

APPEAL NO. 001898

Following a contested case hearing held on July 24, 2000, pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act), the hearing officer, resolved the disputed issue by determining that the appellant (claimant) did not have disability resulting from the injury sustained on April 30, 1999. The claimant has appealed, asserting that the hearing officer's determination is not sufficiently supported by the evidence and that the hearing officer erred in admitting certain records from the Texas Workforce Commission (TWC). The respondent (carrier) urges in response that the evidence is sufficient to warrant our affirmance and that the hearing officer did not abuse her discretion in admitting the TWC records.

DECISION

Affirmed.

The claimant testified that his right hand was injured on _____, while working with a concrete crew at a job site. According to the history in a medical record, the claimant tripped and fell forward onto a slab, jamming his right hand and fracturing and dislocating his little finger on that hand. The medical records reflect that the claimant was taken to an occupational medical clinic by a coworker where he was noted to have some contusions and abrasions and where his little finger was set and splinted. The treating doctor, Dr. B, released the claimant for resumption of work effective May 3, 1999, with the restriction of not lifting more than 10 pounds with his right hand and the claimant said that the employer did accommodate that restriction and gave him light duty. There was no indication that the claimant did not receive his usual hourly pay rate upon returning to work. Dr. B continued the same restriction on May 14 and May 28, 1999. Through not certain of the date, the claimant indicated that Dr. B may have removed the splint on May 28, the date of his last visit with Dr. B.

The claimant further stated that he was seen by Dr. M, a hand specialist, and indicated that he was not interested in pursuing some surgical treatment suggested by Dr. M. He also said that neither Dr. B nor Dr. M ever told him he could return to full duty work. The only record of Dr. M in evidence is a May 27, 1999, report which states Dr. M's assessment as a "resolved right little finger dislocation." Dr. M also states under his treatment plan that he is "going to release [the claimant] for regular duty" and that the claimant should be at maximum medical improvement within a week or two.

The claimant further testified that he continued to work and that on August 12, 1999, he felt that he just could not continue shoveling concrete and said so to the superintendent, Mr. G, who told him to go do something else. He said he then began sweeping up inside a building and that Mr. G then came in and asked him about a problem he was having working with a coworker named Mr. B. The claimant said he responded that Mr. B was "cussing and hollering" at him whereupon Mr. G stated that if he could not work with Mr.

B, he could just "git." He said he construed Mr. G's words as telling him he had just been fired so he left the job site and has not since worked.

Mr. G testified that he had a very small crew and needed the claimant to continue working with Mr. B; that the claimant was not complaining about his injury but about working with Mr. B; and that he told the claimant that he should either work with Mr. B or go home. He said that the claimant then just picked up his shovel and went on home.

Mr. M, a coworker on the crew, testified that after his injury the claimant did light duty at first and that after about a week or so following the removal of his cast the claimant was showing no problems doing his work. Mr. N, the secretary-treasurer of the employer's company, testified that following the claimant's injury he visited the claimant about twice a month at job sites to follow up with him. He said that he would ask the claimant how he was doing concerning the injury and that the claimant responded that he was "OK" and never complained about his injury.

The claimant further testified that on November 3, 1999, he commenced chiropractic treatment with Dr. N who immediately took him off work and has not since released him for return to work. The Employee's Request to Change Treating Doctors (TWCC-53) which the claimant signed on November 3, 1999, states that he wanted to change from Dr. B to Dr. N because he was not getting treatment for his right elbow. Dr. N's records reflect that the claimant was seen on 16 dates between November 3 and December 13, 1999, and on 14 dates between December 15, 1999, and January 24, 2000. Dr. N's Specific and Subsequent Medical Report (TWCC-64) dated March 27, 2000, states that the claimant will be released for full-time work on August 15, 2000. The claimant also stated that his right hand grip strength is much weaker than the left and that he is right handed.

The claimant testified on direct examination that on some date after August 12, 1999, he applied with the TWC for unemployment benefits; that at the TWC hearing he stated the same thing about the circumstances of the termination of his employment as he had just testified to; and that the TWC denied his application for benefits. He further stated that he had attempted to obtain employment driving a truck but could not pass the driving test, apparently because of his injury. He also said that as of February 2000, he has been receiving temporary income benefits (TIBs).

The carrier introduced certain records of the TWC relating to the claimant's August 15, 1999, application for unemployment benefits and his unsuccessful appeal to the TWC of the adverse decision of the TWC Appeal Tribunal. The claimant objected to the admission of this evidence on the grounds that the documents were not relevant to the disputed issue before the hearing officer and asserts on appeal that the admission of the decision documents of another state agency is "unfair". The carrier urged that the documents were relevant in that certain representations made by the claimant in pursuing unemployment compensation benefits were inconsistent with his claim for disability. The claimant contended that he was fired while the carrier contended that he voluntarily quit his job rather than continue to work with Mr. B. The hearing officer ruled that the documents

were relevant and that the weight they would be given was a matter for her discretion. Section 410.165(a) provides that the hearing officer is the sole judge of the relevance and materiality of the evidence offered and of the weight and credibility to be given to the evidence and that “[c]onformity to legal rules of evidence is not required.” We find no abuse discretion by the hearing officer in the admission of the TWC records. Morrow v. H.E.B., Inc., 714 S.W.2d 297 (Tex. 1986).

The claimant contends that his evidence established that he had disability after the date his employment was involuntarily terminated in that he was performing some light duties and some regular duties and had not been released by any doctor to return to his regular duties. In addition to the dispositive legal conclusion, the claimant challenges findings that on August 12, 1999, the claimant voluntarily left his employment; that at the time he quit, he was working in a light-duty position and was earning wages equal to his preinjury wages; that he was capable of performing the work duties assigned to him by his employer; and that his ability “to obtain or [sic] retain” employment at his preinjury wages is not due to his compensable injury.

The claimant had the burden to prove his period or periods of disability by a preponderance of the evidence. 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 Appeals Panel has recognized that disability may be established by lay testimony including that of the injured worker and that objective medical evidence thereof is not required (Texas Workers’ Compensation Commission Appeal No. 91083, decided January 6, 1992); that pain can be considered to the extent that it prevents the performance of work (Texas Workers’ Compensation Commission Appeal No. 91024, decided October 23, 1991); and that the compensable injury need not be the sole cause of the disability (Texas Workers’ Compensation Commission Appeal No. 960054, decided February 21, 1996). Further, the Appeals Panel has said that “a restricted release to work, as opposed to an unrestricted release, is evidence that the effects of the injury remain, and that disability continues (Texas Workers’ Compensation Commission Appeal No. 92432, decided October 2, 1992), and that 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 the preinjury wages (Texas Workers’ Compensation Commission Appeal No. 91045, decided November 21, 1991). Finally, it is well-settled that if and when an injured employee, whose employment is terminated for cause, can sufficiently establish that the work-related injury is precluding him or her from obtaining and retaining new employment at the preinjury wage level, then TIBs may once again become payable. See Texas Workers’ Compensation Commission Appeal No. 980003, decided February 11, 1998, and cases cited therein.

We are satisfied that the challenged findings are not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. 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). The hearing officer, considering all the evidence, could conclude that at some time

before August 15, 1999, the claimant was essentially performing all or nearly all of the same work he was doing before his injury and that it was not as a result of his compensable injury that he was unable to obtain and retain employment at his preinjury wage rate after August 12, 1999.

The decision and order of the hearing officer are affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Kathleen C. Decker
Appeals Judge

Robert W. Potts
Appeals Judge