APPEAL NO. 000709

This appeal arises pursuant to the Texas Workers= Compensation Act, TEX. LAB. CODE ANN. ' 401.001 *et seq.* (1989 Act). A contested case hearing was held on March 7, 2000. The hearing officer determined that the appellant=s (claimant) low back injury of _____, does not extend to nor include her left knee injury in _____; and that the claimant did not have disability from May 24, 1997, through August 12, 1997. Claimant has requested our review of the disability determination. The respondent (self-insured) urges in response that the hearing officer correctly decided the disability issue. The hearing officer=s determination of the extent-of-injury issue, not having been appealed, has become final. Section 410.169.

DECISION

Reversed and a new decision rendered.

Claimant testified that while working as a nurse=s assistant at one of the self-insured=s elementary schools, she injured her back on _____, while assisting a student in a wheelchair; that in January 1997 she underwent lumbar spine surgery at the L3-4 and L4-5 levels; that Dr. S released her for return to "very light work" with restrictions against bending, stooping, twisting, and lifting more than eight pounds; and that on or about March 8, 1997, she returned to work at the school performing tasks within her restrictions until late May 1997 when the school term ended. Claimant further stated that in the summers of 1994 and 1995 she worked in the office of a shopping mall and in the summer of 1996 at a card store at another mall before resuming her school job each August and that she knew she could not perform her summer job at the mall office during the 1997 summer months because of her bending, stooping, and twisting restrictions. According to her responses to the self-insured=s interrogatories and her testimony, claimant applied for a job in the summer of 1997 at the mall card shop where she had previously worked but could not do the job because she could not stock shelves; she looked for work at a day care center but was told she could not work there because she could not lift the kids; and she called the self-insured=s central office "to inquire as to subbing" and was advised not to apply due to her lifting limits. Claimant also testified to seeing a summer job posting for a position working with special education students but was told she could not handle the position with her restrictions. Claimant indicated that in August 1997 she resumed her job at the school, working within her restrictions, and was still only released for light duty.

Claimant indicated that her school salary was annualized, referring to it as "continuation pay." She explained that she received school paychecks every month even though she did not work at the school from sometime in May until sometime in August each year. Claimant further stated that because she did not return to work by March 1, 1997, following her surgery, she did not receive paychecks in the summer months of 1997 and that both she and the school principal were unsuccessful in obtaining the self-insured=s rationale for that decision.

The self-insured=s claims manager, Ms. S, wrote claimant=s attorney on June 25, 1999, stating, in part, as follows:

> I received your letter regarding the payment of temporary income benefits [TIBs] to [claimant] during the summer of 1997. In reviewing our records, [claimant] had surgery on1-8-97 and 6-5-98. Carrier=s records reflect that claimant was disabled from work the following dates and was paid TIBS accordingly:
>
> > 10/18/96 - 10/23/96; 1/8?97 - 3/9/97; 10/6/97; 10/24/97; 6/5/98-8/4/98;
>
> [Claimant] is a seasonal employee and does not work during the summer months. Her normal pay is divided by 12 months so that she receives a paycheck the year round. However, when employees are off for an extended period of time, an adjustment must be made for the number of days that she did not work during the year. However, this has no effect on her workers= compensation income benefits. [Claimant] was paid TIBS when she was disabled from working due to her compensable injury.

In Finding of Fact No. 5, which is the hearing officer=s only finding of fact in support of his Conclusion of Law No. 3 that claimant did not have disability from May 24 through August 12, 1997, as a result of her compensable injury of _____, the hearing officer found that "[f]rom May 24 through August 27, 1997, the Claimant continued to be able, despite her compensable injury and medical treatment therefor, to obtain and retain employment at a wage equivalent to her pre-injury wage."

Claimant contends that she had only been released for light duty following spinal surgery in January 1997; that she returned to work for the self-insured performing light duty from March 8, 1997, to May 23, 1997, when the school term ended; and that she was unable to obtain employment during the summer months of 1997, at the self-insured=s school or elsewhere, because of her restrictions from her compensable injury.

