

## APPEAL NO. 001637

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 June 20, 2000. The hearing officer determined that the respondent (claimant) had disability from March 27, 2000, and continuing through the date of the CCH. The appellant (carrier) appealed on the grounds of sufficiency of the evidence. The appeals file contains no response from the claimant.

### DECISION

Affirmed.

The claimant worked as a plasterer for the employer and sustained an injury to his left ankle on \_\_\_\_\_. He sought medical treatment on the same day with Dr. R, who diagnosed the claimant with an ankle sprain. Dr. R released the claimant to modified work duties with restrictions as to standing and climbing. The claimant was subsequently terminated from his employment due to a positive drug test. The claimant did not return to Dr. R after November 9, 1999, and sought medical treatment with Dr. B on December 15, 1999, who also diagnosed a sprained ankle and then released him from work. The claimant was released back to work at light duty by Dr. B on February 18, 2000, with restrictions as to no climbing, no lifting over 40 pounds, and limited use of his left ankle. The claimant testified that he tried to work two days in February 2000 but was unable to continue due to pain and swelling in his ankle.

Dr. B sent the claimant to a work hardening program which the claimant attended all day Monday through Friday from March 27, 2000, through April 21, 2000. The claimant testified that he successfully completed the program and sought light-duty work after April 21, 2000, by trying to find work such as a cleaning position which conformed to his light-duty restrictions. The claimant testified that although he tried to find work, no one would hire him because of his restrictions and as of the date of the CCH he was unemployed. The claimant testified that he might be able to return to work as a plasterer but he would not do so because he feared the weakness in his ankle could cause him to lose his balance when climbing to higher areas to apply the plaster. The claimant testified that he thought he would have to find another kind of job in the future.

Medical records from Dr. B reflect that he treated the claimant for a sprained left ankle. X-rays taken on November 19, 1999, were unremarkable except for some soft tissue swelling. Dr. B wrote in a letter dated March 30, 2000, that the claimant required work hardening because he had become deconditioned during the recovery period for his left ankle. He opined that the work hardening program was necessary to increase the claimant's stamina so that he could return to a full eight-hour workday.

The claimant was examined by Dr. J on April 4, 2000, at the carrier's request. Dr. J, by letter dated April 18, 2000, wrote that the claimant presented with complaints of continued pain and swelling in the left foot and ankle. An examination revealed that the claimant's left ankle had swelling over the anterior portion at the lateral portion of the tibiotalar joint and tenderness over the plantar fascia and at the insertion of the plantar fascia at the calcaneus. Dr. J diagnosed plantar fasciitis and possible internal derangement of the left ankle and recommended that the claimant undergo an MRI. Dr. J concluded that the claimant would reach maximum medical improvement in three to four months and that at the present he was capable of performing a sitting type of job but could not perform any heavy activities including lifting, standing, or climbing.

"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. A claimant's testimony alone is sufficient to establish that an injury has caused disability. Gee v. Liberty Mutual Fire Insurance Company, 765 S.W.2d 394 (Tex. 1989). When an employee sustains a compensable injury, receives a light-duty release, and is then terminated by the employer, we must consider whether his termination was for cause. Texas Workers' Compensation Commission Appeal No. 91027, decided October 24, 1991.

Critical to the resolution of a disability issue is the determination that the inability to earn the preinjury wage was a result of the compensable injury. In this regard, we have noted that termination for cause does not necessarily preclude disability, but may be considered by the hearing officer in determining why a claimant is unable to earn the preinjury wage. Appeal No. 91027. Thus, disability can continue after termination if a cause of the inability to earn the preinjury wage after termination was the compensable injury. Texas Workers' Compensation Commission Appeal No. 93850, decided November 8, 1993. We have also held that the 1989 Act does not "impose on an injured employee the requirement to engage in new employment while still suffering some lingering effects of his injury unless such employment is reasonably available and fully compatible with his physical condition and generally within the parameters of his training, experience, and qualifications. On the other hand, we do not believe the 1989 Act is intended to be a shield for an employee to continue receiving temporary income benefits where, taking into account all the effects of his injury, he is capable of employment but chooses not to avail himself of reasonable opportunities. . . ." Texas Workers' Compensation Commission Appeal No. 91045, decided November 21, 1991.

In the case before us, the hearing officer found the claimant's testimony credible that he was unable to return to work because of the pain and swelling in his ankle. This finding is consistent with the medical records of Dr. B and Dr. J. The 1989 Act provides that the hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). Where there are conflicts in the evidence, the hearing officer resolves the conflicts and determines what facts the evidence has established. As an appeals body, we will not substitute our judgment for that of the hearing officer when the determination

is not so against the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Texas Workers' Compensation Commission Appeal No. 950456, decided May 9, 1995.

We affirm the hearing officer's decision and order.

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Kathleen C. Decker  
Appeals Judge

CONCUR:

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Gary L. Kilgore  
Appeals Judge

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Robert W. Potts  
Appeals Judge