APPEAL NO. 950264

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). Following a contested case hearing held in (city), Texas, on January 14, 1994, the hearing officer, (hearing officer), resolved the two disputed issues, disability and average weekly wage (AWW), by concluding that the respondent (claimant) had disability resulting from her undisputed lower back injury of (date of injury), on certain dates in 1992 and 1993, and that her average weekly wage (AWW) was $636.19. The appellant (self-insured) appeals challenging the sufficiency of the evidence to support the dispositive findings and conclusions. The respondent seeks affirmance.

DECISION

Affirmed.

The parties stipulated that claimant sustained a compensable lower back injury on (date of injury). Claimant, a teacher, testified that on (date of injury), while moving some boxes at the school where she was then employed, she injured her lower back. She had injured her neck in a motor vehicle accident in January 1992. With respect to the disability issue, claimant's exhibits show she requested a benefit review conference (BRC) because the self-insured had refused to pay temporary income benefits contending that her lost time was due to the auto accident. At the BRC the self-insured's position was that claimant did have disability but only from (date of injury) until August 2, 1992. Claimant testified that on the date of her back injury she saw (Dr. T), who had been treating her injured neck, and that he took her off work until August 4, 1992. In evidence was a "Certificate to Return to School or Work" signed by Dr. T stating that she had been under his care from "[date of injury]" and was able to return to work on "8/4/92."

The hearing officer found that claimant had disability on the following dates: "August 27 & 28, 1992; September 17 & 18, 1992; October 16 & 21, 1992; October 23, 1992; November 11, 1992; November 18 & 24, 1992; December 16, 1992; January 14 & 15, 1993; February 12, 1993; March 29, 1993; May 4, 12, 24 & 25, 1993; and May 29, 1993 through August 15, 1993." Although claimant testified that she also had disability during the period from April 9 through 19, 1993, and Dr. T's certificate to that effect was in evidence, the hearing officer did not include this period of disability in his finding. Since claimant has not appealed the decision, we need not further consider this period.

Claimant introduced various "Absent From Duty" slips, all signed by claimant and some by the self-insured's superintendent at the approximate times of the absences, which showed absences from work on the dates the hearing officer found claimant had disability between August 27, 1992, and May 25, 1993. Most stated "back pain" as the reason though some indicated doctor appointments and some indicated only half day absences.

Claimant testified that on the dates she contended she had disability she was unable to work solely as a result of her low back injury; that she resigned her teaching position with

the self-insured in June 1993 and commenced teaching for another school district on August 16, 1994; that she normally obtained summer jobs; and that she could not work in the summer of 1993 because she had excruciating back pain and was on medications.

Also in evidence was a letter from Dr. T dated August 13, 1993, stating 10 dates in the period from January 14 through June 25, 1992, and April 20 and May 28, 1993, as dates claimant missed work because of her automobile accident injury; that claimant could not work because of her work-related low back injury on "[date of injury], 8/3/92, 10/21/92, 4/9/93;" and that her work-related injury causes sacroiliitis and related muscle spasm and that she continues to have problems and pain in both areas. Dr. T's August 30, 1993, letter stated that claimant "was recommended to not work during the summer of '93 due to her neck and her back injuries." Dr. T's June 24, 1994, letter stated that she had been under his care for her back injury and that the following were dates she was unable to work: "10/16/92 - 10/21/92, 10-23/92, 5/24/93, 5/25/93, 5/12/93, 5/4/93, 11/18/92, 11/24/92, 12/16/92, 2/12/93, 11/11/92, 3/29/93, 9/17/92, 8/28/92, 9/18/92, 8/27/92, 1/14/93, 1/15/93, 5/28/93, 8/15/93." Claimant testified that she missed work on both October 16 and 21, 1992, but not for the intervening period as indicated in Dr. T's letter; and she also said she was "withdrawing" a claim of disability date of May 28, 1993.

Disability is defined as "the inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage." Section 401.011(16). In its appeal the self-insured essentially attacks claimant's credibility and the sufficiency of her evidence. Claimant had the burden of proving by a preponderance of the evidence that she sustained disability because of the compensable injury. The existence of disability is a question of fact to be determined by the hearing officer from all the available evidence including medical evidence and that given by claimant (Texas Workers' Compensation Commission Appeal No. 92147, decided May 29, 1992; Texas Workers' Compensation Commission Appeal No. 91024, decided October 23, 1991) and the burden of proof can be met by the injured employee's testimony alone. Texas Workers' Compensation Commission Appeal No. 93858, decided November 9, 1993. We said in Texas Workers' Compensation Commission Appeal No. 93953, decided December 7, 1993, that "[s]ince disability is not necessarily a continuing status, a claimant may have intermittent or recurring periods of disability. In such a case, the claimant has the burden of proving when each period or recurring disability is reestablished. [Citations omitted.] The Appeals Panel has also held that when an employee is no longer employed by the employer, the employee has the burden to show disability continues after the termination of employment. [Citation omitted.]"

