

APPEAL NO. 012019  
FILED OCTOBER 25, 2001

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 June 25, 2001. The record closed on July 27, 2001. The hearing officer determined that the appellant/cross-respondent (claimant) sustained a compensable injury on \_\_\_\_\_, and that he had disability from December 10, 2000, through February 25, 2001, and from May 12, 2001, through the date of the hearing. The claimant appeals the determination that he did not have disability for the periods from February 26 to March 18, 2001, and from April 18 to May 12, 2001, on sufficiency grounds. The respondent/cross-appellant (self-insured) cross-appeals the injury and disability determinations. Neither the claimant nor the self-insured responded to the other party's appeal. The parties resolved an issue as to the claimant's average weekly wage (AWW) by stipulating that the claimant's AWW is \$885.10.

DECISION

Affirmed in part and reversed in remanded in part.

COMPENSABLE INJURY

The hearing officer did not err in determining that the claimant sustained a compensable injury on \_\_\_\_\_. The claimant had the burden to prove that he sustained damage or harm to his lumbar spine, arising out of and in the course and scope of his employment. Texas Workers' Compensation Commission Appeal No. 91028, decided October 23, 1991. There was conflicting evidence presented with regard to this issue. The hearing officer is the sole judge of the weight and credibility of the evidence (Section 410.165(a)) and, as the trier of fact, resolves the conflicts and inconsistencies in the evidence including the medical evidence (Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ)). In view of the evidence presented, we cannot conclude that the hearing officer's determination is 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 (Tex. 1986).

DISABILITY

The hearing officer erred in determining the periods of the claimant's disability. The claimant asserts that he had disability from February 26 through March 18, 2001, and from April 18 to May 12, 2001, in addition to the periods of disability found, namely from December 10, 2000, to February 25, 2001, and from May 12, 2001, through the date of the hearing. Disability is a question of fact to be determined by the hearing officer and may be based on the testimony of the claimant alone. Texas Workers' Compensation Commission Appeal No. 000303, decided March 29, 2000. Additionally, we have said that a restricted release to work as opposed to an unrestricted release is some evidence that

the effects of the injury remain and disability continues. See Texas Workers' Compensation Commission Appeal No. 92432, decided October 5, 1992.

#### PERIOD FROM FEBRUARY 26 TO MARCH 18, 2001

In the Statement of Evidence portion of the decision, the hearing officer recognized that the claimant was restricted to light-duty work from February 26 to March 18, 2001, and that the claimant did not work for this period, but stated that, "[t]here was no evidence presented as to whether or not Claimant was or was not able to obtain and retain employment equivalent to his preinjury wages between February 26 and March 18, 2001 while he was working with restrictions." The hearing officer appears to assume that the claimant could have earned his pre-injury wage had he returned to work consistent with his restrictions during the disputed period, and requires the claimant to provide evidence to the contrary. In view of his statement, we believe the hearing officer may have applied an incorrect standard with regard to the issue of disability in the context of a conditional or light-duty release to return to work. Accordingly, we remand the hearing officer's decision for further findings regarding whether the claimant had disability for the period of February 26 through March 18, 2001. On remand, it might be appropriate for the hearing officer to make specific findings explaining the claimant's ability to obtain or retain employment at wages equivalent to his preinjury wage as a result of the compensable injury during this period.

#### PERIOD FROM APRIL 18 TO MAY 12, 2001

The claimant next asserts that the hearing officer erred in not finding disability for the period of April 18 to May 12, 2001. The evidence shows that the claimant was released to full duty on March 18, 2001, and that he returned to work. On April 11, 2001, the claimant was suspended from his employment through May 11, 2001, for failure to comply with a company policy regarding the reporting of work-related injuries. The claimant's treating doctor took the claimant off work beginning April 18, 2001, when the MRI results were received. As noted above, the hearing officer determined that the claimant had disability from May 12, 2001, through the date of the hearing. The determination that the claimant had recurring disability on the day after his suspension ended appears to be premised upon the fact that the claimant was still in an off-work status from his treating doctor at that time. That is, the hearing officer was persuaded that the claimant's medical condition was such that he was unable to obtain and retain employment on May 12, 2001, the day after his suspension ended. Thus, it seems that the claimant's medical condition would also be a cause of his inability to obtain and retain employment at his preinjury wage during the period of his suspension after April 18, 2001, in that his medical condition did not change from April 18 to May 12, 2001. It should be noted that the issue of whether the claimant had disability during the period from April 18 to May 12, 2001, is not necessarily resolved by considering whether he could return to work for the particular employer where his injury occurred in that period, due to the suspension. Rather, the determination must be made based upon consideration of the claimant's ability to obtain and retain employment at wages equivalent to his preinjury wage based upon his

physical condition during that period. If on remand, the hearing officer determines that the claimant did not have disability for the period from April 18 to May 12, 2001, he should articulate the basis for that determination in light of his decision that the claimant had disability on May 12, 2001.

### SELF-INSURED'S DISABILITY CHALLENGE

The self-insured's challenge to the hearing officer's disability determination is premised upon the success of its argument that the claimant did not sustain a compensable injury. Given our affirmance of the injury determination, we likewise affirm the hearing officer's determination that the claimant had disability from December 10, 2000, through February 25, 2001, and from May 12, 2001 through the date of the hearing, subject to our decision above with regard to the claimant's appeal on the disability issue.

The hearing officer's decision and order are affirmed with regard to the claimant's compensable injury, affirmed in part with regard to disability, and reversed and remanded in part with regard to disability for the periods of February 26 to March 18, 2001, and from April 18 to May 12, 2001. 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 (amended June 13, 2001). See Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

The true corporate name of the self-insured is **INTERNATIONAL PAPER COMPANY** and the name and address of its registered agent for service of process is

**C.T. Corporation  
811 Dallas Avenue  
Houston, Texas 77002.**

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Elaine M. Chaney  
Appeals Judge

CONCUR:

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Susan M. Kelley  
Appeals Judge

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Gary L. Kilgore  
Appeals Judge