APPEAL NO. 031228
FILED JUNE 16, 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 11, 2003. The hearing officer determined that: (1) the appellant (claimant) sustained a compensable injury on _____; (2) the claimant had disability from August 30, 2002, to September 5, 2002, and at no other time as of the date of the hearing; and (3) the respondent (carrier) did not waive its right to contest the injury because it disputed the injury in accordance with Section 409.021. The claimant appealed the disability determination on sufficiency of the evidence grounds, asserting that disability continued from September 10, 2002, through November 13, 2002. The carrier urges affirmance. The hearing officer's injury and waiver determinations were not appealed and are, therefore, final. Section 410.169.

DECISION

Reversed and rendered.

The claimant sustained a compensable back injury on _____. He completed his shift and took a prescheduled vacation for one week following the date of injury. The claimant returned to light duty work, due to his compensable injury, at his preinjury wage. On August 30, 2002, the claimant was taken off work by his treating physician. He was released to light duty, again, on September 5, 2002. The claimant worked light duty until September 9, 2002, when he was laid off by his employer. The medical evidence shows that the claimant remained under light-duty work restrictions through November 2002. The claimant testified that he returned to work with another employer on November 14, 2002, at wages higher than his preinjury wage.

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 work 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 19, 1997, and cases cited therein. The hearing officer found that the claimant did not have disability beginning September 10, 2002, stating "Claimant testified that he could have begun working for [the new employer] on September 9, 2002." The evidence is clear, however, that the claimant was not offered a position with the new employer on September 9, 2002. In view of the applicable law, we conclude that the hearing officer erred in determining that the claimant did not have disability beginning September 10, 2002, because that determination effectively requires the claimant, in this case, to show that no work was available within his light-duty work restrictions.

In the Statement of the Evidence portion of the decision, the hearing officer states, "Claimant testified that, on September 14, 2002, he returned to work…another employer, at a higher rate of pay than his pre-injury wage." In our review of the record, the claimant testified that he returned to work for another employer at a higher rate of pay on November 14, 2002, two months later than the date relied upon by the hearing officer. Accordingly, 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, 176 (Tex. 1986).

For the reasons stated above, we reverse the hearing officer's disability determination and render a decision that the claimant had disability from August 30, 2002, through September 5, 2002, and September 10, 2002 through November 13, 2002.

The true corporate name of the insurance carrier is **TRAVELERS INDEMNITY COMPANY** and the name and address of its registered agent for service of process is

CORPORATION SERVICE COMPANY
350 NORTH ST. PAUL STREET
DALLAS, TEXAS 75201.

_____
Edward Vilano
Appeals Judge

CONCUR:

_____
Gary L. Kilgore
Appeals Judge

DISSENTING OPINION:

We have frequently noted that the Appeals Panel is not a fact finder and does not normally substitute its judgment for the trier of fact citing National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied). In this case the hearing officer was clearly under the mistaken impression that the claimant had returned to work for another employer at a higher wage than the preinjury wage on September 14, 2002, instead of the correct date of November 14, 2002. That mistaken impression may well have led the hearing officer to conclude that the claimant's disability ended on September 5, 2002. I would have pointed out that error and remanded the case for the hearing officer to determine dates of disability that are supported by the evidence and not contrary to precedent.

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Thomas A. Knapp
Appeals Judge