APPEAL NO. 033090
FILED JANUARY 12, 2004

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 October 28, 2003. The hearing officer determined that the respondent (claimant) had disability due to his _____, injury from October 31, 2002, through the date of the CCH.

The appellant (self-insured) appealed on a number of grounds including that the claimant's inability to obtain and retain employment at his preinjury wage was due to his retirement, due to unapproved out-of-state spinal surgery, and that the hearing officer erred in "applying an 'old law' concept of incapacity rather that the definition of disability set out in Section 401.011(16)." The claimant responds, urging affirmance.

DECISION

Affirmed.

The only issue is disability, defined in Section 401.011(16) as being the inability because of a compensable injury to obtain and retain employment at the preinjury wage. The claimant was employed as a jailer by the self-insured and although he had had some back problems in the past, the parties stipulated that the claimant sustained a compensable (low back) injury on _____. By all accounts the claimant continued to work when his immediate supervisors modified his duties to accommodate his limitations. Whether the claimant's condition improved or got progressively worse is disputed. The hearing officer found that "the claimant's condition deteriorated between January and October [2002]" and that determination is supported by the evidence including therapy notes from (CORE). The claimant testified that partially because of his deteriorating physical condition, he put in his application for retirement on September 23, 2002. Two days later on September 25, 2002, the claimant received a lumbar epidural steroid injection at L5-S1. According to the claimant, his condition continued to get worse and he was hospitalized for five days with severe back pain on October 31, 2002. The claimant's retirement became effective on November 8, 2002. The claimant's condition did not improve and a request to change treating doctors to an out-of-state surgeon (recommended by an in-law, who is a physician, and who had previously treated the claimant) was denied on April 16, 2003. The claimant nonetheless went out-of-state and received spinal surgery on April 29, 2003, paid for by either the claimant or private group health insurance. The claimant testified that his condition has improved substantially but that he continues to have physical restrictions. The claimant subsequently began working doing personal care home inspections at substantially less than 80% of his preinjury wage.

The self-insured first contends that the claimant had continued to work after his injury for 10 months until he retired on November 8, 2002. The self-insured points to

certain activities the claimant performed during the summer of 2002 to show the claimant was capable of performing certain activities. Whether the claimant's inability to obtain and retain employment at his preinjury wage, after November 8, 2002, was due to the compensable injury or voluntary retirement is a factual determination for the hearing officer to resolve. Certainly retirement is a factor for the hearing officer to consider in evaluating the statutory definition of disability but retirement from the job where the claimant was injured does not as a matter of law end disability. Texas Workers' Compensation Commission Appeal No. 970089, decided February 28, 1997, Texas Workers' Compensation Commission Appeal No. 992073, decided October 25, 1999. The claimant need only prove that the compensable injury is a cause, not necessarily the only cause, of the inability to earn the preinjury wage. The hearing officer's determination on this point is supported by the evidence.

Secondly, the self-insured contends that it should not be liable for recovery from the out-of-state "*sua sponte* and unapproved back surgery." We note that with our affirmance that the claimant's retirement does not preclude disability, the claimant was in a disability status when he received the unapproved surgery. Further the compensable injury was still found to be a producing cause of the inability to earn the preinjury wage when the claimant had the surgery. The self-insured contends that the "unauthorized medical treatment becomes an independent intervening cause of [the] inability to work" but there is virtually no evidence to show that the surgery was the sole cause of the claimant's inability to earn his preinjury wage in April/May 2003.

Finally, the self-insured argues that the hearing officer erred in applying an "old law" concept of disability because the hearing officer referred to the claimant's "functional capacity." Our review of the record as a whole does not indicate that the hearing officer was confused or misapplied the statutory definition of disability. Rather we will infer that the use of terms "limitations on his physical activities" and "resume full duty employment" refers to the ability, or inability, to earn the preinjury wage.

We have reviewed the complained-of determinations and conclude that the hearing officer did not err on the application of legal standards and that his determinations 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).

We affirm the hearing officer's decision and order.

The true corporate name of the insurance carrier is **self-insured through the TEXAS ASSOCIATION OF COUNTIES SELF-INSURANCE FUND** and the name and address of its registered agent for service of process is

EXECUTIVE DIRECTOR
(ADDRESS)
(CITY), TEXAS (ZIP CODE).

_____
Thomas A. Knapp
Appeals Judge

CONCUR:

_____
Judy L. S. Barnes
Appeals Judge

_____
Robert W. Potts
Appeals Judge