APPEAL NO. 92560

On September 9, 1992, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. The hearing officer determined that the appellant (claimant) was not entitled to temporary imcome benefits (TIBS) due to his acceptance of another position offer by the employer, the (employer). The claimant was injured on the job on (date of injury), while working out of (city), and resumed employment with the employer in a different position in (city) on May 9, 1991.

The claimant disputed several findings and conclusions made by the hearing officer, and asks that we reverse the hearing officer's decision and award him TIBS. The carrier responds that the (city) job was neither light duty nor accepted by the claimant because of his injury, and asks that the decision be affirmed.

DECISION

After reviewing the record, we affirm the decision of the hearing officer.

The claimant testified for himself. (Mr. G), State Adjutant Quartermaster for the employer, testified for the carrier. The facts developed through testimony and documents in evidence are as follows.

The claimant contacted the employer by letter on November 10, 1990, identifying himself as a physically disabled veteran taking vocational rehabilitation through enrollment at a local college. He had been given approval to change his rehabilitation from schooling to on-the-job training. To this end, claimant asked for employment as a veteran service officer with employer. Mr. G responded on November 16, 1990, that there were no current positions, but indicated that it was anticipated that a service officer in (city) was nearing retirement age and a position could open up. Thereafter, the claimant was offered a mobile service officer position based out of (city), with the understanding that he would have first option for the (city) position if and when it arose.

Mr. G and claimant agreed that a portion of his salary would be paid through veterans on-the-job training, and that when such stipend was approved, his pay from the employer would be correspondingly decreased. The claimant and Mr. G agreed that they also discussed the expected availability of the (city) job, and that claimant was told he would have first option to accept the job when it became available. Claimant stated that his pay for the (city) mobile van job was $20,000 per year and, in addition, he was given the use of a van, plus $15.00 per day for meals, when he was on the road. He would stay overnight in the van when away from his residence. Claimant testified that his travel was not to exceed 21 days per month, and he estimated his actual travel was "pretty close" to that amount of time. The claimant began work on January 28, 1991, and worked to (date of injury), the date he was injured.

According to Mr. G, the claimant's total salary was $20,000, but this consisted of $18,000, plus $2,000 to compensate him for weekend and overtime work that would be required as part of the job. The parties stipulated that the van and meal allowance had a fair market value, all totalled, of $50.00 per day. Mr. G stated that, according to the employer's records, the claimant traveled 37 days during the entire period he was employed in the (city) position. Mr. G said that after claimant was injured, he was not replaced and the mobile van job was eliminated from the VFW budget effective July 1, 1991, because it was not cost-effective. Mr. G said that this position involved more public relations and dispensing of information to veterans and their families in the communities visited, with less paperwork than office-based service officer positions.

The claimant testified that on May 8, 1991[1], Mr. G called him and told him that the (city) position had opened up, and offered the position to him. The claimant said he accepted the job during that conversation. He then called the carrier's adjuster to ask how this would affect his benefits. The adjuster told him that if his doctor released him, he should take the job or his benefits could be affected. He then contacted his doctor, (Dr. W), who wrote a letter on May 8, 1991, stating that the claimant could returned to work with restrictions: no heavy lifting, no stooping, bending, or twisting. He was not to spend prolonged periods of time riding in a car. Dr. W wrote that he could do general office work so long as these restrictions were followed and he was allowed to move around intermittently. No restrictions were placed on the hours that the claimant could work. The (city) position was "full time."

The claimant reported for work in (city) on May 9, 1991, and showed Dr. W's letter to the manager, (Mr. H). Mr. H was concerned about the letter and called one of the employers' (city) supervisors. He determined that the (city) service officer's job could accommodate these restrictions.

The claimant said that this job was primarily paperwork, that he interviewed veterans at the (city) field office, and that little, if any, travel was required. He stated that the adaptations made for him were that he used only the top two drawers of the filing cabinets, and other employees retrieved items for him from the bottom drawers. Also, he was permitted to move around the office, the employer was lenient concerning doctor's appointments, and extra-long hearings which required prolonged sitting were handled by Mr. H. The claimant's salary was $20,000, characterized by Mr. G as an increase in his base pay. Claimant and Mr. G agreed that the (city) job did not require work on weekends. The claimant worked in (city) until December 31, 1991, when he resigned to take another job. Around September 1991, his salary paid by the employer was reduced for the amount of stipend that was paid directly to the claimant by the veterans on-the-job training program.

