

APPEAL NO. 001860

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 July 13, 2000. The respondent (claimant) had two separate claims with the employer, and the appellant (carrier) provided coverage on each date of injury claimed. The hearing officer issued two separate decisions. With respect to the only issue before her in this case, the hearing officer determined that the claimant had disability as a result of her _____, injury from November 21, 1999, to March 18, 2000, and from March 19, 2000, through the date of the hearing. The parties stipulated that the _____, compensable injury did not extend to and include left carpal tunnel syndrome (CTS) and that the claimant's average weekly wage is 329.66. The parties further stipulated that the claimant earned wages of \$148.01 in the week of November 21 to November 28, 1999; \$250.59¹ in the week of November 28 to December 4, 1999; \$185.53 in the week of December 5 to December 11, 1999; \$184.42 in the week of December 12 to December 18, 1999; \$231.41 in the week of December 19 to December 25, 1999; \$191.65 in the week of December 26, 1999, to January 1, 2000; \$161.80 in the week of January 9 to January 15, 2000; \$129.08 in the week of January 16 to January 22, 2000; \$248.98 in the week of January 23 to January 29, 2000; and \$89.41 in the week of March 12 to March 18, 2000. In its appeal, the carrier asserts error in the hearing officer's disability determination, arguing that the claimant was terminated for cause on March 13, 2000, and that her termination is the cause of her inability to earn her preinjury wage after that date and that the claimant's reduced earnings in the period from November 21, 1999, to March 13, 2000, was because the employer did not have enough work for its employees; thus, all employees were sent home on a rotating basis. The appeals file does not contain a response to the carrier's appeal from the claimant.

DECISION

Affirmed.

Because only the issue of disability is before us on appeal, our factual recitation will be limited to those facts most germane to that issue. It is undisputed that the claimant sustained a compensable injury on _____, right CTS, in the course and scope of her employment in the distribution center of a department store. The claimant had carpal tunnel release surgery on March 9, 1999, and she returned to work in June 1999 following her surgery. At issue is the question of whether the claimant had disability for the periods from November 21, 1999, to March 13, 2000, the date that her employment with the employer was terminated, and the period from March 14, 2000, through the date of the hearing. On November 8, 1999, Dr. L stated that the claimant could not lift over five to ten pounds with the right hand, that she could not use the right hand as an assist, and that she

¹The hearing officer's decision and order mistakenly lists this figure as \$250.69; however, the parties stipulated to the figure of \$250.59.

should avoid repetitive activity with the right hand. Following the termination of her employment, the claimant began treating with Dr. C. On March 23, 2000, Dr. C completed a Texas Workers' Compensation Work Status Report stating that as of that date, the claimant is "unable to work and restricted from all work." On June 6, 2000, Dr. C responded to a deposition on written questions. He stated that while he recommended that the claimant be off work, she could perform "vocational and avocational activities" with the restrictions of avoiding overhead activities, lifting more than one pound, exposure to cold, exposure to vibratory tools with the affected arm, and repetitive pinching/flexing/extending of the wrist and forearm. The claimant has also received treatment from Dr. N, who took the claimant off work from May 12 to June 12, 2000, and from June 12 to July 12, 2000.

There was considerable testimony at the hearing concerning the circumstances surrounding the termination of the claimant's employment on March 13, 2000. Witnesses for the employer maintained that the claimant was terminated for insubordination, a claim which the claimant denied. In a decision dated June 7, 2000, the Appeal Tribunal of the Texas Workforce Commission (TWC) reversed a determination that the claimant was disqualified from receiving unemployment benefits because of misconduct connected to her work for the employer.

The claimant testified that in the period from November 21, 1999, to March 13, 2000, she was sent home on many occasions because the employer did not have enough work for her to do within her restrictions. She stated that other employees, who were not under restrictions, were able to work a regular shift. Ms. L, the personnel manager for the employer, testified that the employer has slow months where it is necessary to send all employees home early because there is not enough work. Ms. L insisted that all employees are affected and not just the employees on light duty. Ms. L identified the slow period as the end of November, December, and January.

The claimant had the burden to prove that she had disability as a result of her compensable injury for the periods claimed. 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 issue of whether the claimant had disability is a question of fact for the hearing officer to resolve. 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, as here, 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.

The carrier argues that the hearing officer erred in finding that the claimant had disability for the weeks of November 21 to November 27, 1999; November 28 to December 4, 1999; December 5 to December 11, 1999; December 12 to December 18, 1999; December 19 to December 25, 1999; December 26, 1999, to January 1, 2000; January 9

to January 15, 2000; January 16 to January 22, 2000; January 23 to January 29, 2000; and March 12 to March 18, 2000. The carrier argues that the claimant's reduced earnings in the weeks prior to the termination of her employment on March 13, 2000, were due to the employer's lack of work and not because of the claimant's injury. There was conflicting evidence on that issue. Ms. L testified that all employees were affected by the lack of work for the period at issue, while the claimant stated that she was sent home because the employer did not have enough work for her to do which was within her restrictions. The hearing officer was acting within her province as the fact finder in resolving this conflict in favor of the claimant and in determining that the claimant had disability in those weeks. Our review of the record does not demonstrate that the hearing officer's determination in that regard is so contrary to the great weight and preponderance of the evidence as to compel its reversal on appeal. We likewise cannot agree that the hearing officer erred in finding that the claimant had disability following the termination of her employment. Much was made as to whether the termination was made "for cause." However, even if the hearing officer had so found, which she did not, it would not have automatically ended the inquiry as to whether the claimant had disability. Texas Workers' Compensation Commission Appeal No. 91027, decided October 24, 1991; Texas Workers' Compensation Commission Appeal No. 94239, decided April 11, 1994; Texas Workers' Compensation Commission Appeal No. 000801, decided May 30, 2000. In this instance, the claimant's testimony and the work restrictions and off-duty slips from Dr. L, Dr. C, and Dr. N support the hearing officer's determination that the claimant's disability continued after her employment with the employer was terminated. Nothing in our review of the record demonstrates that the determination that the claimant's disability continued through the date of the hearing following the termination of her employment on March 13, 2000, is so against the great weight of the evidence as to be clearly wrong or manifestly unjust. Therefore, no sound basis exists for us to disturb that determination on appeal.

The hearing officer's decision and order are affirmed.

Elaine M. Chaney
Appeals Judge

CONCUR:

Tommy W. Lueders
Appeals Judge

Philip F. O'Neill
Appeals Judge