

APPEAL NO. 020074
FILED FEBRUARY 20, 2002

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 begun on June 28, 2001, continued to October 1, 2001, and continued to and completed on December 11, 2001. The sole issue for determination was whether the appellant (claimant) had disability as a result of the _____, injury, and, if so, for what period. The hearing officer determined that the claimant had disability from October 14, 1998, through the date of the hearing on December 11, 2001, as a result of the _____, injury. The claimant appeals on sufficiency of the evidence grounds, arguing that disability for the _____, injury did not start until September 17, 2001, when the claimant was taken off work by her treating doctor for that injury. The respondent (self-insured) replies, urging affirmance.

DECISION

Affirmed.

The 1989 Act defines disability as 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 has the burden of proving disability, and whether a claimant has disability is generally a question of fact for the hearing officer to decide. Texas Workers' Compensation Commission Appeal No. 93560, decided August 19, 1993.

The claimant testified that she sustained a shoulder injury on _____, but did not immediately miss any work because of the shoulder injury. She subsequently sustained a second compensable injury (to her foot) on _____, but was able to work full duty or light duty at full wages until July 1998, when her doctor took her off work due to the foot injury, and she began receiving temporary income benefits (TIBs). According to a Supplemental Report of Injury (TWCC-6), dated October 14, 1998, the employer placed the claimant in leave-without-pay status on October 14, 1998, for the _____, injury. The claimant testified that she had shoulder surgery on September 21, 1999, but that she continued to have pain in the shoulder, and ultimately had a second surgery on the shoulder on June 19, 2001. The record does not establish what the claimant's pay status was with the employer from the time she started receiving TIBs in July 1998 until October 14, 1998, when the employer placed her in leave-without-pay status. The hearing officer, however, could easily conclude that a person in leave-without-pay status is not receiving wages equivalent to the preinjury wage, and that disability was established as of that date. The evidence is sufficient to support the hearing officer's factual determination.

It is the hearing officer, as the sole judge of the weight and credibility of the evidence (Section 410.165(a)), who resolves the conflicts and inconsistencies in the evidence (Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex.

Civ. App.-Amarillo 1974, no writ)), and determines what facts have been established from the conflicting evidence. St. Paul Fire & Marine Insurance Company v. Escalera, 385 S.W.2d 477 (Tex. Civ. App.-San Antonio 1964, writ ref'd n.r.e.). The Appeals Panel will not disturb the challenged factual findings of a hearing officer unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust and we do not find them so in this case. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

We affirm the decision and order of the hearing officer.

The true corporate name of the insurance carrier is **STATE OFFICE OF RISK MANAGEMENT (a self-insured governmental entity)** and the name and address of its registered agent for service of process is

For service in person:

**RON JOSSELET, EXECUTIVE DIRECTOR
THE STATE OFFICE OF RISK MANAGEMENT
300 W. 15TH STREET
WILLIAM P. CLEMENTS, JR. STATE OFFICE BUILDING
6TH FLOOR
AUSTIN, TEXAS 78701.**

For service by mail:

**RON JOSSELET, EXECUTIVE DIRECTOR
THE STATE OFFICE OF RISK MANAGEMENT
P.O. BOX 13777
AUSTIN, TEXAS 78711-3777.**

Michael B. McShane
Appeals Judge

CONCUR:

Robert E. Lang
Appeals Panel
Manager/Judge

Edward Vilano
Appeals Judge