

APPEAL NO. 020785
FILED MAY 22, 2002

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 March 5, 2002. The hearing officer determined that the respondent's (claimant) injury extended to a lumbar disc defect at L5-S1. He further held that she had disability from her injury for the period beginning on _____, until February 4, 2002.

The appellant (carrier) has appealed, arguing that the claimant did not prove a herniation. Primarily, the carrier appeals the disability determination, pointing out that the claimant continued to work at her regular job until laid off, demonstrating that she had the ability to work even with her injury. There is no response from the claimant.

DECISION

Affirmed in part, reversed and rendered in part.

FACTS

The claimant worked as a project manager for a remodeling company. She said this was basically a desk job that entailed talking on the telephone and paperwork. Lifting was not a job requirement, although she, on occasion, would move boxes of supplies that were delivered to her office. On December 10, 2000, she was shifting a filing cabinet to make room for boxes being put in her office and hurt her back.

The claimant continued to work her regular job. She said that she requested a seat cushion and an ergonomic chair, both of which were readily supplied. All lifting (although not a requirement for her position) was left to other employees. The claimant worked until _____, when she was laid off in a reduction in force. The claimant said had it not been for this, she likely would have continued working. She said that she had been missing time from work for doctor's appointments, but no testimony or evidence was developed as to whether this also meant a loss of wage.

The claimant's attorney asked when it was that she "felt better" and was able to resume working. She responded that returning to work for another employer in February 2002 was not because of feeling better, but because she was contacted by the other company in mid-January about coming to work for it. She had returned for a position paying more than her preinjury average weekly wage. The claimant said she was not actively looking for work when contacted by her new employer.

A careful review of the transcript shows no testimony which attributes being off work in any way to the claimant's injury for the period from _____, until her return to work in 2002. A Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-

21) in evidence asserts that the claimant received unemployment compensation after she was laid off.

The claimant was treated by a clinic after her injury, and three documents show releases to regular duty date effective December 14 and 27, 2000, and January 5 and 10, 2001. Corresponding Work Status Report (TWCC-73) forms were completed to this effect. An MRI was reported as showing a bulge at L5-S1 and one in November 2001 reported a protrusion at the same site.

On September 4, 2001, the claimant sought a change of her treating doctor to Dr. J, which was approved two weeks later. However, the claimant asserted that she had actually begun treating with him around February 19, 2001 (there are reports in evidence from that date, albeit not on Texas Workers' Compensation Commission (Commission) forms). Dr. J completed a TWCC-73 on this date which stated that the claimant's injury "has prevented and still prevents the employee from returning to work as of 2-19-01" and that this would continue to an undetermined time. A dictated typewritten report of that date shows that he understood that the claimant had not missed any time from work but does not further comment on ability to work, and notes that her pain was bothersome but not excruciating.

The claimant was treated conservatively and with injections. On July 17, 2001, Dr. J wrote to the carrier indicating his belief that her injury extended to a herniated disc; he also noted that he last saw the claimant on May 14, 2001, at which time she was doing better. He declined to assess her functional capacity because he had not seen her since that date. Dr. J's written report that appears to be dated August 1, 2001, states that the claimant is "85% better" and no longer has continuous pain. Another TWCC-73 from Dr. J opined that the claimant could return to restricted work effective August 21, 2001, with a 10-pound lifting restriction and some varying positional restrictions.

Dr. E examined the claimant on October 1, 2001; after initially indicating that the mechanism of injury did not support a herniated disc, he wrote a week later, on October 30, that the claimant had sustained an aggravation injury to her spine in December 2000. The same exhibit includes a TWCC-73 that is not signed or fully completed in which someone has written that claimant was unable to work from October 1, 2001, through January 1, 2002. There is also an unexplained December 12, 2001, letter to the Commission from a referral doctor attributing the claimant's herniated disc to a _____, accident. The only other accident that the claimant testified about was an automobile accident that occurred 14 years prior to the injury under dispute.

EXTENT OF INJURY

The hearing officer did not err in finding that the claimant sustained an injury to her lumbar spine that went beyond the strain/sprain argued by the carrier. While the evidence was conflicting, as outlined above, there is support in the record for his resolution of the conflicts in favor of claimant's asserted extent of injury.

DISABILITY

The hearing officer erred in finding that the claimant had disability beginning the day she was laid off from work until she resumed employment. The evidence does not support that finding, and we reverse and render the decision that the claimant did not prove that she had disability, as defined by Section 401.011(16).

Under the 1989 Act, the concept of disability superceded the old law concept of "incapacity," injecting an economic concept into the equation. One could have a severe injury, yet, if it did not cause the inability to obtain and retain employment equivalent to the preinjury average weekly wage, there was no "disability." We have stated that disability can be proven through a claimant's testimony alone. As we noted, however, there is no testimony attributing the claimant's inability to obtain and retain employment to anything but a reduction-in-force layoff beginning _____. The only evidence even asserting any inability to work is the TWCC-73 dated February 19, 2001, obviously erroneous when written because the claimant in fact was working and continued to work for another six or seven weeks. While a restricted release might be some evidence of disability, it is not conclusive and cannot "trump" the undisputed fact that the claimant in fact continued to work at her regular job with no reduction in pay. In the absence of any evidence that the claimant's injury was a factor in precluding her from obtaining employment after the lay off prior to her return to work in February 2002, the hearing officer erred by giving new effect to the evaluation conducted February 19, 2001, leading to the erroneous statement that the claimant was precluded from work and had not worked since that date. In fact, the medical evidence post-layoff showed that the claimant was doing better as of May 14 and in fact had not returned to see Dr. J as of July 17, 2001, when he wrote the carrier.

Because the decision on disability is against the great weight and preponderance of the evidence, we reverse and render the decision that the claimant had not proven disability from her compensable injury as of the date of the CCH.

The true corporate name of the insurance carrier is **ST. PAUL FIRE AND MARINE INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**CORPORATION SERVICE COMPANY
800 BRAZOS
AUSTIN, TEXAS 78701.**

Susan M. Kelley
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Philip F. O'Neill
Appeals Judge