APPEAL NO. 012361
FILED NOVEMBER 19, 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 (CCH) was held on August 27, 2001. The hearing officer determined that the respondent/cross-appellant (claimant) does not have disability subsequent to June 1, 2001, and, as to the added issue, that the claimant's receipt of a severance package does not constitute post-injury earnings (PIE) for the purpose of calculating the amount of temporary income benefits. The appellant/cross-respondent (carrier) appeals only the determination that the severance package was not PIE. The claimant appeals findings that he took a voluntary separation package; that he would still be working but for taking the voluntary separation package; and that the employer did not retract the offer of light-duty employment; and the conclusion that the claimant did not have disability subsequent to June 1, 2001. The claimant responds to the carrier's appeal, and urges that the hearing officer correctly decided that the severance package does not constitute PIE. The carrier responds to the claimant's appeal, urging the correctness of the hearing officer's determination that there was no disability.

DECISION

Affirmed.

The claimant worked for the employer for more than 20 years. He sustained a compensable low back injury on _____, and subsequently worked light duty as a board operator. This job was considered light duty even though it was a 12-hour shift, and a board operator had to be familiar with every job in the plant to be able to run the board. The employer decided to close the plant where the claimant worked, resulting in the elimination of more than 100 positions. In order to reduce the workforce, a plan was developed which combined voluntary separations, involuntary separations, and placement at other facilities. The claimant did not believe that he would be able to transfer to another job in another plant, due to his restrictions. He did not believe that he was capable of performing the more physical jobs because of the compensable injury, and he believed that there were sufficient differences in operation of the various plants that he would have been unable to be a board operator at another plant because he would not be familiar with every job in that plant. The employer's representative testified that because of the claimant's seniority, he would have been able to transfer to another plant at the same wage, if he had asked to do so, and that the employer would have found work within the claimant's restrictions. This option was apparently not discussed with the claimant. The claimant was offered a "Voluntary Separation Package," although he testified that he understood that the separation was to be treated as involuntary for purposes of benefits. There was testimony that the "involuntary" separation package would provide about half the benefits as compared to the "voluntary" package. The claimant ultimately decided to accept the voluntary package and take regular retirement as well. The claimant continued to work light duty until May 31, 2001, the approximate time that the plant closed. The claimant

received the severance package (computed at 52 weeks pay, the maximum available for any separating employee) and also began to receive monthly retirement checks. The claimant had always planned to work up to age 65, but took retirement because of the plant closure and because of his injury.

There was evidence from which the hearing officer could determine that the claimant took a voluntary separation package, and took retirement in addition to the separation package, but could still be working but for taking the voluntary separation package, and that the employer did not retract the offer of light-duty employment to the claimant.

The claimant had the burden to prove by a preponderance of the evidence that he had disability. Texas Workers' Compensation Commission Appeal No. 941566, decided January 4, 1995. "Disability" is defined as "the inability 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. We have held in the past that a claimant's voluntary retirement is a factor for the hearing officer to consider, but is not necessarily controlling on the issue of disability. *See, for example,* Texas Workers' Compensation Commission Appeal No. 990917, decided June 14, 1999, and Texas Workers' Compensation Commission Appeal No. 980168, decided March 3, 1998, and cases cited therein. Under our standard or review of factual determinations of hearing officers, we decline to reverse his determination in this case that there was no disability. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986).

Although this point is technically moot because of our decision upholding the hearing officer's determination that the claimant does not have disability, we note that the issue of severance pay was settled long ago in Texas Workers' Compensation Commission Appeal No. 93404, decided July 8, 1993, when we concluded that severance pay was not included in the definition of "wages."

The carrier also suggests on appeal, as it did in argument at the CCH, that the claimant's retirement pay should constitute PIE. This issue is resolved by noting that retirement pay is not tied to the provision of personal services, but is related to past services. We see no merit in this assertion that retired pay is PIE.

For the foregoing reasons, we affirm the decision and order of the hearing officer.

The true corporate name of the insurance carrier is **ZURICH AMERICAN INSURANCE COMPANY** and the name and address of its registered agent for service of process is

GEORGE MICHAEL JONES
9330 LBJ FREEWAY, SUITE 1200
DALLAS, TEXAS 75243.

Michael B. McShane
Appeals Judge

CONCUR:

Judy L. S. Barnes
Appeals Judge

Susan M. Kelley
Appeals Judge