APPEAL NO. 000890

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on March 27, 2000. With regard to the only issue before him, the hearing officer determined that the appellant (claimant) sustained a compensable low back injury, had disability from June 22, 1999, through July 18, 1999, but did not have disability after July 19, 1999 (all dates are 1999 unless otherwise noted). Claimant appealed, contending that the hearing officer's decision is against the great weight and preponderance of the evidence and that claimant's testimony and medical evidence establishes disability from October 5th to the date of the CCH. Claimant requests that we reverse the hearing officer's decision and render a decision in her favor. Respondent (carrier) responded, urging affirmance.

DECISION

Affirmed.

Claimant had been employed as an "appearance inspector" at the employer's computer assembly facility. The parties stipulated that claimant sustained a compensable low back injury on _____ (loading assembly parts on a cart) and that claimant had disability from June 22nd through July 18th. Claimant testified that she was sent to Dr. R, who was her initial treating doctor. Dr. R diagnosed a lumbosacral sprain/strain and initially, on June 17th, gave claimant restrictions of carrying, pushing, pulling up to 10 to 12 pounds and against repetitive bending/stooping. The parties agree that Dr. R took claimant off work on June 22nd and claimant was paid temporary income benefits for disability through July 18th. In a report dated July 14th, Dr. R released claimant to return to regular activities on July 19th with the restriction "can only work 8 hrs/day." Claimant returned to work; however, there is a dispute whether the work she was given was "heavy," as asserted by claimant, or "very light," as asserted by Ms. V, claimant's immediate supervisor. Both claimant and Ms. V described claimant's job in some detail for the hearing officer. From July 19th until October 5th, claimant worked but on two occasions was counseled about tardiness and once for missing work without a doctor's excuse. Ms. V testified that she helped claimant apply for a promotion, which claimant apparently did not get. Claimant testified that she had not told Ms. V about her _____ injury, or any restrictions that she had, and Ms. V testified that she was unaware of claimant's compensable injury. Claimant testified that on October 5th, she came to work with her back hurting and her duties that day made her back worse. Claimant testified that she told Ms. V about her back hurting (denied by Ms. V) and that she left work at the morning break and did not return. The employer terminated claimant on October 7th for abandoning her employment. Claimant returned to Dr. R on October 11th, 25th and 26th and, in reports of those dates, Dr. R noted "return to work activities with accommodation on 7/19/99," and gave restrictions of: "lifting, carrying, pushing, pulling up to 12-15 lbs. Avoid repetitive/sustained bending, stooping. Can only work 8 hrs/day."

Claimant apparently received no medical treatment after October 26th, until she retained an attorney who referred her to Dr. B, who was approved as claimant's treating doctor on December 12th. (The Employee's Request to Change Treating Doctors (TWCC-53) lists Dr. B as a "chiropractor," but Dr. B's signature block indicates he is an M.D.) Dr. B took claimant off work and began a course of manipulation and treatment three times a week.

The hearing officer made the following disputed findings:

FINDINGS OF FACT

4. Claimant reported to work on October 5, 1999 and worked until the first break. Claimant left work at the break and did not advise anyone with the Employer that she was leaving.

5. The Employer terminated Claimant's employment on October 7, 1999 for abandonment of position.

7. On December 15, 1999 [Dr. B] examined the Claimant for the first time and noted that Claimant has constant severe stabbing pain.

8. Claimant's inability to work, if at all, after July 19, 1999, the date she returned to full duty 8 hours per day, is not the result of the low back sprain of _____.

Claimant, while acknowledging that the hearing officer "has broad discretion in fact finding," nonetheless contends that Dr. R's October reports releasing claimant to work with restrictions, Dr. B's report and claimant's testimony constitute the great weight and preponderance of the evidence, contrary to the hearing officer's decision. Claimant cites Appeals Panel decisions for the proposition that "disability may be based solely on the Claimant's testimony," that "an injured worker [can] go in and out of disability" and that "pain can be considered to the extent that it prevents work performance." We do not disagree with those general propositions; however, we note that 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 as to an employee's disability is a question of fact for the hearing officer. Texas Workers' Compensation Commission Appeal No. 92147, decided May 29, 1992. When an employee sustains a compensable injury, receives a light-duty release, returns to her employer at light duty and then is terminated by the employer, we must consider whether her termination was for cause. Texas Workers' Compensation Commission Appeal No. 91027, decided October 24, 1991. If the termination was for cause, the employee must establish her disability after the termination by credible evidence. *Id.*

In this case, we view the evidence to be in conflict and, while a fact finder may base a finding of disability on claimant's testimony alone, the testimony of claimant, as an interested party, only raises an issue of fact for the hearing officer to resolve. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ); Texas Employers Insurance Association v. Burrell, 564 S.W.2d 133 (Tex. Civ. App.-Beaumont 1978, writ ref'd n.r.e.). We will reverse a factual determination of a hearing officer only if that determination is so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986). Applying this standard of review to the record of this case, we decline to substitute our opinion of the credibility of the respective witnesses for that of the hearing officer.

Upon review of the record submitted, we find no reversible error and we will not disturb the hearing officer's determinations unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). We do not so find and, consequently, the decision and order of the hearing officer are affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Philip F. O'Neill
Appeals Judge