APPEAL NO. 92380

This appeal arises under the Texas Workers' Compensation Act of 1989 (1989 Act), TEX. REV. CIV. STAT. ANN. arts. 8308-1.01 through 11.10 (Vernon Supp. 1992). On June 23, 1992, a contested case hearing was held (after a continuance had been granted) in (city), Texas, with (hearing officer) presiding. The hearing officer determined that the respondent, (claimant), due to an undisputed compensable back and hip injury sustained (date of injury), while employed by (employer), had disability from the date of the accident until April 12, 1992, when she returned to work. The hearing officer determined that she was not earlier able to obtain and retain employment at the pre-injury wage, although he did award temporary income benefits subject to any credits and offsets that might be due to the appellant. The hearing officer found that she left a brief employment in January 1991, due to an aggravation of her work-related injury through sitting. (However, the conclusion that respondent had disability after this date shows that the use of the work "aggravation" was not intended as a finding of a new injury.)

The appellant has appealed certain findings of fact and conclusions of law of the hearing officer. Appellant asserts that the hearing officer's finding that there was insufficient evidence to indicate that respondent worked for (employer) is erroneous, because there was evidence introduced to show that she was so employed during a period of time. The appellant further notes that any gaps in evidence were caused by the erroneous actions of the hearing officer in denying a requested subpoena for records from this employer. The appellant also contends that the hearing officer erred in finding that the respondent was not employed by (employer). Finally, appellant contends error in the conclusion that the respondent had disability from (date of injury) until April 11, 1992. Respondent has not replied.

DECISION

After reviewing the record of the case, we affirm the determination of the hearing officer, with modification of an apparent clerical error in the recited stipulation.

At the hearing, the parties agreed on the record to a stipulation that the average weekly wage of the respondent, for purposes of computing any benefits due, would be $197.94. This was not modified during the hearing, nor was evidence ever adduced at the hearing to vary this agreed-upon figure. The stipulation recited in the decision sets a dollar amount of $263.92 as the average weekly wage. As this is apparently a clerical error, the decision must be modified to reflect the amount that was stipulated on the record.

The respondent was injured when she fell from a stool and injured her back and hip, on (date of injury), while working for employer. She was hospitalized during the summer of 1991 for further testing, and had a myelogram performed on August 12, 1991. The issues at the hearing were whether respondent's disability had ceased at some point after the injury, and whether respondent was employed after that time such that the appellant was entitled to any credits or offsets against the temporary income benefits it had paid. The

respondent admitted that she had gone back to work on April 12, 1992, for another employer, within days after an interlocutory order for payment of TIBs was suspended by the Commission. Paycheck stubs indicate that this employment was at wages equivalent to her preinjury wage.

Respondent testified that she had also worked for a company called (employer), a singles dating service. Although she stated that she worked for them only two weeks, she also stated that she began working for that company in the first or second week in December, with time off between December 24th and 29th to visit her mother, and quit this company a few days into the new year when she could no longer tolerate sitting for eight hours a day. She stated that she was paid $6.00 per hour, for working eight to ten hours a day, six days a week. She stated that she received a pay check for $149, plus one other small check, for her services there.

Respondent further stated that she had been released on parole from the Texas Department of Corrections a few months before her injury, after serving a year in prison for forgery. She admitted that when she moved to a new apartment in September 1991, she used a nonexistent company, (employer), as an employment reference, and arranged to have a friend at the listed telephone number verify her "employment." She stated that she had several friends at a company called (employer), which she stated was a loan company, and she would go visit these friends on nearly a daily basis, for four hours a day. She stated that the work place there was informal, and her presence did not interfere with any work going on. She denied that she had ever been employed by them. She stated that she had stopped visiting there after a falling out in December with another friend, (Ms. G). However, her relationship with Ms. G was restored by February 14, 1992, when she helped Ms. G move in with her, which entailed assisting her with moving furniture. Respondent stated that the business manager for (employer), (Mr. J), was one of her friends and in fact had loaned her $400 at the beginning of the year, which she had not repaid. Respondent denied that she ever worked for a company called (employer), as a telemarketer, in September 1991, and stated that she believed that her daughter had worked there under her name, and stated that her daughter would have been able to get her Social Security number. Respondent testified to work experience with various telemarketing, or phone solicitation, enterprises.