In his discussion of the evidence the hearing officer states as follows:

> In regard to disability for the summer of 1997, the Claimant was able to work for the Employer=s school for the last eleven weeks of the school term at her regular wage. The only thing that changed on May 24, 1997, was that school was out. Also, the Employer had paid her all of the wages she earned for that school year, so she did not receive the pro-rated installments in the summer months. Other than that, nothing changed. Her medical condition was the same. The reason she could not earn her regular wage was because school had stopped, and she had already earned and been paid her annual wage. She had already

been paid income benefits for the two months of work she missed, January and February 1997, so that loss of wages was already compensated.

Finding of Fact No. 5 is so against the great weight of the evidence as to be clearly wrong and manifestly unjust and we reverse it. 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). Conclusion of Law No. 3, being unsupported by any sufficient finding of fact, is also reversed.

From his discussion of the evidence it appears that the hearing officer became distracted by the evidence concerning claimant=s not working at the school during the summer vacation periods, the annualization of her salary, and the earlier payment of TIBs, and lost sight of the unrefuted evidence that during the summer months of 1997 claimant was only released to work with restrictions.

Disability is defined as "the inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage." Section 401.011(16). The compensable injury need not be the sole cause of the disability. Texas Workers= Compensation Commission Appeal No. 960054, decided February 21, 1996. In Texas Workers= Compensation Commission Appeal No. 950246, decided March 31, 1995, the Appeals Panel reversed a hearing officer=s determination that a claimant did not have disability during the period of time the claimant was released to light duty and rendered a new decision that he had disability for that period. In Texas Workers= Compensation Commission Appeal No. 982540, decided December 7, 1998, the Appeals Panel similarly reversed a hearing officer=s determination that a claimant did not have disability during a period that the claimant was only released for light duty but remanded because we could not determine from the evidence of record the precise period of disability. In Appeal No. 950246, *supra*, we stated the following:

> As we have previously noted, "a restricted release to work, as opposed to an unrestricted release, is evidence that the effects of the injury remain, and disability continues." Texas Workers= Compensation Commission Appeal No. 92432, decided October 2, 1992. *See also* Texas Workers= Compensation Commission Appeal No. 91045, decided November 21, 1991 ("Where the medical release is conditional and not a return to full duty status because of the compensable injury, disability, by definition, has not ended unless the employee is able to obtain and retain employment at wages equivalent to his preinjury wage."). In addition, we have stated that "an employee under a conditional work release does not have the burden of proving inability to work." Appeal No. 941566, *supra* [Texas Workers= Compensation Commission Appeal No. 941566, decided January 4, 1995] (quoting Texas Workers= Compensation Commission Appeal No. 93953, decided December 7, 1993). Finally, we have noted that where claimant is released to return to work light duty, there is no

requirement that the claimant look for work. Texas Workers= Compensation Commission Appeal No. 941092, decided September 28, 1994; Appeal No. 91045, *supra*. That is, "an employee under a conditional medical release [does] not have to show that work was not available." Texas Workers= Compensation Commission Appeal No. 941261, decided November 2, 1994.

Since the disputed issue on disability was framed to cover the period from May 24 through August 12, 1997, and since the unrefuted evidence established that claimant was only released to work with restrictions during that period, and that she did not work during that period, we render a new decision that claimant had disability during that period. In addition to requesting that the Appeals Panel reverse and render a new decision that claimant had disability during the period in question, claimant further requests that we remand for a hearing as to the amount of benefits due. This we decline to do. There was no disputed issue before the hearing officer concerning whether claimant is a seasonal employee of the self-insured and whether the self-insured is entitled to make any adjustment in the amount of TIBs paid to claimant. *See* Section 408.043 and Tex. W.C. Comm=n, 28 TEX. ADMIN. CODE ' 128.5 (Rule 128.5) in this regard.

The hearing officer=s determination of the extent-of-injury issue has become final by operation of law. We reverse the decision that claimant did not have disability from May 24 through August 12, 1997, and render a new decision that she did.

Philip F. O=Neill
Appeals Judge

CONCUR:

Alan C. Ernst
Appeals Judge

Elaine M. Chaney
Appeals Judge