APPEAL NO. 950302

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On January 23, 1995, a contested case hearing (CCH) was held in (city), Texas, with (hearing officer) presiding. The sole issue was:

Whether Claimant had disability and remained eligible for temporary income benefits after his involuntary termination of employment for refusal to submit to a drug screen.

The hearing officer determined that claimant had disability which began on March 3, 1992, and continued through September 1, 1992, due to his compensable back injury. Appellant, carrier, contends that the hearing officer erred in his decision and that the reason claimant was unable to obtain employment was the involuntary termination of claimant's employment. The file does not contain a response from the respondent, claimant.

DECISION

Affirmed.

The hearing officer explained on the record that although the injury was on (date of injury), and a benefit review conference was held on September 9, 1992; the case was apparently held in abeyance until one of the parties requested a CCH, which was not until October 1994. Subsequent continuances and resettings resulted in the January 23, 1995, hearing date.

Carrier in its appeal recites it received "its copy of the [CCH] Hearing Officer's decision on February 13, 1995." Texas Workers' Compensation Commission (Commission) records show the decision was hand receipted for February 10, 1995. In either case, carrier's appeal is timely, however, we caution carrier that the jurisdictional 15 days to file an appeal begins the date on which the decision is signed for from the Commission (Section 410.202), not the date that the decision may have been given to carrier's attorney or otherwise logged in by carrier.

On the merits of the case, claimant worked as a welder for (employer), employer. Claimant testified that on (date of injury), he fell at work and injured his back. Claimant testified that he was unable to work the next day and saw his family doctor, (Dr. H). Dr. H, in an Initial Medical Report (TWCC-61) dated July 13, 1992, records a date of injury "[date]" diagnosed "a) Ileo lumbar strain b) Sacro-Iliac strain" and projected claimant could return to limited work in "4 wks" and full time work in "6 wks." Dr. H noted "no objective finds" and a treatment plan of "Bed rest and muscle relaxers." Claimant testified that he was off work until February 22nd or 23rd when he returned to work in a light duty status. Claimant continued working in a light duty status until he was terminated on March 3, 1992, for failure to take a required drug test on March 2, 1992. Claimant equivocated that he refused to take the drug test but testified, as is supported by Dr. H, that he was taking a prescription

drug "Vicoden" or "Vicodine" a drug containing codeine which would have resulted in a positive drug test. Claimant testified that his back was still bothering him on March 2nd, that he left work early that day and that he returned to see Dr. H shortly thereafter. Claimant testified that he continued to treat with Dr. H on a regular basis until he was released to return to work in "September 1992." Claimant subsequently obtained employment with another employer in October 1992.

Claimant contends that he had disability from March 3, 1992, until his release to return to work in September 1992. Claimant concedes that he applied for, but failed to receive, unemployment compensation in the summer of 1992 and that he had applied for work with the employer and other potential employers during the time in question.

The only medical evidence, other than Dr. H's TWCC-61 referenced earlier, is a report dated October 2, 1992, from Dr. H which stated:

> [Claimant] was injured and rendered incapable of performing the normal and usual tasks of a workman as a result of said injury. [Claimant] was unable to return to full employment from the date of his injury until September, 1992. He is still partially disabled and should be assigned to light duty or work that does not require lifting of objects any heavier than 25 pounds. [Claimant's] refusal to submit to drug testing was warranted since he was under prescription for vicoden, a drug containing codeine at the time of the request and a test would have shown positive for codeine.

Carrier challenges the following determinations:

FINDINGS OF FACT

4. Claimant sought medical treatment from [Dr. H] on February 18, 1992, and was diagnosed with a lumbar strain and was placed on bed rest and given medication.

5. [Dr. H] indicated in his initial medical examination that he anticipated Claimant would return to limited work in 4 weeks and full time work in six weeks.

8. Claimant continued in a treatment program with [Dr. H] from February 18, 1992, through October 2, 1992.

9. [Dr. H] released Claimant to return to work with a lifting restriction of 25 pounds on September 1, 1992.

10. Claimant was not able to obtain or retain employment from March 3, 1992, through September 1, 1992, because of his work related back injury.

CONCLUSION OF LAW

2.Claimant had disability which began on March 3, 1992, and continued through September 1, 1992.

Carrier contends that claimant " . . . demonstrated before he was terminated from his job that he was capable of doing work and [was] not under a disability at that point." We would note that claimant's uncontroverted testimony was that he returned to work in a light duty capacity and that he was in a light duty status when he was fired. Disability is defined in the 1989 Act as the inability to obtain and retain employment at the preinjury wage. Section 401.011(16). The Appeals Panel had previously noted "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. 92432, decided October 5, 1992. *See also* Texas Workers' Compensation Commission Appeal No. 91045, decided November 21, 1991 ("Where the medical release is conditional and not a return to full duty status because of the compensable injury, disability, by definition, has not ended unless the employee is able to obtain and retain employment at wages equivalent to his preinjury wage.") Further, the Appeals Panel has held that where claimant is released to return to work light duty, there is no requirement that the claimant look for work although it is a factor for the hearing officer to consider. Texas Workers' Compensation Commission Appeal No. 941092, decided September 28, 1994; Appeal No. 91045, *supra.* That is, "an employee under a conditional medical release [does] not have to show that work was not available." Texas Workers' Compensation Commission Appeal No. 941261, decided November 2, 1994. Although claimant had worked a week in a light duty status, disability may be found to continue if the effects of the injury remain and the trier of fact determines an inability to obtain and retain employment resulted. It was claimant's testimony that he was continuing to experience pain and the effects of his injury and the hearing officer as the sole judge of the weight and credibility of the evidence could believe that testimony or not. Section 410.165(a). Aetna Insurance Co. v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ); Taylor v. Lewis, 553 S.W.2d 153 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.).

