

APPEAL NO. 010689

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on March 8, 2001. The hearing officer resolved the disputed issues by deciding that the respondent (claimant) had disability from August 11, 2000, through the date of the CCH, March 8, 2001, and that there is no bona fide offer of employment as of September 5, 2000, that can be used to offset entitlement to temporary income benefits (TIBs). The appellant (carrier) appealed and the claimant responded.

DECISION

Affirmed in part, and reversed and rendered in part.

The claimant testified that he sustained an injury to his right knee on _____, while performing his work duties as a truck driver. The parties stipulated that the carrier accepted liability for the claimant's injury of _____. The employer sent the claimant to Dr. L on August 11, 2000, and Dr. L diagnosed the claimant with a strain of the right knee, prescribed physical therapy, and returned the claimant to work with restrictions. The employer offered the claimant a light-duty job at his regular wages on August 11, 2000, which the claimant accepted. The claimant said that his knee pain worsened and that he went to Dr. J, an orthopedic surgeon, on September 5, 2000. Dr. J diagnosed the claimant as having, among other things, a meniscal tear of the right knee, recommended an MRI, and took the claimant completely off work. Dr. J noted that the claimant was limping and had swelling of the right knee. Dr. J noted on October 3, 2000, that the MRI showed a tear of the medial meniscus, that the claimant might need surgery on his right knee, and that the claimant was totally disabled. On December 5, 2000, Dr. D examined the claimant at the carrier's request and Dr. D reported that the claimant was not at maximum medical improvement because surgery of the right knee was indicated. Dr. J performed surgery on the claimant's right knee on December 22, 2000.

The hearing officer erred in determining that the claimant had disability from August 11 through September 4, 2000. 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 claimant's position at the CCH was that he is entitled to TIBs from September 5, 2000, through the date of the CCH. It is undisputed that the claimant worked from August 11 through September 4, 2000, and earned his preinjury wage during that time period. Accordingly, based on the undisputed facts, the claimant did not have disability from August 11 through September 4, 2000.

The hearing officer did not err in determining that the claimant had disability from September 5, 2000, through the date of the CCH, March 8, 2001. The evidence reflects that the claimant's treating doctor, Dr. J, took the claimant completely off work on September 5, 2000, due to the compensable knee injury and that the claimant subsequently underwent surgery for his compensable knee injury. The claimant had been

initially diagnosed by Dr. L as having only a knee strain and it was not until the claimant went to Dr. J that he was diagnosed with a meniscal tear and surgery was recommended. The hearing officer's determination that the claimant had disability from September 5, 2000, through the date of the CCH is supported by sufficient evidence and is not so against the great weight and preponderance of the evidence as to be clearly wrong and unjust.

The hearing officer did not err in determining that there was no bona fide job offer as of September 5, 2000, which was the date Dr. J took the claimant completely off work due to his compensable knee injury. The hearing officer's determination of no bona fide job offer as of September 5, 2000, is supported by sufficient evidence and is not so against the great weight and preponderance of the evidence as to be clearly wrong and unjust.

The hearing officer's decision that the claimant had disability from August 11, 2000, through the date of the CCH, March 8, 2001, is reversed and a new decision is rendered that the claimant did not have disability from August 11 through September 4, 2000, and that the claimant had disability from September 5, 2000, through the date of the CCH, March 8, 2001. The hearing officer's decision that there is no bona fide job offer as of September 5, 2000, that can be used to offset TIBs is affirmed.

Robert W. Potts
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Philip F. O'Neill
Appeals Judge