APPEAL NO. 990691

Following a contested case hearing (CCH) held in Galveston, Texas, on March 9, 1999, pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act), the hearing officer, resolved the three disputed issues by determining that appellant/cross-respondent's (claimant) compensable injury of _____, does not extend to her neck and arm; that she had disability from _____, until March 19, 1999; and that the employer did not make a bona fide offer of light duty employment to claimant. Claimant has appealed the adverse determination of the extent-of-injury issue, contending that it is against the great weight of the evidence. Respondent/cross-appellant (carrier) has appealed the adverse determinations of the bona-fide-offer-of-employment and disability issues, also on evidentiary grounds. Each party filed a response to the other's request for review.

DECISION

Affirmed.

The parties stipulated that on _____ (all dates are in 1998 unless otherwise stated), claimant was the employee of (employer) and that the carrier accepted liability for a _____, contusion to claimant's left shoulder.

Claimant testified that on November 19th, a Thursday, she was working for the employer at a job site in (city 1) and had been working at that job site for approximately one week; that she had previously worked for the employer at a job site in (city 2); and that she resided in (city 3) and rented a room in city 1 for that job. According to the telephone testimony of Ms. B, the employer's safety manager, the employer does foundation construction nationwide, has its headquarters in another state, and was a subcontractor of the general contractor at the city 1 job site. Claimant said that she was injured on November 19th when a metal screen caked with concrete fell out of a grout machine and struck her on the left shoulder knocking her down. She said the safety man took her to Dr. V,who examined her; that she complained to Dr. V of neck pain also; and that Dr. V obtained x-rays of her left shoulder and told her there was nothing wrong with her shoulder. Dr. V's November 19th report states the impression as left shoulder contusion with probable symptom magnification and he noted "there is no cervical tenderness." Ms. B testified that claimant was taken to a clinic used by the general contractor; that Dr. V told her claimant had only a bruised left shoulder, that he took her off work for November 20th and gave her a follow-up appointment for November 21st; and that Dr. V agreed with claimant's being assigned light duty as a signal person at the job site effective Monday, November 23rd. Claimant said that on November 20th, she spoke to Ms. B by telephone; that Ms. B did tell her to report for work at the job site on November 23rd as a signal person at the same salary; that Ms. B did not state what the job entailed, how long the job was to last, how long the offer for the job was open, what the physical requirements of the job were, or what accommodations would be made for her; and that she did not accept.

Claimant further testified that on November 20th she retained an attorney and returned to her residence in city 3 and that on November 21st she visited a hospital emergency room (ER) where she told a nurse that not only did her left shoulder hurt but also her neck and left arm. The ER record of that visit reflects the chief complaint as left shoulder pain and the diagnosis as left shoulder contusion. Claimant said she next commenced treatment with Dr. H, who took her off work. Dr. H's November 23rd report states the diagnosis as left shoulder contusion, rule out rotator cuff tear, rule out AC joint separation, post traumatic impingement left shoulder, cervical sprain/strain, and cervical radiculitis, and he further stated that claimant was "completely and totally disabled" and not capable of working at that time. On January 27, 1999, Dr. H responded "yes" to written questions from claimant asking if, in Dr. H's medical opinion, claimant's back, left arm, neck/cervical area, and shoulder injuries are job related and are a direct result of her physical impairment and current disability. Dr. H also answered "yes" to a question asking whether claimant's November 19th accident is a producing cause of injuries for which he treated her. Claimant stated that her left arm and hand became swollen and at one point testified that "the injury is my shoulder but the pain goes down to my arm." Claimant's Employee's Notice of Injury or Occupational Disease and Claim for Compensation (TWCC-41), signed by one of her attorneys on November 24th, states the nature of the injury as "left shoulder."

Claimant also stated that she was referred to Dr. R, to Dr. D, and to Dr. B; that Dr. D stated that she cannot work; and that she was also examined by the carrier's doctor, Dr. S, who also said she cannot work. Dr. R, a pain management specialist, reported on November 25th that claimant's diagnosis was internal derangement or impingement syndrome of the left shoulder, cervical sprain/strain, and possible cervical radiculitis and he recommended evaluation by an orthopedic surgeon. Dr. D, an orthopedic surgeon, reported on January 6, 1999, that claimant's diagnosis is left shoulder AC joint dislocation, left shoulder contusion, and cervical spine strain. He also stated that claimant is not capable of working at the present time. Dr. B's January 4, 1999, report states that nerve conduction studies were done to rule out cervical radiculopathy and entrapment neuropathy of the left upper extremity and that the evidence suggested a very mild left carpal tunnel syndrome and mild left ulnar nerve entrapment.

Dr. S's January 28, 1999, report states that claimant appears to have very mild degenerative disc disease with an occasional herniation in the cervical spine and the first degree AC joint dislocation of the left shoulder. Dr. S went on to state that claimant "is a major symptom magnifier," that her complaints "are far in excess of the structural pathology," and that her strong tendency towards pain avoidance made testing efforts suboptimal. Dr. S opined that claimant had not yet reached maximum medical improvement and she recommended shoulder and cervical injections. Dr. S wrote on March 8, 1999, that she had viewed the surveillance videotape of claimant which mostly shows claimant driving; that the videotape shows claimant to have fairly good cervical range of motion; that claimant also keeps her arm in a sling most of the time; that such use of a sling is failing to heed claimant's doctor's advice and can only lead to mobility problems; and that "patients with significant cervical disc herniations try to avoid driving

because it is one of the things that makes their cervical pain worse than almost any other action." Dr. S suggested that after claimant completes the injections, she can return to work on a restricted basis with a 10-pound lifting limit and restrictions against shoveling and overhead lifting.

