

APPEAL NO. 011528
FILED AUGUST 23, 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 (CCH) was held on June 7, 2001. The issues before the hearing officer were:

1. Does the compensable injury of _____, extend to and include the respondent's (claimant) neck, lower back, right shoulder, and left knee?
2. Did the claimant have disability as a result of an injury on July 29, [sic 28] 2000, and, if so, for what period(s)?

The hearing officer determined that the compensable (left shin contusion) injury extended to and included the other claimed body parts and that the claimant had disability from July 31, 2000, continuing through the date of the CCH. In addition, the hearing officer made findings and had a discussion about a bona fide offer of employment (BFOE).

The appellant (carrier) appealed, contending that the evidence was insufficient to support the extent of injury and disability findings and that the employer's BFOE met all the requirements of Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 129.6 (Rule 129.6). The claimant responds, urging affirmance on the issues before the hearing officer and pointing out that BFOE was not an issue before the hearing officer.

DECISION

Affirmed.

The claimant was employed as a laborer and it is undisputed that the claimant sustained a compensable injury on _____, when a ditching machine struck a 2" x 10" board, throwing it into the claimant. The claimant contends that the force of the flying board broke the handle of the shovel he was holding and knocked him to the ground. The carrier asserts the board only hit the claimant's left leg, causing a contusion to the claimant's shin. There is disputed evidence regarding how badly the claimant was injured and whether the claimant asked to go to a doctor at the time.

It is undisputed that the claimant saw Dr. K, a chiropractor, on July 31, 2000. Dr. K found muscle spasms in the claimant's neck and lumbar spinal regions and diagnosed contusions of the back, (left) knee, and shoulder region, and took the claimant off work. Dr. L, a carrier required medical examination doctor, in a report dated October 30, 2000, certified the claimant to have 0% impairment rating (IR). Dr. R, a designated doctor, found the claimant not at maximum medical improvement (MMI) on December 5, 2000, and had an estimated MMI date of March 28, 2001. In evidence is a Work Status Report (TWCC-73) from Dr. K

releasing the claimant to light duty on March 5, 2001, with certain lifting and posture restrictions.

It is undisputed that the claimant and the employer's safety director met on March 7, 2001, and that at least the employer had a copy of the TWCC-73. What was said is in dispute but at that meeting the claimant was given a letter dated "March 7, 2000 [sic 2001]" which purports to be the basis of the BFOE.

Regarding the extent-of-injury issue, there was conflicting evidence regarding the severity of the injury. Extent of injury is normally a question of fact for the hearing officer, as the sole judge of the weight and preponderance of the credibility of the evidence, to resolve. The hearing officer weighed the credibility of the evidence and his determination on this issue is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

Similarly, the hearing officer's determination on disability is supported by the evidence, namely, the claimant's testimony and Dr. K's reports. While a BFOE is not subsumed in an issue of disability, the hearing officer may consider offers of employment, bona fide or otherwise, as having a bearing on the claimant's ability to obtain and retain employment at the preinjury wage (disability). Because a BFOE was not an issue in this case, we will not analyze the employer's March 7, 2001, letter in terms of Rule 129.6 but rather whether that letter was evidence that the claimant no longer had disability as defined in Section 401.011(16). The hearing officer concluded that the claimant had disability and that decision is supported by sufficient evidence.

The hearing officer's decision and order are affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Philip F. O'Neill
Appeals Judge