APPEAL NO. 991810

This appeal is considered in accordance with the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On July 29, 1999, a contested case hearing was held. The issue concerned whether the respondent (claimant) had disability from his _____, injury beginning July 27, 1998, and continuing to the present. Whether the employer made a bona fide job offer was not in issue.

The hearing officer held that the claimant had disability for the period from July 27, 1998, through January 20, 1999, and then on the day of June 10, 1999.

The appellant (carrier) appeals and argues that, because light duty was always available to the claimant after July 27, 1998, the claimant did not have the inability to obtain and retain employment equivalent to his preinjury wage and, therefore, did not have disability. The carrier argues that the decision is not entirely clear. Much of the carrier's appeal argues that light-duty work for 40 hours a week was available. There is no response from the claimant. There was no appeal that the claimant's disability ended on January 20, 1999, based upon the hearing officer's stated belief that a maximum medical improvement (MMI) from the carrier's doctor equated to a full-duty release, notwithstanding subsequent surgery. Our decision is necessarily confined to the period of disability under appeal by the carrier, which runs from July 27, 1998, through January 20, 1999.

DECISION

We affirm.

The claimant was employed as a warehouseman by (employer). On _____, while pulling orders for packing, he injured his neck and left shoulder. The claimant said he was sent first to the company doctor, Dr. B, who diagnosed a left shoulder strain and released him back to light-duty work, lifting no more than five to 10 pounds. However, the claimant said that the work he did, whether cleaning or assembly, caused further pain to his shoulder. The assembly work required him to assume a posture with both arms extended. (This is somewhat corroborated by the carrier's videotape of the assembly line.)

Dr. B ordered an MRI for the claimant's neck, but not his shoulder. The claimant also had an EMG, which the doctor told him did not show nerve damage. The MRI apparently caused Dr. B to set up a myelogram. At this point, the employer, who had been paying directly for the medical treatment, said that the claim would be turned over to the insurance company. No myelogram was done. The claimant said that he kept complaining about the pain and Dr. B said that there was nothing further to be done except for the myelogram because he believed the claimant's problem was in his neck.

The claimant was found to be at MMI by Dr. B on July 7, 1998, with a three percent impairment rating. (A designated doctor later disagreed that the claimant was at MMI, and certified no MMI as of September 10, 1998.) At this point, the claimant began treating with Dr. A, D.C., on July 27, 1998. Dr. A discussed the claimant's light-duty activities with him

and took him entirely off work. A cervical myelogram conducted on October 26, 1998, was normal. Dr. O examined the claimant for the carrier on February 12, 1999, and pronounced the claimant at MMI as of January 20, 1999, with normal range of motion of his shoulders, although noting various pain complaints involving the claimant's shoulder and left arm. However, an MRI of his left shoulder taken February 26, 1999, showed an eight-millimeter tear. The claimant had surgery June 10, 1999.

The medical evidence indicates that Dr. A referred the claimant to Dr. N, who, at least in August 1998, was attempting to track down the source of what he described as cervical radiculopathy. It appears that appreciation by Dr. A that the problem may have related to the claimant's shoulder was somewhat delayed. In the meantime, the claimant testified that his ability to do activities suffered and he had depression relating to his injury. He received pain management and physical therapy. He said Dr. A had kept him off work, pending work hardening therapy. Dr. A wrote a letter in December 1998 stating his belief that the claimant could work only at the sedentary level, according to a functional capacity evaluation.

The claimant pointed out that while he worked for the same hourly rate of pay, his hours were "down" on light duty because he only worked 40 hours. However, there were no stipulations or other evidence elicited on the amount of his preinjury average weekly wage (AWW) or his postinjury earnings on light duty. He agreed that the employer told him it had light duty available and would be willing to accommodate him.

Section 408.103(e) provides that if an employee is offered a bona fide position of employment that the employee is reasonably capable of performing, then weekly earnings after the injury shall include the weekly wage for the position offered. Unfortunately for the carrier's position and most of the evidence it presented, whether the claimant was tendered a bona fide job offer was not articulated or brought forward as an issue. A bona fide job offer and disability are, in fact, two different issues as stated in Texas Workers' Compensation Commission Appeal No. 952098, decided January 26, 1996. *See also* Texas Workers' Compensation Commission Appeal No. 94905, decided August 26, 1994.

There is no job search requirement for temporary income benefits as there is for supplemental income benefits and, consequently, the fact that a worker is released only to limited duty is evidence that disability continues, not that it has ended. The Appeals Panel early on held that where a medical release is given that is conditional, and there is not a return to full-duty status, disability by definition continues unless the claimant obtains and retains employment equivalent to his preinjury AWW. Texas Workers' Compensation Commission Appeal No. 91045, decided November 21, 1991. Disability cannot be said to end when a restricted release is given. Texas Workers' Compensation Commission Appeal No. 941092, decided September 28, 1994; Texas Workers' Compensation Commission Appeal No. 941566, decided January 4, 1995. Therefore, the hearing officer was not required to equate the existence of light duty with an end to disability. For that matter, disability and MMI are two different issues as well, and the achievement of MMI does not, as the hearing officer indicated in his decision, equate to a full-duty release or an ending of

disability; however, the claimant has not appealed or asserted any error in ending disability on this date and we therefore cannot address any error.

In reviewing the record, we cannot agree that the great weight and preponderance of the evidence is against the hearing officer's decision on the matter appealed, and we affirm the decision and order.

_____
Susan M. Kelley
Appeals Judge

CONCUR:

_____
Thomas A. Knapp
Appeals Judge

_____
Alan C. Ernst
Appeals Judge