APPEAL NO. 011285
FILED JULY 23, 2001

Following a contested case hearing (CCH) held on March 26, 2001, with the record closing on May 8, 2001, 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 deciding that appellant's (claimant herein) disability started December 11, 1999, and ended March 19, 2000. The claimant appeals, arguing that the evidence established that she suffered disability through the date of the CCH. The respondent (carrier herein) replies that the hearing officer's findings are sufficiently supported by the evidence.

DECISION

We reverse and remand the decision and order of the hearing officer.

The claimant testified that she had concurrent employment at employer 1 and employer 2 at the time of injury. At employer 1 she cleans and sells jewelry and at employer 2 she fits cancer patients with prostheses and wigs. While working at employer 1 on _____, the claimant accidently kicked a paintcan and got a knot on top of her foot. The carrier has accepted the claimed injury, but it is disputing disability.

In regard to her disability, the claimant testified that her job at employer 2 does not require her to stand. She returned to work with employer 2 on February 18, 2000. The claimant testified that she attempted to go back to the job at employer 1 on February 19, 2000, but employer 1 had no light duty and required her to stand, making the swelling worse. The claimant also testified that her primary physical restriction is no standing and that she has to stand to work as a sales clerk at employer 1. She worked about 8 hours a day 3 days a week making $6.00 per hour plus commission at employer 1 before her injury. She also testified that she works part time at employer 2 but does not think she could work more hours at employer 2 because of the pain.

This case turns on whether there is evidence to support the hearing officer's determination that the claimant suffered disability only until March 19, 2000. This is largely an issue of fact. Section 410.165(a) provides that the contested case hearing officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence as well as of the weight and credibility that is to be given the evidence.

The hearing officer's determination that the claimant only had disability until March 19, 2000, is not supported by the evidence. The hearing officer states that the claimant was released to return to work on March 19, 2000. Nowhere in the record do we find a medical release for that date.

Dr. G, the carrier's peer review and independent medical examination doctor, in his report dated March 16, 2000, indicated that the claimant was not at maximum medical improvement. Although Dr. G states in his report that "I would probably not have objected to [claimant] returning to work," this falls short of an unconditional release to return to work. This is even more evident when viewed in conjunction with Dr. G's second report of March

12, 2001. In that report, after having the opportunity to examine the claimant, Dr. G writes, "I have no opinion at this time whether the [claimant] is physically capable of returning to work full-duty." Thus, even a year after the first report, he was unwilling to opine as to the claimant's ability to work. He further writes in that report that he is referring the claimant for a functional capacity evaluation (FCE) and will defer to the restrictions on the FCE. The FCE report indicates that the claimant is restricted to light duty. The fact that a claimant is released for light duty is evidence that the effects of the injury continue and disability, therefore, exists. *See* Texas Workers' Compensation Commission Appeal No. 91027, decided October 24, 1991.

We note that although the claimant continued working her other job, that does not preclude a finding of disability. While the job functions were similar, the claimant testified that the job at employer 1, where she was injured, required her to stand. In Texas Workers' Compensation Commission Appeal No. 91059, decided December 6, 1991, which did a thorough review of the law involving concurrent employment, we held that where there is more than one employer (concurrent employers), the 1989 Act directed that computation of average weekly wage be based solely upon the wages earned from the employer in whose service the injury was sustained. *See also* Texas Workers' Compensation Commission Appeal No. 972413, decided January 5, 1998 (unpublished). Thus, the fact that the claimant continued working at her concurrent employment at employer 2, is irrelevant to determine disability in this case.

We reverse the hearing officer's decision and order and remand for reconsideration consistent with this decision. 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.

Gary L. Kilgore
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Robert W. Potts
Appeals Judge