

APPEAL NO. 031193
FILED JUNE 30, 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 was held on April 15, 2003. The hearing officer determined that the _____, compensable injury of the appellant (claimant) extends to and includes the diagnosed C5-6 herniated disc but does not extend to the lumbar spine; that claimant's employer did not tender a bona fide offer of employment; and that claimant did not have disability from October 17, 2002, through the present.¹ Claimant appealed only the determinations regarding extent of injury to the lumbar spine and disability. Respondent (carrier) responded that the Appeals Panel should affirm the hearing officer's decision and order.

DECISION

We affirm in part and reverse and render in part.

Claimant contends the hearing officer erred in determining that the compensable injury does not extend to the lumbar spine. We have reviewed the complained-of determination regarding extent of injury and conclude that the issue involved a fact question for the hearing officer. The hearing officer reviewed the record and decided what facts were established. We conclude that the hearing officer's determination is supported by the record and is 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).

Claimant contends the hearing officer erred in determining that she did not have disability from October 17, 2002, through the present. In the decision and order, the hearing officer said:

A claimant may go in and out of disability. In this case, [(Dr. B)]² noted that claimant could work, with limitations of lifting, on June 1, 2002. [Dr. B's] report was credible The employer credibly testified that claimant's work did not require lifting often and not more than 20 pounds. Claimant did not establish that she had disability from October 18, 2002, though the present.

Dr. B said claimant could lift up to 20 pounds occasionally and 10 pounds frequently. A restricted release to work, as opposed to an unrestricted release, is evidence that the effects of the injury remain, and disability continues. Texas Workers' Compensation Commission Appeal No. 981337, decided August 3, 1998. The hearing officer apparently determined that claimant did not have disability because the job she

¹ We note that the actual issue before the hearing officer was whether claimant had disability beginning on October 18, 2002, not October 17, 2002.

² The medical professionals involved in this case are not related to any employee of the Appeals Panel.

had before the layoff was within her restrictions. However, in Texas Workers' Compensation Commission Appeal No. 000354, decided March 20, 2000, we said, [t]he fact that claimant would have continued working light duty for employer had he not been laid off does not mean that his disability cannot continue after the layoff, especially considering the fact that claimant was under a conditional work release." See also Texas Workers' Compensation Commission Appeal No. 990733, decided May 24, 1999; Texas Workers' Compensation Commission Appeal No. 941249, decided October 26, 1994.

In the case before us, there is no unrestricted work release in the record. Further, the cervical MRI stated that claimant had cervical herniations that indented or flattened the cervical cord and there was EMG evidence of cervical radiculopathy. Dr. Y stated that claimant is a surgical candidate. In her decision, the hearing officer acknowledges that the cervical condition is symptomatic and does not state that she believes the symptoms have somehow resolved. Claimant said her condition has worsened over time and no doctor indicated that claimant's injury had resolved so that she was capable of work without any restrictions. This is not a case involving a minor injury such as a sprain/strain that the hearing officer could perhaps believe had resolved after a long period of time. We conclude that, under the facts of this particular case, the hearing officer erred in determining that claimant did not have disability.

Carrier asserts that claimant must prove a change in her condition to reestablish disability because the evidence showed claimant did not have disability from May 30 through October 17, 2002. The parties signed a Benefit Dispute Agreement (TWCC-24) on October 17, 2002, agreeing that claimant had disability due to the _____, injury from October 23, 2001, through May 29, 2002. There is no evidence in the record and no express agreement that claimant did not have disability from May 30 to October 17, 2002. The benefit review conference agreement does not establish, as a matter of law, that claimant did not have disability from May 30 through October 17, 2002. In any case, claimant did testify that her condition has worsened. Because claimant said her condition has worsened, there is no evidence that claimant has an unconditional work release, and due to the seriousness of her condition and surgical recommendation, we conclude that there is no evidence that disability ended before the date of the hearing. Therefore, we need not remand the case for a fact finding regarding disability. For the above-stated reasons, we reverse the hearing officer's decision that claimant did not have disability from October 17, 2002, through the date of the hearing and render a decision that claimant had disability from October 18, 2002, through the date of the hearing.

We affirm that part of the hearing officer's decision that determined that the compensable injury does not extend to include the lumbar spine. We reverse that part of the hearing officer's decision and order that determined that claimant did not have disability from October 17, 2002, through the date of the hearing and render a decision that claimant had disability from October 18, 2002, through the date of the hearing.

According to information provided by carrier, the true corporate name of the insurance carrier is **EMPLOYERS GENERAL INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**ROBERT RAMSOWER
THANKSGIVING TOWER
1601 ELM STREET, SUITE 1600
DALLAS, TEXAS 75201.**

Judy L. S. Barnes
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Margaret L. Turner
Appeals Judge