APPEAL NO. 001437

Following a contested case hearing held on May 25, 2000, pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act), the hearing officer, resolved the disputed issue by determining that the respondent (claimant) had disability from November 12, 1999, through April 9, 2000. The appellant (carrier) challenges this determination on appeal. The file does not contain a response from the claimant.

DECISION

Affirmed.

The claimant testified that she had been trimming the head parts of slaughtered cattle for (employer) with knives and scissors since July 1998 by the time she sustained pain and numbness in her right hand after having to trim with dull scissors; that she visited the employer's nurse with these complaints and was given a trimming job requiring the use of a knife which increased her pain; that she saw Dr. W for her hand in September 1999 and after being off work for a week Dr. W released her for light duty with restrictions against gripping, pulling, and lifting more than 10 pounds; and that with the help of her union stewards she was able to obtain an assignment monitoring six gutters to keep score on a clipboard the number of stomachs, livers, and so forth removed by coworkers, a job she could perform. The claimant said that sometime later her duties were changed to monitoring the cattle hides in four different areas to keep track of the employees who "messed up hides"; that she had to ascend and descend 10-step staircases to do this job; and that on _____, she slipped on a piece of fat and "bounced" down all 10 steps injuring her right elbow and bruising her ribs, right thigh, and buttocks. She said she was told she had to see Dr. A in another town for treatment of these injuries; that she saw Dr. A on November 11, 1999; that Dr. A said she could continue to work and that she did so; and that she only saw Dr. A once because no further treatment was authorized. She indicated that she did not know whether a workers' compensation claim had been filed for her _____, injuries.

The claimant testified that she missed work on November 8, 9, and 10, 1999, because she was in pain and was afraid of slipping in the blood all over the floors if she came to work and that she called in sick to the employer on November 8 and 9, 1999, leaving messages on the recorder, and on November 10, 1999, called the secretary at her home. She indicated that Dr. A gave her some "papers" to give the employer for her days off and that when she brought them to the employer on or about November 15, 1999, she was informed that her employment was terminated for "no show/no call." A carrier exhibit reflects that the claimant's employment was terminated on November 12, 1999, for unexcused absences.

The claimant further testified that before her fall on _____, Dr. W planned to refer her to an orthopedic surgeon, Dr. S; that Dr. W kept her on light duty after her fall and

referred her to Dr. S in November 1999; that neither Dr. W, Dr. A, nor Dr. S ever told her she could not work because of her _____, injuries; and that her doctors continued to restrict her to light duty. She went on to state that in December 1999 Dr. S casted her right hand, up to the elbow, for six weeks; that in February 2000, he put her into a removable cast or brace; that he next administered a series of injections and in March 2000 told her she required surgery; that on April 10, 2000, he operated on her right hand and wrist; and that following the surgery she underwent therapy but that her hand remains stiff and numb. She said she has not worked since her employment was terminated, explaining that she remained under the care of her doctors with restrictions and questioned who would hire her, even for light duty.

Dr. W's record of November 9, 1999, states that he gave the claimant a light-duty release. Dr. S's record of December 6, 1999, states that claimant was placed in a short arm cast and may return to light duty with no repetitive lifting. Dr. W wrote on March 22, 2000, that the claimant was released for light duty prior to her dismissal; that Dr. W placed her on light duty; and that the claimant could presently be released for light duty with an estimated lifting restriction of 15 pounds.

The claimant had the burden to prove her period or periods of disability by a preponderance of the evidence. Texas Workers' Compensation Commission Appeal No. 93143, decided April 9, 1993. *See* Section 401.011(16) for the definition of "disability." The Appeals Panel has recognized that disability may be established by lay testimony including that of the injured employee and that objective medical evidence thereof is not required (Texas Workers' Compensation Commission Appeal No. 91083, decided January 6, 1992; Texas Workers' Compensation Commission Appeal No. 92167, decided June 11, 1992); that pain can be considered to the extent that it prevents the performance of work (Texas Workers' Compensation Commission Appeal No. 91024, decided October 23, 1991); and that the compensable injury need not be the sole cause of the disability (Texas Workers' Compensation Commission Appeal No. 960054, decided February 21, 1996).

The carrier has not challenged twelve findings of fact, which track the evidence. However, in addition to the dispositive conclusion, the carrier challenges the finding that during the period of November 12, 1999, through April 9, 2000, the claimant was in a light-duty status as a result of her compensable right hand injury and she was unable to obtain employment at her preinjury wage because of the right hand injury. The carrier asserts, primarily, that the evidence establishes that had the claimant's employment not been terminated for cause on November 11, 1999, she could still be working for the employer in the light-duty position she held on that date. The carrier also adds that a videotape of the claimant, taken before the claimant's right hand surgery on April10, 2000 (which is also the date the carrier resumed the payment of temporary income benefits (TIBs)), shows that the claimant "had some ability to work"; and that the claimant failed to show that her inability to obtain and retain employment during the disputed period was due to her compensable right upper extremity injury and not to the injuries she sustained when she fell at work on _____.

The Appeals Panel has stated that "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 2, 1992); that 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 the preinjury wages (Texas Workers' Compensation Commission Appeal No. 91045, decided November 21, 1991); that an employee with a conditional work release does not have the burden of proving inability to work (Texas Workers' Compensation Commission Appeal No. 941566, decided January 4, 1995); and that where the injured employee is released to return to work light duty, there is no requirement that the employee look for work. (Texas Workers' Compensation Commission Appeal No. 941092, decided September 28, 1994).

We are satisfied that the challenged finding is not so against the great weight and preponderance of the evidence as to be clearly wrong or 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). As for the contention that the claimant did not have disability because there was good cause for the termination of her employment, we first observe that the carrier does not attempt to explain why that theory did not obtain on and after April 10, 2000, the date the claimant underwent surgery for her right hand injury. Further, it is well-settled that if and when an injured employee, whose employment is terminated for cause, can sufficiently establish that the work-related injury is precluding him or her from obtaining and retaining new employment at the preinjury wage level, then TIBs may once again become payable. *See* Texas Workers' Compensation Commission Appeal No. 980003, decided February 11, 1998, and cases cited therein..

The decision and order of the hearing officer are affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Judy L. Stephens
Appeals Judge