
Appeals Judge

CONCUR:

_____
Thomas A. Knapp
Appeals Judge

_____
Dorian E. Ramirez
Appeals Judge