

## APPEAL NO. 991901

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On August 6, 1999, a contested case hearing (CCH) was held. With regard to the issues before her, the hearing officer determined that appellant (claimant) had sustained a compensable injury to her lumbar spine on \_\_\_\_\_, that claimant had given timely notice to the respondent employer (self-insured) and that claimant had disability from October 26, 1998, through April 1, 1999. The hearing officer's findings and decision regarding injury and notice have not been appealed and therefore have become final. See Section 410.169. Facts, as found by the hearing officer, regarding those issues will only be discussed to provide background and as they relate to the disability issue.

Claimant appeals the hearing officer's findings on disability, contending that claimant's testimony and medical evidence supported disability findings after April 1, 1999, and that the hearing officer's determination that disability ended on April 1, 1999, was not supported by the evidence. Claimant requests that we reverse the hearing officer's decision and award her "income benefits from February 22, 1999 [?] through the date of the [CCH]." The certified self-insured responds that since claimant failed to inform her employer of her light-duty release and restrictions, she was not entitled to disability after April 1, 1999. Self-insured urges affirmance.

### DECISION

Reversed and remanded as to the appealed issue.

Claimant was a factory worker for the employer garment (blue jeans) manufacturer. On \_\_\_\_\_, claimant sustained a left hip and low back injury lifting a bundle of pants. The self-insured's main focus at the CCH was on the timely reporting of the injury to a supervisor; however, as indicated above, the hearing officer resolved that issue in claimant's favor. Claimant continued to work in pain, went to a hospital emergency room on October 7, 1998, was given some medication and continued working until October 27, 1998, when she saw her family doctor, Dr. C, who took her off work. In a report of that date, Dr. C indicated he suspected a herniated disc and ordered a lumbar spine MRI which was performed on November 2, 1998, and was essentially normal with some degenerative changes. Although there are some later reports from Dr. C, Dr. C apparently referred claimant to Dr. U. In a report dated November 9, 1998, Dr. U diagnosed a lumbar sprain, did a lumbar spine assessment and ordered physical therapy. A November 30, 1998, note by Dr. U indicates an MRI was ordered to rule out a herniated disc. On December 3, 1998, Dr. U administered an epidural steroid injection. A January 7, 1999, note comments on continued low back pain and "[claimant] refuses the epidural injection as she is disputing this as a workers' compensation injury and therefore she is in limbo. She has not been to

therapy." A March 4, 1999, note indicates claimant "received an epidural steroid injection on 02/26/99, which as [sic] not helped her out much to this point." In that note, Dr. U anticipated returning claimant to some "limited type of work--Desk job only." Claimant continued to see Dr. U and received treatments of hot packs, electrical stimulation, etc., in March 1999. In an April 1, 1999, note, Dr. U returned claimant to limited-type work stating "she is to continue light duty, but according to the patient none is available in her position." A "Return to Work" slip dated April 1, 1999, shows claimant released to light duty with a five-pound maximum lifting restriction with "NO Bending." Dr. U's notes indicate claimant "was a no-show" for an April 2, 1999, appointment. Claimant testified that she did not go back to the employer or advise the employer of the light-duty release because she did not feel that she could do any of the work that the employer had. The self-insured's attorney represented that the self-insured had a light-duty job program.

Claimant changed treating doctors to Dr. J, D.C., on April 2, 1999. In a report of that date, Dr. J diagnosed low back pain, sciatica, lumbar sprain/strain and lumbar subluxation. Dr. J estimated that claimant would reach maximum medical improvement in 90 days and recommended "a plan of treatment which consists of passive modalities and possible kinetic activities . . . ." Dr. J took claimant off work. Subsequently, claimant was referred to Dr. A, who in a report dated June 16, 1999, diagnosed a lumbar strain/sprain and possible internal derangement of the hip. Claimant testified that no doctor has returned her to full duty.

The hearing officer, in her Statement of the Evidence, commented:

Regarding the issue of disability, the Claimant was released to light duty on April 1, 1999. However, the Claimant failed to present to her employer her restrictions to see if they could accommodate her physically. Claimant also reported to her doctor that her employer could not accommodate her restrictions although she had not even contacted the employer. Based on the evidence and testimony presented, the Claimant did . . . have disability resulting from the injury beginning October 27, 1998 and continuing through April 1, 1999.

Disability is defined as the "inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wages." Section 401.011(16). The claimant has the burden of proving disability. Texas Workers' Compensation Commission Appeal No. 941566, decided January 4, 1995. Whether disability exists is a question of fact for the hearing officer to decide and can be proved by the testimony of the claimant alone, if found credible. Texas Workers' Compensation Commission Appeal No. 93560, decided August 19, 1993. We have further held that a conditional or light-duty release is evidence that disability continues and a claimant under a light-duty release does not have the obligation to look for work or to show that work was not available. See Texas Workers' Compensation Commission Appeal No. 970597, decided May 19, 1997, and cases cited

therein. In this case, it appears from the hearing officer's discussion that the hearing officer is imposing an additional requirement on a claimant with a light-duty release which requires the claimant to present that release, with any restrictions, to the employer "to see if they could accommodate her physically." We find no such requirement in either the 1989 Act, Texas Workers' Compensation Commission (Commission) rules or prior Appeals Panel decisions. We have held, as noted, that a light-duty or conditional release is evidence that the disability continues and we hold that the hearing officer impermissibly added an additional requirement that a claimant must present a light-duty release to the employer in order for the employer to find employment within claimant's restrictions and failure of the claimant to do so will end disability.

Further, the hearing officer makes no reference to Dr. J's off-work report of April 2, 1999, and claimant's continued treatment by Dr. J and Dr. A. Even if claimant's disability ended on April 1, 1999, the Appeals Panel has held that disability is not necessarily a continuing status and a claimant may have intermittent or recurring periods of disability. Texas Workers' Compensation Commission Appeal No. 962342, decided January 6, 1997.

Accordingly, we reverse the hearing officer's decision on disability as imposing an additional requirement on the claimant and for failing to comment or make findings on Dr. J's off-work order, and remand the case for the hearing officer to make further findings on the issue of disability only, not inconsistent with this opinion.

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 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:

---

Alan C. Ernst  
Appeals Judge

---

Dorian E. Ramirez  
Appeals Judge