

APPEAL NO. 012077
FILED OCTOBER 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 was held on August 13, 2001. The following issues were presented: (1) did the employer tender a bona fide offer of employment to the respondent (claimant); and (2) did the claimant have disability from May 7, 2001, through the present from the compensable injury of _____? The hearing officer determined that (1) the employer tendered a bona fide offer of employment which extended until May 7, 2001, when the claimant's treating doctor took her off work; and (2) the claimant had disability from May 7, 2001 through the date of the hearing. The appellant (carrier) appeals the determinations on sufficiency grounds, asserting that the claimant could work light duty after May 7, 2001, and such work was made available to her by the employer. No response was filed by the claimant.

DECISION

Affirmed.

Bona Fide Offer of Employment

The hearing officer did not err in determining that the employer's bona fide offer of employment extended until May 7, 2001, when the claimant's new treating doctor took her back off work. Whether a bona fide offer of employment existed after May 7, 2001, was a question of fact for the hearing officer. See Texas Workers' Compensation Commission Appeal No. 93777, decided October 13, 1993; Texas Workers' Compensation Commission Appeal No. 002799, decided January 17, 2001. There was conflicting evidence presented with regard to that issue. The hearing officer is the sole judge of the weight and credibility of the evidence (Section 410.165(a)) and, as the trier of fact, resolves the conflicts and inconsistencies in the evidence including the medical evidence (Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ)). The hearing officer could give preference to the opinion of the claimant's treating doctor restricting the claimant from all work effective May 7, 2001, and find that a bona fide offer of light-duty employment could no longer be made in that the claimant was no longer released to light duty. Accordingly, the hearing officer's determination 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 (Tex. 1986).

Disability

The hearing officer did not err in determining that the claimant had disability from May 7, 2001 through the date of the hearing. In view of the carrier's argument on appeal, stated above, it is not entirely clear that the carrier disputes that the claimant had some work restrictions as a result of the compensable injury. Rather, the carrier appears more to argue that the claimant does not have disability, given the availability of light-duty

employment.

The Appeals Panel has on numerous occasions stated that the issues of a bona fide offer and disability are separate. Texas Workers' Compensation Commission Appeal No. 001143, decided July 3, 2000. Disability concerns whether a claimant is unable to obtain and retain employment at wages equivalent to the preinjury wage because of a compensable injury, while a bona fide offer is used to determine the amount of temporary income benefits due, if any. Id. Even if there had been a finding of a bona fide offer of employment, it would not result in the end of disability but only a determination of weekly wage for determining entitlement to temporary income benefits, unless the post-injury earnings from the bona fide offer were equivalent to the preinjury average weekly wage. Id.

To the extent the carrier asserts that the hearing officer's disability determination is not supported by the evidence, we note that a restricted release to work as opposed to an unrestricted release is evidence that the effects of the injury remain and disability continues. See Texas Workers' Compensation Commission Appeal No. 92432, decided October 2, 1992. In view of the evidence from the claimant's treating doctor, we cannot conclude that hearing officer's disability determination is so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain, supra.

The hearing officer's decision and order are affirmed.

The true corporate name of the insurance carrier is **SENTRY INSURANCE A MUTUAL COMPANY** and the name and address of its registered agent for service of process is

**GAIL L. ESTES
1525 NORTH INTERSTATE 35E, SUITE 220
CARROLLTON, TEXAS 75006.**

Elaine M. Chaney
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Robert W. Potts
Appeals Judge