Carrier contends that claimant's unemployment was due to his termination rather than claimant's disability, but we note that although such a termination can be a factor, it is not necessarily controlling. In Texas Workers' Compensation Commission Appeal No. 93449, decided July 21, 1993, *citing* Texas Workers' Compensation Commission Appeal No. 92200, decided July 2, 1992, the Appeals Panel noted that while the reason for termination may be a factor to evaluate, the focus of an inquiry as to disability is on the inability to "obtain and retain" employment. In this regard, even if a termination may have been for cause, that does not, in and of itself, foreclose the ability of a hearing officer to find disability.

The fact that claimant looked for work, and even sought work with the employer, does not necessarily mean that he was "able to obtain and retain employment equivalent to his

pre-injury wage." Although claimant was under no statutory duty to seek employment while he was in an off work status, the fact that he did so is only a factor for the hearing officer to consider in arriving at his decision., Nor does the fact that claimant sought unemployment compensation benefits preclude a finding of disability for workers' compensation benefits. Aetna Casualty & Surety Co. v. Moore, 386 S.W.2d 639 (Tex. Civ. App.-Beaumont 1964, writ ref'd n.r.e.); Texas Workers' Compensation Commission Appeal No. 93951, decided December 7, 1993.

While the medical evidence was very sparse, it does support claimant's contention. As we have previously noted above, the hearing officer is the sole judge of the weight and credibility of the evidence. In a workers' compensation case the issue of disability may be based solely on the testimony of the injured employee. Gee v. Liberty Mutual Fire Insurance Co., 765 S.W.2d 394 (Tex. 1989); Reina v. General Accident Fire and Life Assurance Corp., 611 S.W.2d 415, 416 (Tex. 1981). In this case claimant's testimony that he returned to Dr. H a day or so after he was fired and was taken off work is supported, to some extent, by Dr. H's October 2, 1992, report. Claimant further testified that he attempted to obtain more complete records of his doctor visits but was unable to do so because Dr. H had retired in 1993 or 1994. Carrier was apparently likewise unable to obtain medical records which would contradict claimant's testimony. In any event, claimant could meet his burden of proving disability by his testimony alone, if believed by the hearing officer, which it apparently was.

Upon review of the record submitted, we find no reversible error and we will not disturb the hearing officer's determination's unless they are so against the great weight and preponderance of the evidence as to be manifestly unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). We do not so find and consequently the decision and order of the hearing officer are affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

DISSENTING OPINION:

As I view the evidence in this case, it is so overwhelmingly against the hearing officer's finding of disability that reversal is virtually mandated. *See* Lopez v. Hernandez, 595 S.W.2d 180, 183 (Tex. Civ. App.-Corpus Christi 1980, no writ). Accordingly, I dissent from the majority opinion. And, I further believe that the case cited in the principle opinion, Texas Workers' Compensation Commission Appeal No. 91045, decided November 21, 1991, is being over read and misapplied to the instant factual situation. In my opinion, this case is somewhat similar to the situation in Texas Workers' Compensation Commission Appeal No. 950295, decided April 12, 1995, in which I also filed a dissenting opinion. The critical question in both cases is whether the claimant's unemployment is because of his work-related injury. By definition, disability exists only if the inability to obtain and retain employment at wages equivalent to the preinjury wage is because of a compensable injury. Section 401.001(16). While there is no dispute that the claimant sustained an injury on (date of injury), the evidence clearly established that the claimant was returned to light duty shortly thereafter (February 22nd or 23rd) and which he apparently performed without problem or incident although he testified he was still experiencing some pain. However, the claimant was terminated on March 3rd, for failure to take a required drug test on March 2nd, a requirement of the employer and which also involved other employees. Although the claimant was not released to full duty by his doctor until sometime in September 1992, the claimant testified that he had applied for employment with both the employer and other businesses after being terminated on March 3rd, and that he had also applied for unemployment compensation (which generally requires that a person hold himself out as capable of working). The claimant testified that he was on a prescription drug at the time of the required drug test, apparently offering this as some justification for failure to test. (As an aside, I note that the Commission has a strong, vigorous no illegal drugs in the work place program and places firm requirement on employers to have viable anti-drug programs). In any event, there is no doubt in my mind that there was clear justification for the termination of the claimant in this case. And, it is inescapable to me that the reason the claimant became unemployed is because of the justified termination and not "a compensable injury." The evidence in this regard is compelling. I can find no probative support for a determination that the claimant suffered disability at the moment he was terminated when the day before, and without any other changed condition or circumstance, he was capable of and did in fact work and had the ability to work. The bald statement that he was not able to work once he was terminated "flies in the face of the fact that the claimant was working" up to the termination. *See* dissenting opinion in Appeal 950295, *supra*. This is not, in my opinion, what the authority for the proposition that a claimant's testimony alone can establish disability is all about. Further, in this case, the claimant did continue to seek employment and even applied for unemployment compensation, matters wholly inconsistent, in my opinion, with a claim of having disability. Rather, his unemployed state was unrelated to a compensable injury. *See generally* Texas Workers' Compensation Commission Appeal No. 91027, decided October 24, 1991. I would reverse the decision as so clearly against the overwhelming weight of the evidence as to be wrong and unjust.

Stark O. Sanders, Jr.
Chief Appeals Judge