We are satisfied that the evidence sufficiently supports the existence of disability for the several periods found by the hearing officer and that his finding is not so contrary to the great weight of the evidence as to be clearly wrong and manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). Claimant's testimony was supported by the letters from her treating doctor. While there was no evidence to indicate whether claimant was paid wages for the various dates she

missed work due to her back injury, there was no evidence that she was paid and the self-insured neither inquired into the matter at the hearing nor raises it on appeal.

While not stating it was asserting a sole cause defense as such, the self-insured asserted at the hearing that on the dates claimant contended she had disability as a result of her back injury claimant was also missing work because of her neck injury. In this regard, the Appeals Panel stated the following in Texas Workers' Compensation Commission Appeal No. 931134, decided January 28, 1994:

It is not necessary that the injury in issue be the only cause of disability to warrant income benefits. To the contrary, a carrier would be absolved of liability for income benefits only if the other injury or condition was the sole cause of the disability. [Citation omitted.] A claimant has the burden to prove disability from the claimed injury but need not prove that the claimed injury was the sole cause, as opposed to a cause, of disability. [Citations omitted.] The burden is on the carrier to show that a pre-existing or subsequent injury or condition is the sole cause of the disability to be relieved of liability. [Citation omitted.]

The self-insured also asserted that claimant did not have disability during the summer of 1993 because she had resigned. However, claimant testified she could not work during that period due to her back pain and she was supported by Dr. T. The Appeals Panel has had occasion to address disability in the context of whether it can continue after the involuntary termination of an injured employee's employment and has noted that the focus of the inquiry into disability is on the inability to obtain and retain employment at equivalent wages and "the fact that a termination was for cause does not, in and of itself, foreclose the existence of disability." Texas Workers' Compensation Commission Appeal No. 93449, July 21, 1993. We see this same rationale and focus as also applicable where, as here, the employment termination was voluntary, especially in light of Dr. T's recommendation that claimant not work during the summer of 1993 due, in part, to her compensable injury.

As for her AWW, claimant testified that in addition to the weekly salary amount shown on the Employer's Wage Statement (TWCC-3), the TWCC-3 also accurately reflected that her fringe benefits included health insurance at $100.00 per month and that she received a lump sum bonus of $3500.00. She indicated that the bonus was an annual bonus paid sometime in the summer after the school term ended, and that $3000.00 of the amount was a part of her salary for her career ladder level and grade. The hearing officer's findings reflect that he determined claimant's AWW to be $636.19 by adding to claimant's weekly wage of $546.11 (the TWCC-3 stated $546.15) the additional amounts of $23.00 per week for the health insurance premium and $67.08 per week for the annual $3500.00 bonus. The self-insured's appeal appears not to quarrel with the arithmetic but rather with the hearing officer's having included in claimant's AWW the amounts for health insurance and the bonus. The self-insured cites us to no authority concerning its position on the inclusion of the health insurance amount. This is not surprising considering that Tex. W.C. Comm'n,

28 TEX. ADMIN. CODE § 128.1(b)(3) (Rule 128.1(b)(3)) specifically includes health care premiums paid by the employer in the calculation of AWW.

Section 401.011(43) defines "wages" to include all forms of remuneration payable for a given period to an employee for personal services. Rule 128.1(b) provides that an employee's wage (for AWW) "shall include every form of remuneration paid for the period of computation of [AWW] to the employee for personal services." In Texas Workers' Compensation Commission Appeal No. 93209, decided May 3, 1993, the Appeals Panel affirmed the hearing officer's determination that certain amounts paid the injured employee as a bonus should be included in his AWW. Respecting claimant's bonus, the self-insured apparently does not contend that a bonus cannot be a part of AWW (the TWCC-3 contains a specific block for bonuses and the self-insured included it) but rather that it should not have been included since it was paid after the date of the injury, citing Texas Workers' Compensation Commission Appeal No. 92344, decided August 31, 1992, for the proposition that money paid after the 13-week period preceding the injury should not be included. In that case, the injured employee sought to have certain vacation and sick leave paid to him three days after his injury when his employment was terminated added to his 13 weeks of wages for purposes of calculating his AWW. Neither the employee nor the employer's benefits coordinator were able to answer whether the leave time accrued periodically as the employee worked. In affirming, the Appeals Panel noted that not only was the employee actually paid the unused leave three days after his injury "so such amounts would not literally be within the ambit of wages paid for the preceding 13 week period," but further given the absence of evidence as to the employer's method of accrual of leave time, "such payments appear to be more in the nature of a settlement for leave the appellant could have taken in the future, had he not been terminated." We view the facts in the case we consider as distinguishable from those in Appeal No. 92344. It seems clear from reading the hearing officer's findings together that he regarded claimant's $3500.00 bonus as having accrued throughout the year preceding the lump sum payment. The hearing officer stated in his discussion that the employer provided an annual bonus as a fringe benefit "for work Claimant had performed for Employer in the preceding 12 month period." There was no evidence that the bonus reflected on the TWCC-3 was paid prospectively. We find no merit to the self-insured's asserted errors concerning the AWW determination.

Finding the evidence sufficient to support the challenged findings and conclusions and no reversible error, the decision and order of the hearing officer are affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Susan M. Kelley
Appeals Judge