

APPEAL NO. 041323
FILED JULY 26, 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 was held on May 10, 2004. The hearing officer determined that the appellant (claimant) was entitled to change treating doctors, and that he had disability due to his _____, compensable injury from May 3 through June 30, 2003, and from July 3, 2003, through February 20, 2004, but not thereafter through the date of the hearing. The claimant appealed the disability determination, asserting that disability continued through May 3, 2004. The respondent (self-insured) responded, urging affirmance. The hearing officer's determination regarding the change of treating doctors has not been appealed, and has become final. Section 410.169.

DECISION

Reversed and rendered.

It is undisputed that the claimant is employed by the self-insured as a firefighter and emergency medical technician. It is also undisputed that the claimant sustained a compensable low back injury on _____. Between the date of injury and May 4, 2004, the date the claimant testified that he was released to unrestricted full-duty work, the claimant was either taken totally off work or had a restricted duty release by the various doctors. We note that there were two "bona fide offers of employment (BFOE)" from the self-insured to the claimant dated June 24, 2003, and August 5, 2003, in the record. The validity of the BFOEs was not an issue at the hearing, and the hearing officer made no findings in that regard. The claimant testified that he did in fact attempt to return to work under restrictions for two days at the beginning of July 2003, but he was unable to perform the work. The claimant began treating with his new treating doctor on August 8, 2003, and that doctor maintained the claimant on off-work status until his ultimate release to unrestricted full-duty.

The hearing officer determined that the claimant's disability ended on February 20, 2004. In so doing, the hearing officer stated the following:

[The claimant's treating doctor's] letter of January 9, 2004 indicated that [c]laimant would be released to full duty on February 3, 2004. She did not do that, but [c]laimant was examined by [the Texas Workers' Compensation Commission-selected designated doctor] on February 20, 2004, who found [c]laimant to have a virtually normal presentation. Claimant failed to prove disability after that date.

We cannot agree with the hearing officer's assessment of what the designated doctor's February 20, 2004, report indicates. In fact, the report indicates that the claimant was unable to perform the heel/toe walk; that the claimant was not yet at maximum medical

improvement (MMI); that the claimant needs to continue with physical therapy; and that the claimant is able to return to work with restrictions. We note that the designated doctor did not list what the restrictions should be as the examination was to make a determination regarding MMI. There is no evidence that the self-insured offered the claimant a position at wages equivalent to his preinjury wage which met his restrictions after February 20, 2004. Nor was there evidence that such employment was readily available to the claimant after that date.

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 or her 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 after February 20, 2004, based upon a designated doctor's report which indicated that the claimant had a "virtually normal presentation." As noted above, that report merely states that the claimant could return to work with a restricted-duty release. In view of the applicable law, we conclude that the hearing officer erred in determining that the claimant did not have disability after February 20, 2004, because that determination effectively requires the claimant, in this case, to show that no work was available within his work restrictions. We therefore reverse the decision of the hearing officer as to the issue of disability and render a decision that the claimant had disability from May 3, 2003, through June 30, 2003, and from July 3, 2003, ending May 4, 2004, the date he was released to, and returned to, full duty.

The true corporate name of the insurance carrier is **(a self-insured governmental entity)** and the name and address of its registered agent for service of process is

**CITY SECRETARY
(ADDRESS)
(CITY), TEXAS (ZIP CODE).**

Daniel R. Barry
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Margaret L. Turner
Appeals Judge