APPEAL NO. 001326

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). This case is actually back from a remand in Texas Workers' Compensation Commission Appeal No. 000548, decided May 1, 2000, where we remanded the case for the hearing officer to make findings on disability that are supported by some evidence or an explanation of why the hearing officer picked October 20, 1999, as the ending date of disability. In this case, the hearing officer recites that no remand hearing was held and the parties were notified that their presence was not required. In Appeal No. 000548, we affirmed the hearing officer's decision that the appellant (claimant) had sustained a compensable muscle strain injury to her neck on _____. The hearing officer essentially repeats her original decision (with some additions which we will subsequently discuss), including findings on compensability. The claimant again appeals the compensability issue, arguing that her injuries were much more extensive and severe than found by the hearing officer. The compensable injury was established in our decision in Appeal No. 000548 and we decline to review the issue of compensability here. We will disregard the hearing officer's repeat determinations and the claimant's appeal of those determinations as being res judicata.

On the issue of disability, and more particularly the ending date of disability, the hearing officer, in the Statement of the Evidence in the decision on remand, states that the claimant's testimony was not persuasive as to disability after October 15, 1999, and the "date of October 20, 1999, a typographical error on the first Decision and Order, is corrected to October 15, 1999." The hearing officer explains why or how she picked the October 15 date and finds disability from August 23, 1999, through October 15, 1999. The claimant appeals that decision, asserting that neither the claimant's testimony nor any doctor's opinion established an end to disability prior to the CCH. The claimant requests that we reverse the hearing officer's decision on that issue and render a decision in her favor. The respondent (carrier) responds, merely urging affirmance.

DECISION

Reversed and rendered.

The facts and much of the medical testimony were summarized in Appeal No. 000548, *supra*, and will not be repeated here. The claimant had been a pharmacy technician and "felt a pop" in her neck reaching for some medication. The claimant began treating at the (clinic) and Dr. P, a clinic doctor, became her treating doctor. The hearing officer, in the Statement of the Evidence in the remand decision, commented:

> Claimant's evidence is minimally sufficient to prove by a preponderance of the evidence that she had disability from August 23, 1999 through October 15, 1999 the last day she was seen by [Dr. P]. Her evidence was insufficient to support disability after October 15, 1999 to the date of hearing.

Regarding a similar comment about the October 20 end date of disability in Appeal No. 000548, *supra*, we stated:

> Dr. P released claimant to return to light duty with certain restrictions in his TWCC-64 [Specific and Subsequent Medical Report] dated October 21st for an October 15th office visit. Claimant's testimony that she approached the employer about light duty and was told that none was available is uncontroverted by carrier. Dr. P, in the October 21st TWCC-64, noted that maximum medical improvement was undetermined and that a return to full-time work was "undetermined." Claimant testified that she was unable to return to work at that time. Texas Workers' Compensation Commission Appeal No. 91045, decided November 21, 1991, early on, held that a restricted release to work, as opposed to an unrestricted release, is evidence that the effects of the injury remain and disability continues. *See also* Texas Workers' Compensation Commission Appeal No. 992899, decided February 7, 2000. That case also held that an employee under a conditional work release does not have the burden of proving an inability to work. *See also* Texas Workers' Compensation Commission Appeal No. 941566, decided January 4, 1995. While the claimant has the burden of proving disability, she did so by her testimony as supported by Dr. P's reports (at least through October 15th) and subsequently by Dr. S's [Dr. S] reports. We find no indication of any evidence or event which would support the hearing officer's determinations that disability ended on October 20th.

In both Appeal No. 000548, *supra*, and in this case, the hearing officer comments that the claimant (improperly) changed treating doctors from Dr. P to Dr. S and that the claimant "subsequently obtained a full work release from [Dr. S]." A careful review of Dr. S's records and reports found on pages 4, 6, 7, 10, 12, 13, 14 and 15 of Claimant's Exhibit No. 6 covering reports and off-work slips from December 21, 1999, until January 12, 2000, indicate continued therapy and the last off-work slip dated January 10, 2000, takes the claimant off work from that date to "undetermined." A report from Dr. W of a January 18, 2000, visit has a diagnosis of "[c]ervical strain/sprain, neuralgia of the right arm and thoracic myositis/myofascitis" and recommends "conservative care including rest." The hearing officer dismisses all of these reports and the claimant's testimony as not being credible and picks the claimant's last visit to Dr. P as the ending date of disability when clearly, as we have pointed out in Appeal No. 000548, Dr. P's note of the October 15, 1999, visit states that it was "undetermined" if the claimant could return to full-time work. There is simply no evidence to support an end date of disability of October 15, 1999, or any other date. While the hearing officer is the sole judge of the weight and credibility to be given to the evidence, and she has broad discretion on what to find credible or not, the hearing officer's decision must be based on some evidence.

We hold that the hearing officer's decision that disability ended on October 15, 1999, when the claimant last saw Dr. P, to be unsupported by the evidence and so against the great weight and preponderance of the evidence as to be manifestly unjust and clearly wrong. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

Accordingly, we reverse the hearing officer's decision on the ending date of disability and render a new decision that the claimant had disability, as that term is defined in Section 401.011(16), from August 23, 1999, through the date of the initial CCH, February 14, 2000.

Thomas A. Knapp
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

DISSENTING OPINION:

I respectfully dissent. I do not find the hearing officer's decision on remand to be so contrary to the overwhelming weight of the evidence as to be clearly wrong or unjust.

Robert W. Potts
Appeals Judge