APPEAL NO. 000205

Following a contested case hearing (CCH) held on January 10, 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 appellant (claimant) did not have disability from April 12, 1999, to October 5, 1999 (all dates are 1999 unless otherwise noted), resulting from the injury sustained on _____. Claimant appeals, contending that she was unable to work during the period in question, that her doctors had her off work, and that the employer did not have light work available, and requesting that the Appeals Panel reverse the decision and order of the hearing officer and render a decision in her favor. Respondent (carrier) responds, urging affirmance.

DECISION

Affirmed.

Claimant had been employed as a machine operator. On _____, she slipped and fell on some ice and as she was falling her hand got "hung up" on a chair, injuring her left shoulder. Carrier has accepted liability for a left shoulder injury. Claimant's first treating doctor was Dr. B; then claimant changed doctors to Dr. W, in April and then subsequently changed doctors again to Dr. H, in June. Claimant was apparently paid income benefits to April 12th when Dr. B released her to return to work. At issue is whether claimant had disability from April 12th through October 5th. Claimant contends that, due to her left shoulder injury, she cannot move or use her left hand and, therefore, she cannot work. (The hearing officer noted in his Statement of the Evidence that claimant "moved her left hand during the [CCH].") Also in evidence are two surveillance videotapes showing claimant assisting in the operation of a flea market stall on March 27th and May 29th. Ms. G, employer's human resources manager, testified that there was light duty at the preinjury wage available to claimant during the period in question. We note, however, that bona fide offer of employment was not an issue although the hearing officer found that "[l]ight duty work at Claimant's preinjury wage which Claimant was capable of performing was available" during the period in question.

A report dated April 7th from Dr. B is in evidence. That report, in long hand, notes some left shoulder complaints and releases claimant "from our care for non-compliance" with the assessment "[f]ail to follow recommendations." Claimant began treatment with Dr. W, who, in a note dated April 12th, took claimant off work through April 25th. In a report dated April 28th, Dr. W continued claimant off work, commenting that Dr. B's treatment "was not effective." In a report dated June 11th, Dr. W opines that claimant's shoulder injury included "the tearing of the Supra and Infraspinatus muscles" as a result of the _____ fall. In a report dated June 28th, Dr. W observed that claimant had received conservative treatment from April 28th to June 2nd "without benefit of full recovery." Dr. W suggested surgery might be required and released claimant "so that she may pursue the services of a surgeon." Claimant began seeing Dr. H on July 2nd and in a note of that date, Dr. H took claimant off work from July 2nd through 16th commenting "surgical

candidate, work release undetermined at this time." Claimant received "electrical muscle stimulation" of the left shoulder and massage therapy. A report dated July 8th noted claimant "had been placed on a therapy program of 3 days a week to receive physical therapy and chiropractic manipulations" and continued claimant off work until further notice. Dr. H referred claimant to Dr. UW for a neurological consultation. In a report dated July 7th, Dr. UW had an impression of left shoulder sprain, "rule out rotator cuff tear," C-5 radiculitis, and recommended an MRI to rule out a cervical disc herniation. Dr. H also referred claimant to Dr. L for a consultation. Dr. L, in a report dated August 8th, reviewed an MRI, noted a "[l]arge rotator cuff tear," and stated that claimant "is still having a lot of tenderness and guarding." Dr. L believes that claimant will require surgery. Claimant was also evaluated by Dr. MB, apparently carrier's required medical examination doctor who recites claimant's treatment, comments on the surveillance reports of March 27th and May 29th, indicates that claimant would need surgical repair of the rotator cuff, and opines that the videotapes, "clearly displayed the ability of the patient to carry out any light-duty activities."

The videotapes depict claimant's activities working at the flea market stall on March 27th and May 29th from approximately 10:00 a.m. to 3:00 or 4:00 p.m. on those days. The March 27th video shows claimant carrying and handling small objects with both hands, making change, reaching overhead, and walking around. Most of the video, however, shows a young male sitting and attending the stall with claimant inside. The May 29th video shows even less of claimant although at one point claimant reaches overhead for an object with her left arm. In neither video does claimant appear to be in distress.

Claimant testified that she operated the stall in the flea market earning considerably less than the $9.10 an hour she was earning with the employer. Claimant also testified that she had returned to work with the employer for two days, tentatively identified as May 3rd and 4th. It is not clear whether that work was her regular work or light-duty work which Ms. G described as involving work where claimant would have another worker assisting her in pulling items off the assembly line. The hearing officer found claimant did not have disability, specifically finding in the disputed findings:

FINDINGS OF FACT

5. During the period from April 12, 1999 to October 5, 1999, which is the only period under consideration, Claimant was able to obtain and retain employment at the preinjury wage as evidenced by her activities in operating a stall at [market], a local flea market, where she sold items including hair care products and baby blankets.

