APPEAL NO. 950395

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On October 28, 1994, a contested case hearing was held in (city), Texas, with (hearing officer) presiding as hearing officer to consider the single issue of whether respondent (claimant) had disability as a result of his (date of injury), compensable injury and, if so, for what period. The record closed on February 10, 1995. The hearing officer determined that claimant had disability from February 18, 1994, to February 10, 1995. In its appeal, appellant (carrier) argues that the hearing officer's disability determination is against the great weight of the evidence. Specifically, carrier argues that claimant has not satisfied his burden of proving that his disability continued following his suspension and eventual termination from his employment with (employer). Claimant's response urges affirmance on the basis of the sufficiency of the evidence in support of the hearing officer's decision.

DECISION

We affirm.

It is undisputed that on (date of injury), claimant, who was a butcher for employer and had been in that position for 15 years, was carrying meat weighing about 50 pounds to be ground in the walk-in refrigerator, slipped on some meat scraps left on the floor by his supervisor and fell. Claimant stated that he hit his shoulder as he was falling and landed on the floor. Claimant stated that after the fall, he left work and went to Med Alert, where he was seen by (Dr. M). Claimant testified that on or about December 3, 1993, he was transferred from the (city) Med Alert office to the (city) Med Alert and he began treating with (Dr. J).

On (date), claimant returned to light duty work with the employer. In the first week after his injury, claimant was apparently assigned to the kitchen, but was asked to do work which was not consistent with his restrictions. Thereafter, claimant began to work with (Ms. D), the administrative assistant in employer's human resources department, who was responsible for coordinating employer's light duty program. Ms. D assigned claimant to the engineering and security departments. From January 31 to February 11, 1994, claimant states that he arranged with (Mr. M), the supervisor of the convention services department, to perform light duty work in that department.

(Ms. T), the assistant director of human resources for employer, testified that on February 9, 1994, a driver for Med Alert came to the office to pick up claimant for his therapy and Ms. D was unable to locate claimant. In addition, Ms. D allegedly learned that claimant had not been working in the convention services department as he had indicated. In the week ending February 18, 1994, claimant was assigned by Ms. D to the sales department. On February 18th, claimant was suspended without pay pending Ms. T's investigation of whether claimant had actually been working from January 31 to February 11, 1994. Ms. T testified that her investigation revealed that claimant had not been working in convention

services as he had stated. Therefore, Ms. T recommended that claimant be terminated. Because claimant was a 15-year employee, the corporate office had to approve his termination, which it did on March 27, 1994. Claimant consistently maintained that he reported to Mr. M every day in the period at issue and did whatever work Mr. M assigned for him to do. Claimant had no explanation for Mr. M's denial that claimant had worked for him. (Mr. W), the floor coordinator in convention services, also testified at the hearing. He stated that the claimant did not work in that department during the period at issue. Finally, (Ms. A) testified that she investigated the allegations that claimant had been clocking in and not performing any work. Ms. A stated that her investigation also revealed that claimant was clocking in and not performing any work during the period from January 31 to February 11, 1994. Therefore, he was terminated for falsification of his time records. She stated that she advised claimant of his termination on or about March 27, 1994, after it was approved by the corporate office.

Claimant testified that on April 11, 1994, he began treating with (Dr. S), after the Texas Workers' Compensation Commission (Commission) approved his change of treating doctor request. In a letter of July 7, 1994, Dr. S states:

> As you know, [claimant] was injured on (date of injury), but yet, I did not see him until April 11, 1994. At that time, he was not working and I agree with the fact that he was not able to work. I have treated him for approximately three months and he has not yet improved to the status of being able to return to work. As you know, he has had significant problems with the right shoulder and neck regions causing significant limitation to this dominant upper extremity.

In a deposition on written questions dated September 26, 1994, Dr. S listed claimant's restrictions as "any tasks requiring significant usage of the right upper extremity such as repetitive movements and lifting greater than five pounds using his right upper extremity. No above-the-head lifting. No abduction of the right upper extremity." In addition, Dr. S's deposition provides that he considers claimant disabled from "(date of injury), to date" and identifies meat grinder as the job assigned to claimant by the employer after (date of injury), which claimant was unable to perform. Finally, in a report dated October 27, 1994, Dr. S states on the issue of claimant's ability to work:

> I initially evaluated [claimant] on April 11, 1994 at which time I determined him to be unable to work completely. I last saw [claimant] this morning & he remains completely unable to work. The duration of my treatment of [claimant] has not shown (revealed) a point in time in which he should have worked. I did not allow light duty for concern that it would worsen his condition.

