APPEAL NO. 991378

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on June 3, 1999. She determined that the respondent (claimant) had disability resulting from an _____, compensable injury from March 30, 1997, through March 4, 1998. 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.

The claimant worked as a "rod buster helper." His job involved installing steel bars (rebar) in concrete forms to reinforce concrete. He estimated that the bars weigh from 20 to 30 pounds. He sustained a compensable low back injury on _____. After a week or so, he returned to light duty, then regular duty, then apparently back to light duty. He was terminated from his employment on March 24, 1997, for cause, that is, the falsification of information about his health condition in connection with his application for employment. He has not returned to work since this termination.

The claimant admitted that he had a work-related injury in 1990, which involved lumbar herniation and included low back and radiating pain. Surgery was not recommended at the time because the claimant was overweight. He returned to the workforce in June 1995. He was hired for the job where he sustained his current injury about a week before the injury. Dr. T was the treating doctor for the 1990 injury.

On October 8, 1996, the claimant saw Dr. P for the current injury. The diagnosis was a suspected lumbar strain. X-rays showed mild osteophyte formation at L2-3. The claimant was referred for a functional capacity evaluation (FCE) and on October 24, 1996, Dr. P wrote that the claimant was doing "much better" and was "able to continue to perform his duty without any increased risk for injury." He released the claimant to his "regular job." The claimant failed to show up for an October 31, 1996, appointment with Dr. P. The claimant testified that he returned to his regular job and worked until February 13, 1997, when he went back to Dr. P after he experienced low back pain while operating a jackhammer. In his report of this visit, Dr. P noted that the claimant "has been doing heavy manual labor." Dr. P again suspected a lumbar strain and restricted the claimant from excessive climbing, bending, and stooping, and limited his lifting to no more than 25 pounds. The claimant next saw Dr. P on March 3, 1997, "to determine work status for employment." In progress notes for this visit, Dr. P wrote that the claimant continued to complain of back pain, that he was capable of moderate to heavy work, and he was advised to avoid "heavy lifting." No quantification of "heavy" was provided.

An FCE on February 25, 1997, at Dr. P's request placed the claimant in a "medium-heavy" category, defined as occasionally lifting 75 pounds, frequently lifting 35 pounds, and constantly lifting 15 pounds. It considered the claimant's current job to be in the "heavy" category "which would require occasional lifting of large diameter and link rebar in multiple strands of greater than 100 lbs." For this reason, the evaluator commented that "it continues to be rather borderline and questionable that the patient be allowed a full duty unrestricted return to work."

According to the claimant, he began seeing Dr. M in August 1997. On September 22, 1997, Dr. M placed the claimant in a "no work until further notice" status. Dr. M referred the claimant to Dr. T. Dr. T examined the claimant on September 26, 1997, and noted that he continued to be "grossly overweight," gaining some 50 pounds since he had last seen him five years before. He reviewed the MRI and concluded that the "previously noted disk at L3-4 is no longer present and it should be stressed that practically none of his symptoms can be correlated with a lesion at L3-4. . . ." An EMG study of the left leg was normal. A pain consultation provided by Dr. H, at Dr. M's request, on October 22, 1997, stated that the claimant "has not been able to return to work since March 1997." From November 25, 1997, to December 31, 1997, the claimant was enrolled in a work hardening program. At the conclusion of the program, the therapist placed the claimant in a light to medium lifting category and concluded that he could not resume his preinjury job unless it was modified.

Ms. W, the project site safety coordinator, testified that the policy of the site owner at this job site was to limit lifting to 50 pounds. She said that the claimant was placed on light duty until Dr. P released him to full duty in _____. When the claimant came to her office on February 13, 1997, complaining of back pain, she said, he denied any "work event" and sent him back to Dr. P. At this time, Ms. W said she first learned of the prior injury in 1990 and said that the claimant would never have been hired if the employer knew of this previous injury. She said that, if the claimant had not been terminated from his employment, he probably would not have been sent back to his old job because Dr. P would not have allowed it. Mr. H, the rebar foreman, testified that the work could be done within the 50-pound lifting restriction. He also said that after the claimant returned to work, he complained a lot about back and leg pain.

Section 401.011(16) defines disability as the "inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage." The hearing officer considered the evidence and concluded that the claimant had disability as claimed from March 30, 1997, through March 4, 1998. The carrier appeals this determination for essentially four reasons. First, it argues that the claimant's work restrictions were within the requirements of his preinjury job. Second, it contends that the claimant's _____ injury was a strain which resolved shortly thereafter and that he suffered a new strain injury in February 1997 from which disability, if any, would result. The third contention is that the claimant's failure to disclose the prior 1990 injury, which would have precluded him from being hired, has forced the carrier to prove the claimant

could perform work that he was not capable of performing when he was hired due to his "dishonesty and obfuscation." The fourth contention is that the claimant's termination for cause effectively ended disability in the absence of any proof by the claimant that he was unable to "obtain" new employment.