6. Light duty work at Claimant's preinjury wage which Claimant was capable of performing was available from Employer during the period from April 12, 1999 to October 5, 1999, which is the only period under consideration.

Claimant appeals, saying her injury prevented her from earning her preinjury wage and that the employer "had no light duty available."

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). The hearing officer is the sole judge of the materiality, relevance, weight, and credibility to be given to the evidence. Section 410.165(a). While disability may be established by the testimony of the claimant alone, if believed (Houston General Insurance Company v. Pegues, 514 S.W.2d 492 (Tex. Civ. App.-Texarkana 1974, writ ref'd n.r.e.)), the testimony of the claimant, as an interested party, only raises an issue of fact for the hearing officer to resolve. Escamilla v. Liberty Mutual Insurance Company, 499 S.W.2d 758 (Tex. Civ. App.-Amarillo 1973, no writ). It was within the hearing officer's province to reject claimant's testimony that her injury prevented her from working (or even moving her left arm). The hearing officer, in Finding of Fact No. 5, clearly uses the definition of disability and finds that claimant does not have disability "as evidenced by her activities in operating a stall" at the flea market.

The hearing officer also makes a finding that light duty at claimant's preinjury wage was available during the period at issue, based on Ms. G's testimony. That light duty basically consisted of having a coworker assist claimant with activities which would involve use of claimant's left, nondominant arm. Claimant denies that is so; however, it is within the hearing officer's province to resolve conflicts and contradictions in the evidence. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). Since the hearing officer found that the evidence showed that light-duty work within claimant's limitations was available, that claimant was capable of performing that light duty, that the light-duty wage was the same as the preinjury wage and that claimant voluntarily chose not to perform that work, we conclude that there is sufficient evidence to support the hearing officer's conclusion that claimant did not have disability and that conclusion is not again the great weight and preponderance of the evidence. *See* Texas Workers' Compensation Commission Appeal No. 91045, decided November 21, 1991, and Texas Workers' Compensation Commission Appeal No. 92056, decided April 3, 1992.

We do note that carrier, in its response, argues that claimant "failed to present compelling medical evidence of a total inability to work" and that the doctors failed to explain how the compensable injury rendered claimant "totally unable to work." The standard for disability is inability to obtain and retain employment at the preinjury wage. Total inability to work is a supplemental income benefits concept in Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(d)(3) (Rule 130.102(d)(3)). While claimant may have alleged a total inability to do any work with her left arm and hand, she was only required to prove that she was unable to obtain and retain employment at her preinjury wage due to the compensable injury.

Upon review of the record submitted, we find no reversible error and we will not disturb the hearing officer's determinations unless they are so against the great weight and

preponderance of the evidence as to be clearly wrong or unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). We do not so find and, consequently, the decision and order of the hearing officer are affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

DISSENTING OPINION:

I respectfully dissent. In Finding of Fact No. 6, the hearing officer determined that "[l]ight duty work at Claimant's preinjury wage which Claimant was capable of performing was available from Employer during the period from April 12, 1999 to October 5, 1999, which is the only period under consideration." From this finding, it follows that the hearing officer believed that the claimant was restricted to light-duty work. Generally, a release to light duty is evidence that the claimant's disability continues. Texas Workers' Compensation Commission Appeal No. 992899, decided February 7, 2000; Texas Workers' Compensation Commission Appeal No. 970579, decided May 12, 1997; Texas Workers' Compensation Commission Appeal No. 92432, decided October 2, 1992. In this instance, as the majority noted, bona fide offer of employment was not at issue. Nonetheless, the hearing officer gave the carrier the benefit of such an offer in spite of the fact that the record does not reflect that an offer, in accordance with the requirements of Section 408.103(e) and Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 129.5 (Rule 129.5), was ever made to the claimant. The hearing officer could have found that the claimant's activities at the flea market were in excess of light-duty restrictions; however, he did not so find. Rather, he based his determination that the claimant did not have disability on the availability of light duty from the employer, without reference to the procedure outlined in Section 408.103(e) and Rule 129.5 and he erred in so doing. Given that the hearing officer determined that the claimant had a restricted work release, I believe that the claimant has established that she had disability for the period at issue because the evidence in the record demonstrates that she made less than her preinjury wage in her work at the flea market and no other light-duty work was made available to her. Accordingly, I would reverse the hearing officer's decision and order and render a new decision that the claimant had disability from April 12 to October 5, 1999.

Elaine M. Chaney
Appeals Judge