Ms. B testified that on November 20th she spoke with the employer's superintendent at the job site and was told that claimant could be assigned light duty at the job site as a signal person until she was released for regular duty and that on that date she also spoke with Dr. V, who indicated his approval of assigning claimant to the light-duty job effective November 23rd. Ms. B further stated that she and claimant spoke by telephone on that date; that she indicated that Dr. V had released claimant for light duty; and that, as she was attempting to tell claimant about the signal position available for her on November 23rd, claimant screamed profanities at her and said she could not return to work at light duty and that her entire left side was affected so that she could not move or work. Ms. B also said that she tried to contact claimant later on November 20th but she had already checked out of the motel. Ms. B further stated that claimant did not report for light duty on November 23rd and that the employer regarded her as having voluntarily quit her job. In evidence is a November 20th letter from Ms. B to claimant regarding light-duty work at the job site, which stated that Dr. V had informed the employer that claimant is able to return to light-duty work and that the letter is to confirm that the employer did offer her light duty to begin on November 23rd. The letter also stated the following: "Although your current position will be modified to a 'signal' person to accommodate your light duty status, your hourly pay will not change." The carrier did not argue that this letter created a presumption of a bona fide offer of employment pursuant to the provisions of Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 129.5(b) (Rule 129.5(b)).

Claimant had the burden to prove that her injury extended to her neck and arm and that she had disability as that term is defined in Section 401.011(16). Texas Workers' Compensation Commission Appeal No. 94248, decided April 12, 1994. The Appeals Panel has stated that in workers' compensation cases, disputed issues of injury and disability can, generally, be established by the lay testimony of the claimant alone. Texas Workers' Compensation Commission Appeal No. 91124, decided February 12, 1992. However, the testimony of a claimant, as an interested party, only raises issues of fact for the hearing officer to resolve and is not binding on the hearing officer. Texas Employers Insurance Association v. Burrell, 564 S.W.2d 133 (Tex. Civ. App.-Beaumont 1978, writ ref'd n.r.e.).

The evidence regarding the extent of claimant's injury, particularly that pertaining to whether her neck was also injured on November 19th, was in conflict. The hearing officer is the sole judge of the weight and credibility of the evidence (Section 410.165(a)), resolves the conflicts and inconsistencies in the evidence including the medical evidence (Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ)), and determines what facts have been established from the conflicting evidence. St. Paul Fire & Marine Insurance company v. Escalera, 385 S.W.2d 477 (Tex. Civ. App.-San Antonio 1964, writ ref'd n.r.e.)). The hearing officer found that claimant's November 19th injury did not extend to damage to the physical structure of her neck or left

arm. As an appellate reviewing tribunal, the Appeals Panel will not disturb a challenged factual finding of a hearing officer unless it is so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust and we do not find it so in this case. 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). The hearing officer could, as he apparently did, rely on the earlier medical records and the EMG report which do not reflect that claimant sustained a cervical injury.

Disability means the "inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage." Section 401.011(16). Disability, by definition, depends upon there being a compensable injury. The hearing officer found that claimant's November 19th left shoulder injury has prevented her from earning the wages she earned before November 19th from that date until March 9, 1999, the date of the CCH. While claimant was not asked and did not state whether she was able to work during that period, the opinions of Dr. H, Dr. D and Dr. S sufficiently support the hearing officer's determination of the disability issue.

Section 408.103(e) provides that if an employee is offered a bona fide position of employment that the employee is reasonably capable of performing, given the physical condition of the employee and the geographic accessibility of the position to the employee, the employee's weekly earnings after the injury are equal to the weekly wage for the position offered to the employee. Rule 129.5(a) provides that in determining whether an offer of employment is bona fide, the Texas Workers' Compensation Commission shall consider the expected duration of the offered position, the length of time the offer was kept open, the manner in which the offer was communicated to the employee, the physical requirements and accommodations of the position compared to the employee's physical capabilities, and the distance of the position from the employee's residence. The hearing officer found that on November 20th Ms. B had a phone conversation with clamant; that Ms B intended to offer claimant light-duty work for November 23rd at the job site within what Ms. B understood to be the restrictions imposed by Dr. V; and that claimant was not told what the job required, how long it would be available, and what accommodations would be made for her. The hearing officer concluded that because the carrier has not shown that the employer made a bona fide offer of light-duty employment to claimant within the purview of Rule 129.5, it may not offset liability for temporary income benefits through such offer. The carrier urged below and reurges on appeal that claimant's screaming and shouting at Ms. B during the telephone call on November 20th effectively prevented Ms. B from fully communicating with claimant on the matter and that claimant should not be permitted by her own conduct to defeat the employer's effort to communicate a bona fide offer of employment. However, this was a matter for the hearing officer to resolve in his role as the finder of fact and, again, we are satisfied that this resolution of the disputed issue is not against the great weight of the evidence.

The decision and order of the hearing officer are affirmed.

_____
Philip F. O'Neill
Appeals Judge

CONCUR:

_____
Tommy W. Lueders
Appeals Judge

_____
Judy L. Stephens
Appeals Judge