APPEAL NO. 031188
FILED JUNE 25, 2003

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 April 15, 2003. The hearing officer determined that the compensable (right ankle) injury does not extend to include reflex sympathetic dystrophy (RSD) and that the appellant (claimant) did not have disability from August 6, 2002, through the date of the CCH.

The claimant appeals, essentially on a sufficiency of the evidence basis. The respondent (carrier) responds, urging affirmance.

DECISION

Affirmed in part and reversed and remanded in part.

The claimant, a forklift operator, sustained a compensable right ankle injury on _____, when he was hit by another piece of equipment while stepping off his forklift. Although the medical evidence is conflicting, even the carrier conceded that the claimant sustained a broken right ankle. The claimant was seen in a hospital emergency room in the early morning hours of (date after date of injury), where the claimant's ankle was placed in a "walking boot," and he was given crutches. Later on (date after date of injury), the claimant was seen in a clinic on referral from the employer, where he was treated and released to light duty. The claimant testified that on July 4, 2002, he was at a family gathering when an altercation occurred which resulted in his arrest, incarceration, and extradition to (state) for a possible probation violation. The claimant was incarcerated until about July 17 or 18, 2002. It is undisputed that sometime shortly after the claimant's release he called Ms. LA, the employer's human resources coordinator. What was said, and whether the claimant was referred to the employer's claims risk management specialist is disputed. In evidence is a document labeled "Bona-fide Job Offer" (BFOE) dated July 9, 2002. The parties stipulated that this document does not meet the requirements of a BFOE pursuant to Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 129.6 (Rule 129.6). There is no evidence that Ms. LA or anyone else ever made the claimant an offer of light-duty employment, although the testimony was that the employer had such a program in place.

At some point in time, either during the claimant's incarceration or shortly thereafter, the claimant's employment was terminated. The claimant saw an orthopedic surgeon, who in a report dated July 31, 2002, noted the claimant continues to wear a walking boot and that the claimant "was released from his present job." The claimant was placed on "[l]ight duty and must be sedentary 80% of the time." There is evidence that the claimant missed one or more physical therapy sessions in early August 2002, and was eventually taken off work altogether by a chiropractor on August 6, 2002.

On the extent-of-injury issue, there was conflicting medical evidence. In a report dated November 19, 2002, Dr. O the carrier's required medical examination (RME) doctor, gives details why, in his opinion, the claimant does not have RSD. The hearing officer reviewed the record and medical evidence and decided what facts were established. We conclude that the hearing officer's determinations on the extent-of-injury issue are supported by the evidence and 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). The hearing officer's decision on that issue is affirmed.

Disability means the inability to obtain and retain employment at wages equivalent to the preinjury wage because of a compensable injury. Section 401.011(16). We have said that a light-duty or conditional work release is evidence that disability continues. Texas Workers' Compensation Commission Appeal No. 91045, decided November 21, 1991. We have also held that a claimant under a light-duty release does not have an obligation to look for work or show that work was not available within his restrictions. *See* Texas Workers' Compensation Commission Appeal No. 970597, decided May 16, 1997, and cases cited therein. In this case, in finding no disability after August 6, 2002, the hearing officer in the Statement of the Evidence commented:

> The credible evidence is that had Claimant been sincere and made an honest effort to report to the Employer immediately after he was released from jail that there would have been a light duty work program made available to him. However, the preponderance of the credible evidence is that Claimant did not present himself to his Employer for light duty work as he testified. The credible evidence is that Claimant did not contact his Employer until after August 6, 2002, after he changed treating doctors to [the chiropractor], who placed him in an off-duty status.
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> In the instant case, the credible evidence is that had Claimant chosen to work within reasonable medical restrictions, and not chosen to avoid work altogether, he would have been able to work in a light duty program provided by his Employer. However, in this case, the credible evidence is that Claimant refused physical therapy, and went looking for a doctor who would take him completely off work. Claimant did not meet his burden of proof with regard to the disputed issue of disability.

In so commenting, we hold that the hearing officer erred in applying the wrong standard for disability. Clearly the hearing officer was placing the burden on the claimant to present himself to the employer and/or seek light-duty work.

The carrier and the hearing officer cite Texas Workers' Compensation Commission Appeal No. 012646, decided December 10, 2001, for the proposition that a

claimant does not have disability if "he would have been able to work in a light duty program provided by the Employer." We first note that there was no evidence that an offer of light-duty work was ever made to this claimant. Even the employer's witnesses testified that placing an injured employer in a light duty status was decided on "a case-by-case basis." Secondly, the claimant in Appeal No. 012646 was offered light-duty work at full pay with minimal or no duties, but that "the claimant never availed himself of the light-duty program." We have also addressed Appeal No. 012646 in Texas Workers' Compensation Commission Appeal No. 030399, decided April 1, 2003 stating:

> The carrier cites, in support of its position, Texas Workers' Compensation Commission Appeal No. 012646, decided December 10, 2001. However, in that case, we affirmed the hearing officer's determination that the claimant had disability for the period of light-duty, notwithstanding the availability of light-duty employment consistent with the claimant's restrictions. Indeed, we have said on numerous occasions that a claimant under a light-duty release does not have an obligation to look for work or show that work was not available within his restrictions. Texas Workers' Compensation Commission Appeal No. 022908, decided January 8, 2003.

We do not find Appeal No. 012646 dispositive in the instant case.

We would also note that Dr. O, the carrier's RME doctor, in his November 19, 2002, report, almost two and a half months after the injury, comments:

> I do believe [the claimant] is having difficulty with the ankle as documented by the physiological change on the step test . . . . he simply cannot use his right ankle at this time. He cannot walk or stand a lot, but he can do any sitting job. He can walk a short distance. He can go up one to two flights of stairs with a handrail. There is no reason he could not return to **Sedentary** or **Light** work that is modified so he does not use his ankle to a great degree. [Emphasis in the original.]

If the employer believes that the claimant is capable of performing these functions they should make the claimant a BFOE.

We reverse the hearing officer's determination that the claimant did not have disability after August 6, 2002, and remand the case for the hearing officer to determine the dates of disability which appear to be the days after the claimant's injury and before his incarceration, and after his incarceration at least until after Dr. O's November 19, 2002, report.

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 which was amended June 17, 2001, to exclude Saturdays and Sundays and holidays listed in Section 662.003 of the Texas Government Code in the computation of the 15-day appeal and response periods. *See* Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

The true corporate name of the insurance carrier is **SENTRY INSURANCE, A MUTUAL COMPANY** and the name and address of its registered agent for service of process is

TREVA DURHAM
1000 HERITAGE CENTER CIRCLE
ROUND ROCK, TEXAS 78644.

_____
Thomas A. Knapp
Appeals Judge

CONCUR:

_____
Gary L. Kilgore
Appeals Judge

_____
Veronica Lopez-Ruberto
Appeals Judge