

APPEAL NO. 000014

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On December 14, 1999, a hearing was held. The hearing officer determined that appellant (claimant) sustained disability from September 3, 1999, through the date of the hearing, December 14, 1999. Claimant asserts that there is no evidence to support Finding of Fact No. 3 and Finding of Fact No. 4 which said that claimant was fired for cause and would still be working if not fired for cause. Respondent (carrier) replied that the decision should be affirmed.

DECISION

We reverse and render in part and reverse and remand in part.

Claimant worked for (employer) on _____. The parties stipulated that she sustained a compensable injury on _____. There is medical evidence from (clinic) indicating that claimant was allowed to return to work on January 26, 1999, with restrictions prohibiting heavy lifting and limiting "overhead work." Claimant worked from that date until she was suspended on February 7, 1999, and terminated on February 10, 1999.

The hearing officer found that when claimant had surgery to her shoulder on September 3, 1999, disability began and continued through the date of hearing; there is no appeal to disability being present during that period of time.

The period of time in which no disability was found, and which is under appeal, is from February 7, 1999, to September 3, 1999. Claimant appealed Finding of Fact No. 3 and Finding of Fact No. 4 which said claimant's termination was for "cause" and that she would still be working if not "fired for cause." We note that another finding of fact, Finding of Fact No. 7, was not appealed; it said that claimant's "inability to obtain and retain employment . . . between February 7, 1999, and September 2, 1999, was not [sic] due to her compensable injury." Our review of the Statement of Evidence and other findings of fact indicates that the hearing officer based his decision on claimant's termination and that was the basis for the inability to obtain and retain employment. We therefore will not affirm based on Finding of Fact No. 7 being unappealed, although that finding would sufficiently support the determinative conclusion of law of no disability from February 7 through September 2, 1999.

Carrier provided two medical records; one is the opinion of Dr. B, dated July 28, 1999, in which he says that claimant can work, and the other consists of medical reports of Dr. R in which he addresses physical therapy and work conditioning among other matters. No statements, other documents, or testimony were presented by carrier.

Claimant testified that she was a manager for employer. She testified that when she returned to work with restrictions in January 1999, she was required to do some functions, such as lift money bags, that were not within her restrictions. She said that her termination

took place because of her return of a doll purchased from employer. She said that she collects dolls. On cross-examination she said that she purchased the doll in question three years before she returned it. She added that she still had the receipt so when the same doll went on sale, she returned the one she purchased, got a refund at the higher price, and then bought it back at the current, lower price. She stated that she has been trained in employer's policy concerning returns, describing that policy as allowing a return when there is a receipt and the item is in good condition. On cross-examination, when questioned about the three-year period of time between purchase and return, claimant said, "yeah, it's been done plenty of times by other customers and other associates in the store." Also during cross-examination, claimant said that she was the one who determined that the doll was still in good condition, without checking with a supervisor. Claimant said that when her manager learned of her action, she was suspended on February 7th and terminated on February 10, 1999.

Claimant provided an "Appeal Tribunal Decision" from the Texas Workforce Commission (TWC) which said that claimant had been discharged "because the employer believed the claimant made a fraudulent refund," but then noted claimant's testimony of similar refunds and pointed out that:

the employer provided no evidence prohibiting these types of transactions.

That decision concluded that claimant had not been shown to have been terminated for misconduct. The only evidence from employer that was noted in this TWC decision involved the way in which the return occurred; the decision said, "the employer provided only secondhand testimony regarding how the transaction took place." While the hearing officer may not be governed by the TWC's standards regarding "secondhand testimony" since the 1989 Act does not require that the rules of evidence be followed, the only reference by the TWC to evidence from employer was in regard to the way the refund occurred. No evidence, either rejected or accepted by the TWC, is recited which addresses policies, rules, or standards of the employer which would make the return open to consideration as a fraudulent action. As stated, claimant testified about employer's policy concerning returns (not just about what is allowed to get by), which she said involved a receipt and the condition of the product. There was no evidence at the hearing under review contradicting claimant's description of employer's policy and no evidence from employer setting forth what its policy, rules, or standards were that would apply to claimant's action and would provide a basis for a conclusion of fraud.

Carrier argued that the Texas Workers' Compensation Commission (Commission) should consider whether the termination was a "legitimate personnel action" which was not based upon an employer's desire to terminate an employee because she had a workers' compensation claim. There is some language of that nature in Texas Workers' Compensation Commission Appeal No. 91027, decided October 24, 1991, wherein mention is made of whether the termination is a "ruse . . . without justification . . . or selectively applied to [claimant]"; that case, in discussing how other jurisdictions deal with termination relative to disability, also used stronger language when it said, "it is apparent that the cause

of the termination following a return to employment must be a 'just cause' for discharge." Appeal No. 91027 then said:

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.

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 . . . is more in keeping with the 1989 Act . . . and is fairer to all parties.

The issue of disability is not governed by whether there is a legitimate personnel action such as is set forth in determining whether a particular type of compensable injury has occurred, but may be influenced by whether the termination was for "just cause" or "good cause." In this case, with no evidence from employer that the practice in question is prohibited and with some evidence that it met employer's policy for returns, there is no evidence of termination for just cause presented in the record under review. Therefore, since findings of fact which said termination was for cause were the basis for a determination that there was no disability from February 7, 1999, to September 3, 1999, that determination of no disability is reversed.

A new decision is rendered that claimant had disability from February 7, 1999, to July 28, 1999, the date that Dr. B said claimant could work (disability from September 3, 1999, to the date of hearing was not appealed and is final as to that time period). With medical evidence of record from July 28, 1999, to September 3, 1999, indicating both an ability to work Dr. B and a restricted ability to work (clinic) and with the hearing officer only having addressed disability in the context of the termination, the case is remanded for the hearing officer to determine whether or not there was disability from July 28, 1999, to September 3, 1999.

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.

Joe Sebesta
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

DISSENTING OPINION:

I respectfully dissent. The claimant has a history of actually working up to the termination. The hearing officer found that the claimant would still be working but for the termination. There is evidence to support this. Whether the termination was for cause or not—which is the focus of the claimant's appeal—matters little in light of this finding. I would affirm.

Alan C. Ernst
Appeals Judge