

APPEAL NO. 992027

Following a contested case hearing held on August 23, 1999, pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act), the hearing officer resolved the sole disputed issue by determining that the respondent (claimant) had disability from April 7, 1999, through the date of the hearing. The appellant (carrier) urges in its request for review that this determination is against the great weight of the evidence. Claimant's response urges the contrary and seeks our affirmance.

DECISION

Affirmed.

The parties stipulated that claimant sustained a compensable injury on _____ (all dates are in 1999 unless otherwise stated).

Claimant testified that in February she began working for the employer in the shipping department and repetitively lifted boxes weighing between 20 and 30 pounds; that on _____, she felt a sharp pain in her right hand which radiated into her wrist and fingers; that the employer sent her to a (clinic) on March 22nd where she was seen by Dr. D, who prescribed therapy and released her to light duty with a five-pound lifting restriction; that she commenced light duty consisting of preparing paper strips to be put in packing boxes; and that she worked her usual hours for her regular pay while performing light duty.

She further testified that soon after reporting this work-related injury, the employer accused her of stealing a bag of coffee and on April 6th terminated her employment for that reason; that she did not commit the alleged theft and the employer never initiated a criminal charge; and that her application for unemployment benefits from the Texas Workforce Commission was denied because she had been fired.

Claimant further testified that on April 7th, she commenced treatment with Dr. J, a chiropractor, because her hand still hurt and she had not yet had a choice of treating doctor; that Dr. J took her off all work on that date and referred her for testing; that the testing revealed that she had carpal tunnel syndrome (CTS); that she was also seen by the carrier's doctor, Dr. K, who said her CTS was due to being overweight but who also felt that she required surgery; and that she was referred to Dr. G. Claimant said that Dr. G performed carpal tunnel release surgery on her right wrist on August 17th; that the surgical wound is bandaged and she still retains the stitches; and that she has been told to expect approximately four weeks of therapy after the wound heals. She said she has not worked since April 7th and cannot now work due to pain and numbness in the right wrist, hand, and fingers.

Dr. J's Initial Medical Report (TWCC-61) dated April 14th states that all active ranges of motion in the right wrist and hand were decreased to 20%; that pain, stiffness, and

soreness were noted; and that the Phalen's orthopedic examination was positive on the right wrist. This form reflected that claimant could return to a limited type of work on "6-1-99" and to full-time work on "8-1-99."

In his August 2nd report of his independent medical examination of claimant on July 29th, Dr. K stated that claimant, who is right-hand dominant, has pain in the right wrist, some finger numbness, and is also symptomatic in the left hand; that June 7th neurodiagnostic studies note bilateral CTS of moderate to severe degree, worse on the right, which Dr. K later characterized as "significant"; and that claimant wears a splint on the right wrist. Dr. K also stated that since claimant's work injury was to the volar aspect of the right wrist, "and her nerve studies are so severe," and since she had only worked for this employer for several weeks, it is probable that her bilateral CTS was preexisting and not due to her work activity. Dr. K agreed that claimant required surgery on her right wrist.

Dr. G wrote on August 19th that claimant underwent an endoscopic carpal tunnel release on the right wrist on August 17th; that she is unable to work at any occupation at this time; and that her work status will be reevaluated in four weeks.

Claimant had the burden to prove by a preponderance of the evidence not only that she had disability but also the period or periods during which she had disability. Disability means the "inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage." Section 401.011(16). The determination of an employee's disability is a question of fact for the hearing officer.

The hearing officer found that after the injury, the employer reassigned claimant to new tasks consistent with her work restriction of not lifting over five pounds; that claimant could have performed these new tasks up to the date of her surgery on August 17th; that on April 6th, claimant "was terminated" for cause by the employer; that claimant has been unable to perform the work she was doing on the date of her injury since the day of her injury; and that due to the compensable injury, claimant has been unable to obtain and retain employment at wages equivalent to her preinjury wage only for the period beginning April 7th and continuing through the date of the hearing.

The carrier contends on appeal that the finding of disability from April 7th is inconsistent with the findings that claimant was reassigned to light-duty tasks, that she could have performed these new tasks up to the time of her surgery on August 17th, and that her employment was terminated for cause on April 6th. The carrier urges that the sole reason claimant did not work between April 6th and August 17th is because her employment was terminated for cause. The carrier also urges, though less forcefully, that claimant did not have disability after her surgery.

In Texas Workers' Compensation Commission Appeal No. 91027, decided October 24, 1991, the Appeals Panel considered the case of a hospital aide who hurt her back transferring a patient, who eventually returned to light-duty work at her preinjury wage, and

whose employment was subsequently terminated for a dishonest act. Our decision stated that under the circumstances present in that case and in view of the definition of disability, the employee's ability to obtain and retain employment at the time of her termination was not because of her compensable injury but was because of misconduct unrelated to her injury and noted that the employee performed light duty without incident until the termination of her employment. We went on to state that "if and when an injured employee, who is terminated for cause, can sufficiently establish that the work-related injury is precluding him or her from obtaining and retaining new employment at preinjury wage levels, temporary income benefits once again become payable." With regard to the problem of finding disability after a termination of employment for cause, we stated the following:

It is our opinion that a broadly stated rule forever denying workers' compensation benefits to an employee returned to light duty and subsequently discharged for cause [citation omitted] has the potential to undermine a very basic purpose of workers' compensation programs: to compensate injured workers for loss of earnings attributable to a work-related injury. While virtually all case authority holds that the reason for the termination must be justified or for a just cause, the results of the injury remain and may prevent any or very limited gainful employment at all. Therefore, we are convinced that an approach to this issue which also factors in the continuing effect of the injury on the capacity to obtain and retain some gainful employment is more in keeping with the 1989 Act, the intent and purposes of workers' compensation and is fairer to all parties.

In Texas Workers' Compensation Commission Appeal No. 92016, decided February 28, 1992, our decision stated, succinctly, that "[i]nvoluntary termination that is based on good cause can be a factor, along with the continuing effect of the injury on the ability to obtain and retain employment, in considering whether temporary income benefits are due. Texas Workers' Compensation Commission Appeal No. 91027 [*supra*]. Also, see Gonzales v. TEIA, 772 S.W.2d 145 (Tex. App. - Corpus Christi 1989, writ denied)."

In Texas Workers' Compensation Commission Appeal No. 92200, decided July 2, 1992, the Appeals Panel stated that "while the reason for termination may be a factor to evaluate, the focus of the inquiry as to disability is on the inability to 'obtain and retain' employment at equivalent wages," and that "the fact that a termination may have been for cause does not, in and of itself, foreclose the existence of disability."

In Texas Workers' Compensation Commission Appeal No. 92277, decided August 5, 1992, we observed that a conditional medical release (limited duty) did not end disability unless the employee was thereafter able to obtain and retain employment at preinjury wage levels. See also Texas Workers' Compensation Commission Appeal No. 92282, decided August 12, 1992, where the Appeals Panel affirmed a finding of disability for a period after the injured employee had been terminated for cause and was released only for light-duty

work. *And see* Texas Workers' Compensation Commission Appeal No. 93449, decided July 21, 1993.

The hearing officer is the sole judge of the weight and credibility of the evidence (Section 410.165(a)) and, as the trier of fact, resolves the conflicts and inconsistencies in the evidence (Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ)). As an appellate reviewing tribunal, the Appeals Panel does not disturb the challenged findings of a hearing officer unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust and we do not find them so in this case. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

The decision and order of the hearing officer are affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Gary L. Kilgore
Appeals Judge