APPEAL NO. 000209

This case is decided under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on August 20, 1999. The hearing officer determined that the appellant's (claimant) _____, compensable injury was a producing cause of her S1 joint dysfunction and facet arthropathy; that the respondent (carrier) waived the right to contest compensability by not contesting within 60 days of notice; and that the claimant did not have disability from January 22, 1999, through the date of the hearing resulting from the injury sustained on _____. The Appeals Panel, in Texas Workers' Compensation Commission Appeal No. 992082, decided November 5, 1999, affirmed the determination that the compensable injury was a producing cause of the S1 joint dysfunction; reversed the determination that the carrier waived the right to contest compensability; and remanded the disability issue "for reconsideration, further underlying findings of fact and rationale, and a new decision and order" as to whether the claimant had disability resulting from the injury sustained on _____, from January 22, 1999, through the date of the original hearing. A hearing on remand was held on January 7, 2000. The hearing officer determined that the claimant did not have disability resulting from the _____, injury beginning on January 2, 1999, through the date of the original hearing. The claimant appeals, urging that the finding and conclusion of no disability are against the great weight of the evidence and are wrongly decided and that there is error in the hearing officer's refusal to admit additional evidence at the hearing on remand. The carrier responds, urging that there is sufficient evidence to support the finding and conclusion of the hearing officer and asks that the decision be affirmed.

DECISION

Reversed and rendered.

Initially, we do not find error in the hearing officer's ruling not to accept the new evidence proffered by the claimant on this remand. The remand instructions did not require the acceptance of any additional evidence and was predicated on reconsideration of an inconsistent finding and conclusion and the lack of underlying facts supporting the ultimate determination. Texas Workers' Compensation Commission Appeal No. 93530, decided August 10, 1993.

Because of an inconsistency in a finding and conclusion on disability at the original CCH, and the lack of underlying findings of fact as to the basis for the ultimate determination, the case was remanded for further consideration and findings of fact regarding the issue of disability from January 22, 1999, to the date of that hearing, August 20, 1999. The claimant's compensable injury of _____, which extended to S1 joint dysfunction and facet arthropathy, was not on remand. Regarding disability, the claimant had not returned to work until July 27, 1998, as a result of being released to restricted light duty on July 21, 1998, by Dr. C and having received a bona fide offer of employment. The

claimant testified that she attempted to work the job offered but was not able to because of pain from her injury after working part of the day on July 27, 1998. She testified that she was subsequently taken completely off work and never released to work by any of the doctors she saw. She also stated that she continues to have severe pain, cannot stand or sit for any prolonged period, cannot bend, and is unable to do many of the household chores she was able to do although she could cook and do some laundry and cleaning. She states that she has had to have injections in her back, the last one apparently being in January 1999, and that they helped for a short period of time but that she has more pain now. She also states that she cannot perform her preinjury job, that she wants to go back to work, and indicated she had looked for some work within her restrictions. Two videotapes taken in June and July 1998, offered in evidence by the carrier, essentially, and, at most, show the claimant walking.

The claimant's average weekly wage (AWW) was determined to be $300.00 at an earlier CCH. The bona fide offer of employment made to the claimant in July 1998 was for $5.15 per hour with working hours from 8:00 a.m. to 5:00 p.m. Medical evidence in the record shows that on August 11, 1998, Dr. C, who had earlier released the claimant to restricted duty, took her off work completely for two weeks. Subsequently, the claimant saw Dr. K who treated her and administered lumbar facet block injections in November 1998 and a sacroiliac joint injection in February 1999. His report of October 3, 1998, states, "she continues in a non-working capacity" and subsequent reports of November 16, 1998; December 8, 1998; January 18, 1999; and March 15, 1999, do not return her to work "pending re-evaluation" and record her ongoing pain, symptoms, range of motion limitation, and treatment. An independent medical evaluation by Dr. S requested by carrier in December 1998 records the claimant's right sacroiliac joint injury with resultant spur formation in the ligamentous area and states "I would keep her in a non-working status as she has not reached maximum medical improvement at this time."

The hearing officer, in making her determination on disability, seems to focus on the July 21, 1998, bona fide offer of light-duty employment and that the claimant indicated that she has looked for some employment after January 22, 1999, in determining no disability. Of course, a bona fide offer of light-duty employment does not discount disability as defined in Section 401.011(16); indeed, it may well support disability as in a case such as this where the wages offered appear to be substantially below the preinjury AWW. Texas Workers' Compensation Commission Appeal No. 91045, decided November 21, 1991. In this regard, bona fide offers of employment provisions do not end disability but only provide that the employee's weekly earnings for temporary income benefits (TIBS) purposes are equal to the weekly wages for the position offered. Section 408.103(e). Further, while there is no job search requirement to qualify for TIBS (as opposed to the requirements for supplemental income benefits under the provisions of Section 408.142), that employment is sought does not necessarily show there is no disability particularly where the employment being sought is employment according to restrictions and capabilities of the injured employee and less than preinjury capabilities. Texas Workers' Compensation Commission Appeal No. 981730, decided September 4, 1998; Texas Workers' Compensation Commission Appeal No. 962634, decided February 5, 1997. The hearing officer makes a

finding that Dr. C took the claimant off work for two weeks on August 11, 1998, but seems to ignore the following reports of Dr. S in December 1998 and Dr. K's report on up to March 1999. (In this regard, the claimant stated that she did not see Dr. K after that because her treatment was stopped.) The claimant testified that no doctor had returned her to work during the period in issue, that she was not able to work without restrictions, and that her conditioned worsened over the time frame involved. While we realize that the hearing officer is not required to accept the claimant's testimony at face value (Bullard v. Universal Underwriters Insurance Company, 609 S.W.2d 621 (Tex. Civ. App.-Amarillo 1980, no writ) and that the hearing officer determines weight and credibility of the evidence (Section 410.165(a)), here there is significant corroborating medical evidence not only supporting the claimant's testimony but clearly and convincingly showing the continuing medical problems, treatment, and medical judgment taking the claimant off work and showing her limitations. Given the basis for determining no disability from January 22, 1999, to the date of the August 20,1999, CCH (the July 1998 bona fide offer and the post January 22, 1999, limited job search) we conclude, from our review of the evidence of record, not only that an inappropriate standard may well have been applied, but also that the finding and conclusion of the hearing officer regarding disability is so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Accordingly, we reverse the decision and render a new decision that the claimant had disability during the period of January 22, 1999, to August 20, 1999, with appropriate adjustments to be made for any period of attributed wages under Section 408.103(e).

Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Thomas A. Knapp
Appeals Judge