Disability is defined in the 1989 Act as "the inability because of a compensable injury to obtain or retain employment at wages equivalent to the preinjury wage." Section 401.011(16). It is well settled that claimant had the burden of proving that he had disability. Texas Workers' Compensation Commission Appeal No. 941566, decided January 4, 1995.

As we have 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"). In addition, we have stated that "an employee under a conditional work release does not have the burden of proving inability to work." Appeal No. 941566, *supra* (quoting Texas Workers' Compensation Commission Appeal No. 93953, decided December 7, 1993). We have also noted that where claimant is released to return to work light duty, there is no requirement that the claimant look for work. 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. Finally, in Texas Workers' Compensation Commission Appeal No. 91027, decided October 24, 1991, we rejected a general rule that an employee discharged for cause is forever barred from receiving temporary income benefits (TIBS). Instead we found that "an approach to this issue which also factors in the continuing effect of the injury on the capacity to obtain and retain some gainful employment is more in keeping with the 1989 Act. . . ." However, as we found in Texas Workers' Compensation Commission Appeal No. 92277, decided August 5, 1992, where the hearing officer finds no good cause for the termination and claimant is released to light duty, disability continues, without the claimant having to present additional evidence that his disability was caused by the compensable injury.

In this instance, the hearing officer determined that claimant was not discharged for cause. There was considerable conflict in the evidence as to whether claimant was or was not actually working for the period from January 31 to February 11, 1994. Claimant steadfastly maintained that he was performing the work that Mr. M asked him to do in that period, whereas the witnesses for carrier insisted that the employer's investigation had revealed that claimant had not been working during the period. It was for the hearing officer as the sole judge of the relevance, materiality, weight and credibility under Section 410.165(a) to resolve that conflict. Our review indicates that her determination that claimant's termination was not for just cause is supported by sufficient evidence and is not so against the great weight of the evidence as to be clearly wrong or manifestly unjust. Therefore, there is no basis for disturbing it on appeal. Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986): Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986). Likewise, the fact that the evidence could have allowed different inferences under the state of the evidence herein, does not provide a sufficient basis for reversing the hearing officer's decision on appeal. Texas Workers' Compensation Commission Appeal No. 92308, decided August 20, 1992.

In this case, carrier concedes that claimant was never released to work at anything other than light duty. In addition, there is evidence that Dr. S has taken claimant off work

altogether. Specifically, his October 27, 1994, report, so stating, to which, contrary to carrier's assertion on appeal, it did not object at the hearing. The hearing officer determined, and we affirmed, that claimant had not been discharged for cause in this instance; thus, because, at most, he had only been released to light duty, under the reasoning of Appeal No. 92277, *supra*, the hearing officer correctly determined that claimant's disability continued despite his suspension and termination by employer.

Finding that the hearing officer's determinations are supported by sufficient evidence, her decision and order are affirmed.

Gary L. Kilgore
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

CONCURRING OPINION:

I concur. However, I caution against devoting our hearings to litigating personnel issues and determining from such matters whether disability exists or not. Such inquiry moves the focus away from where it should be: whether a claimant has the inability to obtain and retain work equivalent to the pre-injury wage. I think that question is broader than "would this worker have continued in light duty 'but for' the occurrence of certain events?" We should recognize that many companies commendably offer light duty as an accommodation to workers who gave years of service before their injury, and positions that don't otherwsie exist are created for injured workers, or jobs are offered for which the same person would not be hired if he or she were not a previous employee. Therefore, when a job is lost from a light duty program, for any reason, it does not necessarily mean that the person has ability to obtain and retain employment in the open job market. Finally, when the emphasis is on good or bad cause for a termination, I fear that analysis of the facts could be colored by perception of who was the "heavy" in an employment situation.

Susan M. Kelley
Appeals Judge