

APPEAL NO. 950381

Pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act), a contested case hearing (CCH) was held in (city), Texas, on October 27, 1994, with the record stated as closing February 1, 1995, (hearing officer) presiding as hearing officer. She determined that the respondent (claimant) had disability from February 17, 1994, through May 12, 1994, and from May 28, 1994, through the date the benefit CCH was closed on February 1, 1995, and that the appellant (carrier) is entitled to adjust the weekly earnings under a bona fide offer of employment for the period of May 13, 1994, through May 27, 1994. The carrier appeals urging error in the hearing officer's finding that the claimant was terminated without just cause, that it was error to conclude the claimant sustained disability from May 29, 1994, through the date of the closing of the record, February 1, 1995. The claimant responds, in essence, that the evidence sufficiently supports the hearing officer's findings and conclusions and asks that the decision be affirmed.

DECISION

We affirm in part and reverse and render in part.

That the claimant sustained a compensable twisting injury to her knee on (date of injury), when she slipped on some grease was not in dispute. Although the claimant testified that she was taken to an emergency room within the hour and did not return to work, for some inexplicable reason the initial date of disability was determined to be February 17, 1994. That determination is not on appeal, rather the period of disability in question by the carrier is the period from May 28, 1994, to February 1, 1995. It was not disputed that the claimant was released for and did return to light duty sometime in April, although she apparently was not earning the same wage. The claimant was returned to full duty in May although she continued to work in a light duty capacity and then was taken off work in June by her treating doctor. In any event, the claimant was terminated on May 28, 1994, and that is one of the centers of this controversy. The claimant testified that she was not terminated for just cause, rather because of not being able to perform her regular duties as a waitress because of her injured knee. The carrier asserted and had a manager testify telephonically that the claimant was terminated for missing a scheduled shift.

Needless to elaborate, there was considerable conflict in the evidence on this point. The evidence seems to establish that the shift in question was not the claimant's regularly scheduled shift and that she had been requested to fill in for someone else. She testified that she told the management she had a conflict and did not think she could work but that she would look around for somebody else and let them know. This occurred on the 27th of May and she states she called the next day to say she could not take the shift. The employer's version was different although the manager directly involved was apparently not available. The manager testifying over the phone indicated that the claimant was terminated because she had repeatedly missed shifts and that the shift book indicated that the manager assigned the claimant to the shift. Although any shift change would normally

require the initials of the employees involved there were no initials of any employee on the date in question, May 28th. The manager explained that this could happen if it was vocally okayed over the phone. In sum, there were two distinct versions of what transpired and the hearing officer chose to believe the claimant.

Our review of the evidence does not lead us to conclude that the hearing officer's determination, that is, that the claimant's termination on May 28, 1994, was not justified nor based upon just cause (and for a reason totally unrelated to the injury), was so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951); Atlantic Mutual Insurance Co. v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.). The hearing officer is the sole judge of the relevance and materiality of the evidence and of the weight and credibility to be given the evidence (Section 410.165(a)) and is responsible for resolving conflicts and inconsistency in the evidence and testimony. Garza v. Commercial Insurance Co. of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). In addition to the claimant's testimony regarding the occurrences of the 27th and 28th of May, she testified, concerning disability, that she tried to obtain other employment after being terminated but was not successful because of her knee and the brace that could be seen. There are also medical records that support the assertion that the claimant continued to have problems with her knee, with the latest medical record in evidence dated October 20, 1994, which states:

The patient has occasional problem (sic) with her knee, although her tone is improving. She still has slight tenderness over the inferior pole of the patella. She has no effusion. We are going to continue her with physical therapy and have injected her today. We are going to continue to watch this over the next several months and see if it continues to improve over the next several months and see if it continues to improve. We will plan on seeing her on return to clinic in four to six weeks or p.r.n. problems.

Although the claimant had surgery (a D&C and hysterectomy) during July and August, the medical records show she was still suffering the effects of her knee injury which lends support that although the surgery was disabling, the knee independently remained disabling. The hearing officer could infer from the evidence that the claimant continued to suffer disability from the compensable injury. The evidence did not compel a determination that the surgery became the only cause of the claimant's disability, that is, the knee injury was no longer a cause of the claimant's inability to obtain and retain employment at wages equivalent to the preinjury wage. Section 401.011(16).

Where we find an insufficient basis to sustain the determination of the hearing officer is extending the period of disability to February 1, 1995. Indeed, we are at a loss as to the hearing officer's statement that the record closed on February 1, 1995, without any explanation of the delay. To the contrary, at the end of the hearing on October 27, 1994, the hearing officer announced that she would keep the record open until November 17,

1994, to allow the carrier to obtain records. Subsequently, a letter from the hearing officer gave the claimant until November 28, 1994, to respond to several records submitted by the carrier. The claimant responded on November 28, 1994, (the response concerns basically the matter of the termination issue) and there is no indication of any further evidence or other matter coming before the CCH, medical or otherwise. The decision was rendered February 10, 1995. With the hearing concluded on October 27, 1994, and the evidence closing on November 28, 1994, we do not find a sufficient basis for the hearing officer to determine that disability continued to February 1, 1995. That is not to say disability may not be shown at a future proceeding for periods beyond a CCH, but rather that there is insufficient evidence to sustain a finding of continuing disability after the CCH is effectively concluded and no further evidence is produced. This cannot be artificially extended by delaying the stated closing date of the record as such unwarranted delay can clearly result in the payment of benefits to which a claimant may well not be entitled. Accordingly, we affirm only so much of the finding regarding disability that finds that the claimant had disability up to November 28, 1994, the last date that any evidence, documentary or through testimony, was brought into the record. We have reversed a hearing officer's ending date of disability occurring after the hearing and affirmed disability up to the date of the hearing. Texas Workers' Compensation Commission Appeal No. 92147, decided May 29, 1992. See *also* Texas Workers' Compensation Commission Appeal No. 94820, decided August 9, 1994. Similarly, we have upheld disability up to the date of a hearing. See Texas Workers' Compensation Commission Appeal No. 93953, decided December 7, 1993; Texas Workers' Compensation Commission Appeal No. 93422, decided July 12, 1993.

For the foregoing reasons we affirm the decision except that portion which provides claimant had disability "through the date the Benefit [CCH] was closed on February 1, 1995" and render that the claimant had disability "through November 28, 1994."

Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Lynda H. Neseholtz
Appeals Judge