

APPEAL NO. 991623

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 5, 1999. With respect to the issues before him, the hearing officer determined in his first decision and order that: (1) the respondent (claimant) sustained a compensable injury in the course and scope of his employment; (2) the date of injury is _____; (3) claimant timely reported his injury; and (4) claimant did not have disability. Claimant appealed the disability determination, contending that he had disability from his compensable injury. Appellant (carrier) responded that the Appeals Panel should affirm the disability determination. Carrier appealed the injury and timely notice determinations on sufficiency grounds. Claimant did not respond to carrier's appeal. The Appeals Panel affirmed the injury and timely notice determinations, but remanded the disability issue to the hearing officer. Texas Workers' Compensation Commission Appeal No. 990782, decided June 1, 1999. The Appeals Panel noted that claimant was under a conditional work release at the time that he was terminated and remanded for consideration of the disability issue in that regard. The hearing officer did not hold a CCH on remand. In his decision and order on remand, the hearing officer determined that claimant had disability from November 10, 1998, to the date of the CCH. Carrier appeals that determination on remand on sufficiency grounds. The file does not contain a response to this appeal after remand.

DECISION

We affirm.

Carrier contends the hearing officer erred in determining that claimant had disability after he was terminated from his job. Carrier asserts that claimant did not have disability after his termination because: (1) claimant continued to work full-duty after his injury; and (2) claimant said that he would still be working if he had not been terminated. Carrier contends that the claimant failed to prove that he had the "inability *because of a compensable injury* to obtain and retain employment at wages equivalent to the preinjury wage. [Emphasis in original.]"

The applicable law regarding disability, our appellate standard of review, and the facts are stated in our prior decision. Briefly, claimant testified that he sustained a shoulder injury while working as a truck driver on _____. By August 25, 1998, his doctors had advised him to restrict the use of his arm. An October 6, 1998, MRI report stated that claimant had a tendon tear in his shoulder. Claimant said he continued to work his regular hours after his injury, although he had pain, took medications for pain, and stopped to rest while working. He said he was terminated in November 1998 and there was evidence that he was terminated because he did not take a direct route while driving. Claimant said that after he lost his job, he began to seek work as an equipment operator, but that he did not continue looking for work because he was not "at 100%." Claimant indicated that truck driving jobs were plentiful.

In our prior decision, the Appeals Panel noted that termination for cause does not necessarily preclude a finding of disability. Texas Workers' Compensation Commission Appeal No. 92282, decided August 12, 1992. The Appeals Panel acknowledged that the issue of

whether disability exists is a question of fact for the hearing officer to decide. Texas Workers' Compensation Commission Appeal No. 93560, decided August 19, 1993. The 1989 Act "is not intended to be a shield for an employee to continue receiving temporary income benefits where, taking into account all the effects of the injury, he is capable of employment but chooses not to avail himself of reasonable opportunities or, where necessary, a bona fide offer." The Appeals Panel has also stated that a restricted release to work is evidence that the effects of the injury remain and that disability continues; that where the medical release is conditional and not a return to full duty because of the compensable injury, disability, by definition, has not ended; and that an employee under a conditional work release does not have the burden of proving inability to work and is not required to look for work. See Texas Workers' Compensation Commission Appeal No. 970597, decided May 19, 1997.

In remanding, the Appeals Panel noted that it was essentially undisputed that the claimant was continuing to work after his injury and before his termination, but that he was under a conditional work release regarding the use of his arm. The Appeals Panel said that it was unable to tell whether the hearing officer considered the applicable law regarding disability and conditional work releases and remanded the case for reconsideration for that reason.

In his first decision and order, the hearing officer determined that: (1) claimant was able to work from the date of his injury through the date of his termination performing his usual duties; and (2) claimant has been able to obtain employment at wages equivalent to his preinjury wage at all times subsequent to _____. In that decision, the hearing officer did not mention that claimant was continuing to work, but that he had been told by his doctor to use his uninjured arm more than the other. In his decision and order after remand, the hearing officer determined that: (1) claimant had a torn tendon in the left shoulder which limited his ability to work; (2) claimant was given light-duty restrictions on December 1, 1998; and (3) claimant proved that he was unable to obtain and retain employment at wages equivalent to the preinjury wage "due to his compensable injury after he was terminated from employer."

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 observed that even when a termination is justified, the results of a compensable 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. The opinion concluded with the observation that when the injured employee establishes that the injury prevents him from obtaining and retaining new employment, disability may be established. In determining whether claimant had disability, the hearing officer could consider that if the employee is continuing to work, but has work restrictions when terminated, this can be evidence of disability. See Texas Workers' Compensation Commission Appeal No. 980003, decided February 11, 1998.

In the case we now consider, the claimant testified that he did not look for a truck driving job after his termination because he was not at 100%. There was evidence that claimant's use of his arm was restricted and that, though he was continuing to work, he was working in pain. The hearing officer could have chosen to give weight to this testimony and the medical evidence

discussed above and in our prior decision. The hearing officer was not required to find that claimant had disability in this case. However, under the facts of this case, the hearing officer could conclude that the claimant had established disability after the termination. Applying our standard of review, we find the evidence sufficient to support the determination of disability.

We affirm the hearing officer's decision and order.

Judy Stephens
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Tommy W. Lueders
Appeals Judge