Mr. J, the former office manager for (employer), testified that his company was in the business of loan brokerage, and employed up to fifteen telemarketers in October and November. He stated that respondent had never been employed by the company, and indicated that he would have known if she had been employed there, or had been employed by any of the company principals directly. He stated that the company's bookkeeper, (Ms. E), had verified that respondent was employed there only because the bookkeeper understood that respondent had applied for credit with the person seeking verification, and wanted to assist her. Mr. J stated that he wasn't a party to this, but was told after the fact by (Ms. E). He stated that he had become good friends with the respondent, and that she still visited the most recent business incarnation of (employer), which Mr. J characterized as

still around, but "very quiet, very low." He acknowledged that respondent had stopped her extended visits, which he characterized as nondisruptive to (employer) work, around the time she had an argument with Ms. G.

The appellant had hired a private investigator, (Service). (Mr. N), an investigator with this company, testified that the company verified by telephone that a person using respondent's name and social security number was employed by (employer), at undisclosed salary, for a period from September 4 through 18, 1991. Mr. N. stated that he was told on the telephone by a man named "(J)" at (employer) that respondent was employed there as a telemarketer for a base salary of $300-350 per week. Mr. N presented an affidavit dated November 11, 1991, from his brother (Mr. WN), who was an investigator for the company at that time. Mr. WN went to the (employer) office on that date (after the telephone call by Mr. N); he stated that he observed a woman subsequently identified as respondent working at a desk. Mr. WN states that he met with a woman named "(L)," who began to fill out his company's employment verification form for respondent, and who verbally confirmed that respondent was working for $350.00 per week plus bonus. An unidentified gentleman interrupted this by saying that respondent's permission would be required to give out information. Mr. WN stated further that respondent was called to the office, and began to give her permission until the gentleman told her not to. Mr. N stated that Mr. WN was employed by another company at the time of the contested case hearing and was unable to attend to testify personally, although he had been present and ready to testify at the originally set hearing date. Mr. N stated that he took a videotape showing respondent assisting a friend with moving furniture into another residence, on February 15, 1992.

It must be frankly stated that reasonable minds could draw different inferences from the record herein than have been drawn by the hearing officer. Nevertheless, the hearing officer is the sole judge of the relevance and materiality, the weight and credibility, of the evidence offered in a contested case hearing. Article 8308-6.34(e), 1989 Act. The decision of the hearing officer will be set aside only if the evidence supporting the hearing officer's determination is so weak or against the overwhelming weight of the evidence as to be clearly wrong or manifestly unjust. Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986).

The appellant did not subpoena business records from (employer) which might have clarified respondent's status there. It did subpoena records from (employer), which subpoena was denied. However, no complaint was made about this at the contested case hearing and, in fact, appellant submitted an employment verification taken over the phone by its investigator from (employer). Therefore, any error committed by the hearing officer in noting an omission of records, for which omission he arguably bears some responsibility, has been waived. In any case, the amount of wages paid would have added little to information already in evidence.

In any case, the inquiry is whether respondent had disability as a result of her compensable injury, and medical as well as nonmedical evidence may be considered by the

trier of fact to determine whether an injured employee has, according to the definition contained in Article 8308-1.03(16), "the inability to obtain and retain employment at wages equivalent to the pre-injury wage because of a compensable injury." In the case at hand, wages were diminished for most of the period in question. The only issue for the hearing officer to resolve, therefore, was whether such resulted from the compensable injury. This can be established by a claimant's testimony, even if there were medical evidence to contradict such testimony. Appeals Panel Decision No. 91083 (Docket No. redacted) decided January 6, 1992. We would observe that an employee need not be bedridden to continue to suffer an inability to work because of a compensable injury. Therefore, the fact that an injured worker may be photographed engaged in a physical activity is another piece of evidence to be considered by the trier of fact.

Given respondent's explanation for the (employer) information, the testimony of Mr. J concerning respondent's relationship to (employer), respondent's reason for leaving her employment with (employer), and the fact that she incurred a compensable injury which was not disputed, we cannot say that the complained of findings and conclusions of the hearing officer are not supported by sufficient evidence.

The determination of the hearing officer is affirmed, and appellant's three points of appeal are rejected, with the stipulation recited therein modified to show that the average weekly wage for purposes of computing benefits will be $197.94.

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Susan M. Kelley
Appeals Judge

CONCUR:

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Joe Sebesta
Appeals Judge

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Lynda H. Nesenholtz
Appeals Judge