APPEAL NO. 011100
FILED JULY 02, 2001

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on April 4, 2001. The hearing officer resolved the disputed issues by deciding that the determination of the designated doctor is entitled to presumptive weight; that the respondent (claimant) has not reached maximum medical improvement (MMI) pursuant to the designated doctor's determination; that the issuance of an impairment rating (IR) is not appropriate until the claimant reaches MMI; that the claimant has disability which began on November 14, 1999, and continued through the date of the hearing; that the claimant's outside employment is concurrent employment and his wages from the concurrent employment are not deductible by the appellant (self-insured) in calculating temporary income benefits (TIBs). The self-insured appealed both the hearing officer's determinations that the claimant has not reached MMI and that the claimant had disability. The claimant responded, urging affirmance.

DECISION

Affirmed in part and reversed and remanded in part.

Appealed Issue 1 and Decision: The hearing officer did not err in determining that the designated doctor's opinion that the claimant has not reached MMI is entitled to presumptive weight, and that the issuance of an IR is not appropriate until the claimant reaches MMI.

Rationale: There is conflicting medical evidence as to MMI in this case. It was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence.

Appealed Issue 2 and Decision: The hearing officer's determinations on disability are remanded for further consideration.

Rationale: The claimant was employed by a health agency of the self insured (employer 1) as a licensed vocational nurse (LVN). The claimant worked a regular 40-hour week with a base salary of $2,033.00 per month doing physically demanding nursing duties. The claimant also had concurrent employment with a health outreach service (employer 2) as an LVN performing duties that were not physically demanding. The claimant sustained a compensable cervical spine injury and ceased working at employer 1 on _____, due to his compensable injury. The claimant was able to continue working for employer 2 because of the nature of the lighter duties. The claimant testified that he was a contract employee with employer 2. The claimant receives no benefits from employer 2, and has no guaranteed hours. The number of hours the claimant works for employer 2 depends on the need of the employer and the availability of the claimant. The claimant testified that after his injury he had greater availability because he was no longer

working for employer 1. The records submitted at the hearing indicate that the claimant grossed $9,315.63 in 1998, and 11,367.60 in 1999, while working for employer 2. The record further indicates that the claimant earned $27,253.77 in 2000, from his employment with employer 2.

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). In determining that the claimant has disability, the hearing officer disregarded the claimant's earnings from employer 2. We have previously noted that income from concurrent employment is generally not considered as long as the concurrent employment income is not increased due to additional efforts by the claimant. *See* Texas Workers' Compensation Appeal No. 990827, decided May 19, 1999. In the present case, it appears that the claimant's increased earnings from employer 2 are a direct result of his greater availability to work due to the fact he is no longer employed by employer 1.

In his the Statement of the Evidence with respect to the claimant's employment with employer 1, the hearing officer states, "Claimant has been available to work more hours because he cannot perform the LVN job at . . . after his injury and was terminated from employment there on January 20, 2000." The hearing officer's Finding of Fact No. 14 is, "Claimant's employment with [employer 2] is concurrent employment and the post-injury earnings from [employer 2] are not deducted by the self-insured in calculating [TIBs]". This was an error because the hearing officer had determined that not working for employer 1 enabled the claimant to increase the hours the claimant worked for employer 1 and the result was that the claimant's earnings from working for employer 2 increased.

To correct the error the decision is remanded to the hearing officer to determine for what periods, if any, on and after _____, the claimant was unable to obtain and retain employment at wages equivalent to his preinjury wage. To make that determination the hearing officer must decide during what period, if any, the claimant was able to earn wages equivalent to his preinjury wages because the claimant was no longer working for employer 1 and his availability to work for employer 2 was increased. In this case, the wage equivalency test for establishing disability must be based only on the wages the claimant earned with employer 2 that are in excess of the wages the claimant would have been expected to earn with employer 2 under the preinjury conditions of being concurrently employed by employers 1 and 2. Such earnings are postinjury earnings for determining whether there is disability.

If the hearing officer deems it appropriate, he may reopen the record for more evidence. Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new

decision is received from the Texas Workers' Compensation Commission's Division of Hearings, pursuant to Section 410.202. *See* Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

Thomas A. Knapp
Appeals Judge

CONCUR:

Judy L. S. Barnes
Appeals Judge

Robert E. Lang
Appeals Panel
Manager/Judge