

APPEAL NO. 002807

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). Following a contested case hearing held on November 15, 2000, the hearing officer, resolved the disputed issues by determining that the appellant (claimant) sustained a right inguinal hernia in the course and scope of his employment on _____, and that he has not had disability from August 8, 2000, through the date of the hearing. The claimant has appealed the disability determination, contending that the evidence established that he did have disability despite the fact that his employment was terminated for cause on August 8, 2000, in that he still has a lifting restriction of 15 pounds and has been unsuccessful in his efforts to obtain employment because of that restriction. The respondent (carrier) urges the sufficiency of the evidence to support the challenged determination. The unappealed determination-of-the-injury issue has become final. Section 410.069.

DECISION

Reversed and remanded.

The claimant testified that on _____, while working at the employer's convenience store, a "tote" or plastic box of magazines he was unloading slipped off the counter and he felt an internal strain; that he finished his shift and had the following day off but was summoned to a meeting at the employer's office where he was informed that his employment was terminated for not following proper procedures regarding the ringing up of sales. He said that when he first saw Dr. M for his pain, sometime during the August 22 to 24 time period, Dr. M diagnosed him with the hernia and advised him not to return to work at a job requiring him to lift more than 15 pounds. Dr. M wrote on September 21, 2000, that the claimant is restricted from work until his hernia is repaired if he is required to lift more than 15 pounds or perform strenuous work. The claimant indicated that he did not seek treatment earlier because the pain was not continuous and he also said the appointment with Dr. M had to be rescheduled after the carrier denied his claim. He further stated that surgical repair of the hernia has been deferred because the carrier has not accepted the claim and that he went to the unemployment office and obtained some job leads but has not been successful in obtaining employment because of his lifting restriction.

The only finding of fact regarding the disability issue states that "[t]he injury did [sic] cause Claimant to be unable to obtain and retain employment at wages equivalent to his pre-injury wages from 8-8-00 through the date of this hearing." Since the corresponding legal conclusion and the decision both state that the claimant does not have disability resulting from the injury, it appears that the hearing officer omitted the word "not" in the challenged factual finding. Aside from this apparent typographical error, we are concerned that there are no other findings of fact to support the legal conclusion in view of the unrefuted evidence that the claimant is restricted by Dr. M from strenuous employment and from any employment involving the lifting of more than 15 pounds.

The Appeals Panel has stated that a restricted work 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); that where the medical release is conditional and not a return to full duty because of the compensable injury, disability, by definition, has not ended unless the employee is able to retain and obtain employment at the preinjury wage equivalent (Texas Workers' Compensation Commission Appeal No. 91045, decided November 21, 1991); that an employee under a conditional work release does not have the burden of proving inability to work (Texas Workers' Compensation Commission Appeal No. 93953, decided December 7, 1993); and 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 training, experience, and qualifications (Appeal No. 91045, *supra*). *And see* Texas Workers' Compensation Commission Appeal No. 970597, decided May 19, 1997, where we reversed and remanded for further consideration of the disability issue. Given the lack of factual findings on disability, as well as discussion by the hearing officer, it does not appear as though the hearing officer properly considered the effect of the claimant's restricted release to work on the issue of disability.

We also note that the hearing officer mentions in his discussion that the claimant's employment was terminated for cause. As the claimant correctly argued below, while such employment termination is a factor the hearing officer can consider, it does not compel a determination that there can be no disability. *See, e.g.,* Texas Workers' Compensation Commission Appeal No. 980003, decided February 11, 1998; Texas Workers' Compensation Commission Appeal No. 992669, decided January 11, 2000 (Unpublished); and Texas Workers' Compensation Commission Appeal No. 992027, decided October 29, 1999 (Unpublished).

For the foregoing reasons, we reverse so much of the hearing officer's decision and order as determined that the claimant has not had disability from his compensable hernia injury of _____, and remand for further consideration and for such further findings and conclusions as may be appropriate.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Texas Workers' Compensation Commission's Division of Hearings, pursuant to Section 410.202. See Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

Philip F. O'Neill
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Judy L. Stephens
Appeals Judge