The evidence of the physical requirements of the claimant's job varied widely, from a maximum lifting of 35 pounds up to 100 pounds, with frequent bending. The hearing officer made no express findings that the claimant could return to his preinjury work. Dr. P released the claimant to his "regular job," but there is other evidence from the claimant that he was initially returned to light duty, which was then changed to regular and then back to light duty. The February 1997 FCE considered it "borderline" whether the claimant could return to his preinjury work. Dr. H did not believe the claimant could return and a work hardening program suggested modified duty. Even Ms. W suggested that had the claimant not been terminated from his employment, Dr. P would not have let him continue his regular duties. From this evidence, we conclude that the hearing officer, at least implicitly, determined that the claimant could not return to his prior duties and find the evidence sufficient to support such an implied determination. With regard to the carrier's argument that the claimant had recovered from his initial strain injury and sustained a new strain injury in February 1997, which is the cause of his inability to earn the preinjury wage, we note that the injury of _____, need only be a cause of the claimed disability, not the only cause. Texas Workers' Compensation Commission Appeal No. 931117, decided January 21, 1994. This, too, presented a factual question for the hearing officer, which she resolved in favor of the claimant. We find the evidence sufficient to support this determination. In its third point on appeal, the carrier argues that only because of the claimant's "dishonesty and obfuscation" in his employment application was he hired. If he had been honest in disclosing his true health history, he never would have been hired and the carrier should not be liable for a situation created by the claimant's dishonesty. We are unwilling to conclude from the evidence presented that the claimant's preexisting health condition would have definitely prevented his employment. In any case, we do not think the answer to this question was or necessarily should be dispositive. It has been noted that an employer takes an employee as is with any susceptibility toward injuries. *See* Texas Workers' Compensation Commission Appeal No. 990401, decided April 14, 1999. In this case, the claimant actually worked for approximately a week before the injury and attributes the injury to a specific lifting event. We decline to reverse an award of disability because of problems in the hiring process even if brought on by the claimant.

The critical issue for the resolution of this case is the carrier's argument that the claimant's termination for cause effectively ended any disability. In Texas Workers' Compensation Commission Appeal No. 91027, decided October 24, 1991, the Appeals Panel addressed this question. In that case, the claimant was injured on the job, was off for about three months, returned to light duty and was fired for dishonesty about six weeks later. The hearing officer found that disability ended because the claimant was terminated. The Appeals Panel reversed and rendered, in part, a decision in favor of disability. In doing so, it observed that even when a termination is justified, the results of the injury may

remain and prevent full employment. Thus, disability could continue, if a cause of the inability to earn the preinjury wage after termination was the compensable injury. This case also noted the problems associated with an injured employee obtaining and retaining light duty with the preinjury employer, who, for any number of reasons, may be disposed to offer the light duty, and the problems faced when that employee seeks to obtain and retain employment with a new employer. The opinion concluded with the observation that when the injured employee established that the injury prevents him from obtaining and retaining new employment, disability is established. The same reasoning was applied in Texas Workers' Compensation Commission Appeal No. 93707, decided September 16, 1993, where we stated:

> Where an injured employee is retained in a working position by the employer but is subsequently terminated for good cause, and there is no changed condition regarding the injury or medical problem, disability does not necessarily thereby recur since the reason for the inability to obtain or retain employment at the preinjury wages is no longer resulting from the compensable injury. (Emphasis added.)

Whether the claimant has established disability after a termination for cause is a question of fact for the hearing officer to decide. Texas Workers' Compensation Commission Appeal No. 92147, decided May 29, 1992. In determining whether there is continuing disability, a hearing officer many consider that a return to light duty when terminated can be evidence of continuing disability. Texas Workers' Compensation Commission Appeal No. 980003, decided February 11, 1998.

In the case we now consider, the claimant testified that he could not earn his preinjury wage. The foreman, Mr. H, testified that after his return to work, the claimant complained a lot about back and leg pain. The hearing officer could consider this testimony and the medical evidence, discussed above, as well as the notion that returning to light duty with his employer did not necessarily reflect an ability to obtain new employment in a limited work status and conclude that the claimant had established disability after the termination. While another hearing officer may have decided otherwise, we will reverse a factual determination of a hearing officer only if that determination is so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986). Applying this standard of review to the record of this case, we find the evidence sufficient to support the determination of disability.

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

Gary L. Kilgore
Appeals Judge