APPEAL NO. 000190

This appeal arises pursuant to the Texas Workers' Compensation Act of 1989, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On December 29, 1999, a hearing was held. The hearing officer determined that appellant (claimant) had disability from her _____, compensable injury from July 5, 1999, through September 15, 1999, and that claimant was not tendered a bona fide offer of limited work. Claimant asserts that she had disability until November 2, 1999, citing the medical opinion of Dr. B; claimant states that the hearing officer did not give presumptive weight to the opinion of the designated doctor and that she only lifted "small items" as shown in a video in evidence. Respondent (carrier) replied that the decision should be affirmed.

DECISION

We affirm.

Claimant worked for (employer) on _____. On that date she slipped and fell in a shower area while helping a patient to bathe. There was no issue as to compensability of her injuries to her right wrist and right hip. There is no appeal by carrier to the finding of no bona fide offer of employment or to the finding that claimant had disability from July 5, 1999, through September 15, 1999.

Claimant's treating doctor is Dr. K. His off-work slips in evidence indicate that claimant was not to work from July 6, 1999, through September 10, 1999; in addition, his report of a visit by claimant on September 20, 1999, also indicated that claimant's "return to . . . work" was "undetermined." Dr. K, on November 3, 1999, dictated a report which said that claimant reached maximum medical improvement (MMI) on November 3, 1999, with a two percent impairment rating (IR); he noted that claimant had finished a work hardening program. A benefit review conference (BRC) had been held on November 2, 1999; at that conference a video of claimant was produced by carrier.

The video was dated September 16 and 18, 1999. It showed claimant walking, driving, and carrying groceries. There were no large sacks of groceries involved, but there were two gallon-sized containers of liquid and a large box, such as a detergent box, whose height was greater than the sides of the shopping cart in which the groceries were wheeled to claimant's car. Claimant removed the single plastic sack with her left hand, but then used her right hand to pick up and move each of the gallon containers of liquid, successively, and also used her right hand to grasp the box across its approximate 3- to 4-inch width at the top of the box and lift it singlehandedly into her car. As commented upon by the hearing officer, claimant's right wrist was not encased in a splint.

Claimant saw Dr. B on September 30, 1999; Dr. B said, "she did have a right wrist splint on." An MRI had been performed on August 4, 1999, which showed a "complete tear" of the "triangular fibrocartilage" in the right wrist. Dr. B noted "tearful reaction" of

claimant on range of motion (ROM) testing of the right wrist; Dr. B said that ROM was limited "secondary to pain." Dr. B repeated the finding that claimant's triangular fibrocartilage was torn and said:

> [I]t does not appear that she has any ability to work as she continues on in work conditioning at the present time. At the completion of the work hardening treatment, she should be able to perform sedentary work with no lifting greater than five pounds with the right hand/right arm. [Emphasis added.]

Claimant testified that the gallon containers of liquid weighed less than five pounds; no estimate was made of the weight of the box. The hearing officer commented that claimant's testimony was not persuasive. The hearing officer did not have to accept that the containers lifted weighed less than five pounds and could question Dr. B's opinion that said claimant could lift no more than five pounds even after she finished work hardening. The hearing officer also, as stated, commented about claimant wearing a splint on her right wrist on September 30, 1999, to see Dr. B, while she did not wear a splint on September 16 and 18, 1999, while moving grocery items with her right hand.

Claimant states that Dr. B said on September 30, 1999, that she could not work and also that Dr. K "kept her off work" through November 2, 1999. The latter may be inferred by a fact finder from Dr. K's last document, prepared on September 21, 1999, which said that claimant's return to work was "undetermined," but the fact finder was not required to draw that inference from that September report. Dr. K's next report, the November opinion as to MMI, does refer to claimant having completed work hardening (no date of completion was given) but does not specifically say that claimant could not work until November 3, 1999. However, in questions of disability, a fact finder does not have to accept medical evidence, especially when there is some other evidence provided relevant to disability that conflicts with the medical evidence.

In addition, while a designated doctor is given presumptive weight as to MMI and IR (*see* Sections 408.122 and 408.125), the designated doctor is not given presumptive weight as to disability, which is a different matter than impairment. In reviewing the opinion of the designated doctor, Dr. H, we do not see any comment about claimant's ability to work, but Dr. H does appear to question claimant's "sub-maximal effort" and, in assigning an IR, says that she cannot tell whether claimant's "conditions" were present, or not, before the date of injury. A three percent IR was assigned, largely due to ROM limitations of the right hip.

The evidence brought forth inconsistencies in claimant's responses to stresses on her injured right wrist as shown by the video and the description of claimant's ROM of the right wrist provided by Dr. B less than two weeks later. In addition to the hearing officer's observation of claimant as "not persuasive," Dr. H observed "sub-maximal effort" in conducting her IR examination of claimant. Dr. H then stated that no specific disorders of either the right hip or right wrist were shown to be ratable. The inconsistencies, Dr. K's determination that MMI was reached one day after the BRC, in which the video surfaced,

after giving no indication in his September report that MMI was imminent, claimant's credibility, and Dr. H's comments, provide sufficient evidence to support the hearing officer's determination that disability ended on September 15, 1999, the day before the video began recording claimant's movements.

Finding that the decision and order are sufficiently supported by the evidence, we affirm. *See* In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

Joe Sebesta
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Thomas A. Knapp
Appeals Judge