The claimant argues that he has had reduced earnings because of loss of the *per*

[1] Mr. G recalled the date as May 1, 1991, because he left the country for ten days beginning May 3rd.

diem stipend and van, and that he could not work the (city) job because of his restrictions relating to his injury. He says that he was not given the chance to retain the mobile van job. He asserts that the (city) position was understood by the parties as "light duty." He argues that he felt compelled by the carrier to accept the (city) position and it was therefore not accepted by choice, as the hearing officer found. We note, however, that this is not the sequence of events to which claimant testified at the contested case hearing. His own undisputed testimony was that he accepted the (city) job in the telephone call in which it was offered by Mr. G, before any contact was made with the carrier or Dr. W, and with no evidence that he inquired about returning to the mobile van job. An earlier, unappealed hearing decision[2] on his claim held that the van and meal allowance should be included in the claimant's average weekly wage. Therefore, the question facing the hearing officer in this proceeding was whether loss of the allowance because of transfer to the (city) job resulted in "disability," and thus entitlement to TIBS, according to the definition of disability in the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.03(16) (Vernon's Supp. 1992) (1989 Act): "Disability means the inability to obtain and retain employment at wages equivalent to the preinjury wage because of a compensable injury.

According to this definition, the injury must be a cause of the "inability" to obtain and retain employment at a wage equivalent to the pre-injury job. As we have noted in previous decisions, entitlement to income benefits under the 1989 Act is not based upon inability to return to only the type of work the employee was doing when injured. Texas Workers' Compensation Commission Appeal No. 92083, decided April 16, 1992. The claimant's contention on appeal that he is entitled to TIBS because his doctor has not released him to the mobile van job is not the correct premise on which to base a finding of "disability" for purposes of entitlement to TIBS.

As we have also held, fixing the point at which disability has ended can be difficult or imprecise, and must be evaluated based upon the particular facts of the case at hand. *See* Texas Workers' Compensation Commission Appeal No. 91045, decided November 21, 1991. For example, an injured employee terminated for cause not related to the injury will not automatically be entitled to claim TIBS for "disability" based only on the fact he is without income; other factors, such as availability of employment and efforts to find it, can be reviewed by the hearing officer. *See* Texas Workers' Compensation Commission Appeal No. 91027, decided October 24, 1991.

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[2] The claimant argues that the earlier hearing decision on the claim shows that the (city) position was offered as a light duty position. The previous hearing officer's references to "light duty" are in her statement of evidence, and are not made as findings of fact or conclusions of law; indeed, she found that there was no medical evidence introduced to establish the need for light duty. We would also note that the sole issue before that hearing officer was whether the per diem and mobile home allowance, and certain other expenses, should be considered as part of the claimant's average weekly wage. Therefore, her observations on matters not related to the issue at hand do not bind a subsequent hearing officer. Texas Workers' Compensation Commission Appeal No. 92064 (decided April 3, 1992).

In this case, because the claimant resumed gainful employment, at the same salary, but without the travel-related allowance, the hearing officer had to analyze whether the claimant accepted the (city) job due in part to his injury, or for reasons not based upon the injury. 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. Atlantic Mutual Insurance Co. v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.). Given the evidence that the claimant was promised (prior to the injury) first option for the (city) job, and the testimony that the job was offered and accepted before any discussion of the claimant's physical restrictions, the conclusion of the hearing officer that the claimant took the (city) job voluntarily, rather than because of his injury, is supported by the evidence.[3]

Claimant also contended that the hearing officer made a mistake in the employer's name; however, this is the name that is used on the employer's letterhead on documents in evidence.

The decision of the hearing officer is affirmed.

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Susan M. Kelley
Appeals Judge

CONCUR:

_____
Stark O. Sanders, Jr.
Chief Appeals Judge

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Thomas A. Knapp
Appeals Judge

[3] Additionally, the hearing officer's conclusion of law no. 3, that claimant has not suffered a loss of earnings due to a reduction of salary, indicates that he considered the (city) wage as "equivalent" to that paid for the van job. Webster's *Ninth New Collegiate Dictionary* lists a first definition of "equivalent" as: "equal in force, amount or value . . ."