APPEAL NO. 020281
FILED MARCH 7, 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 (CCH) was held on January 9, 2002. The hearing officer determined that the compensable injury of _____, does include the respondent/cross-appellant's (claimant) temporomandibular joint disease (TMJD) and/or loss of visual acuity; that the claimant did have disability resulting from an injury sustained on _____, beginning on January 4, 2001, and continuing through January 23, 2001, and beginning on June 7, 2001, and continuing through the date of the CCH; and that the employer did not tender a bona fide offer of employment (BFOE) to the claimant. The appellant/cross-respondent (carrier) appealed, arguing that the hearing officer erred in determining extent of injury, disability, and that the employer did not make a BFOE. The claimant appeals the hearing officer's determinations concerning the dates of the claimant's disability and otherwise files a response urging affirmance.

DECISION

Affirmed as modified.

INJURY INCLUDES TMJD AND LOSS OF VISUAL ACUITY

The parties stipulated that the claimant sustained a compensable injury to her head, left shoulder, left elbow and left hip on _____. While working for the employer, the claimant sustained an injury when she fell about 10 feet, hitting steel beams and the cement floor. The carrier contends the hearing officer's determination that the claimant's injuries include TMJD and loss of visual acuity are not supported by the evidence. In a June 26, 2000, letter Dr. H noted that the claimant had some problems with "vision, some double vision, jerking motions and some dizziness." Dr. K an eye doctor, stated that the claimant is experiencing "post-traumatic visual blurring with nonspecific visual field changes as well." Other medical records in evidence, dated January 22, 2001, show that the claimant was diagnosed with TMJD by Dr. H who opined there was "no question" that it was related to the claimant's head injury.

The hearing officer did not err in determining that the claimant's compensable injury extends to and includes TMJD and loss of visual acuity. Extent of injury is a question of fact. Texas Workers' Compensation Commission Appeal No. 93613, decided August 24, 1993. The hearing officer is the sole judge of the weight and credibility of the evidence. The fact that, as in this case, different inferences could be drawn from conflicting evidence will not compel the Appeals Panel to set aside the decision. *See* Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). 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). There is support for the hearing officer's determinations.

DISABILITY

As the carrier concedes in its response to the claimant's appeal, there was no dispute that the claimant sustained disability from November 11, 1999, through February 9, 2000. To address the concern of the claimant that this undisputed period was overlooked in the decision, we modify the hearing officer's determinations on disability to include these dates.

Regarding disability for the period that was in dispute, the claimant had a job offer from a motorcycle shop where she worked from May 1, 2000, until January 3, 2001, when she was fired because she was having difficulty performing the job due to her compensable injury. On January 24, 2001, she began working for a steel company where she worked until June 6, 2001, when she was again fired because she was having difficulty performing her job due to cognitive errors attributed to her head injury. The hearing officer found disability for the period of unemployment in January 2001 and then again beginning on June 7, 2001, through the date of the CCH. Although the carrier argues that it was termination, not the injury, leading to diminished wages during these periods, the hearing officer believed the claimant's evidence pointing to injury-related reasons for leaving these jobs. 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, *supra.* King, *supra*. There is support for the hearing officer's determinations that the claimant had disability.

BONA FIDE OFFER

Section 408.103(e) states that for purposes of paying temporary income benefits (TIBs), any wage offered to the claimant through a BFOE may be considered as weekly earnings after an injury. However, the "bona fide job offer" issue in this case amounts to nothing more than a request for an advisory hypothetical opinion. The offer that was extended to the claimant in this case was actually accepted and she was paid as a "door greeter" for 10 days and then returned to her normal duties. Whether the offer would have passed muster under our applicable rule is therefor of no consequence.

We believe, however, that the import of the carrier's argument on this point is that once an offer is made, even if accepted, it should be assumed to remain "on the table" if an injured worker once again leaves work. There is no evidence that another offer was made after the claimant left work again. In response to arguments in other cases about such asserted "standing offers" of light-duty work for which an offset against TIBs should be granted, the Appeals Panel has previously noted that it is the burden of the employer to offer, and not the burden of the employee to seek out, restricted work. *See* Texas Workers' Compensation Commission Appeal No. 92293, decided August 17, 1992. The

bona fide offer to the claimant in this case was for a job to last until she resumed full-duty work (which occurred after 10 days in the restricted position) and thus would not appear to be even arguable as a "standing offer."

Moreover, the bona fide offer agreement appeared to have been raised at the CCH for a brief period that the claimant was between her job with the employer and that for another employer, which period was not included in the hearing officer's findings of disability. In keeping with the evidence in the case, we modify the hearing officer's conclusion of law concerning the bona fide offer to read:

> 5. While the employer did not tender a bona fide offer of employment to the claimant which met the requirements of applicable rules of the Texas Workers Compensation Commission, the claimant actually accepted and worked in the offered position; therefore, Section 408.103(e) does not apply.

As modified, we affirm the hearing officer's decision.

The hearing officer's decision and order are affirmed.

The true corporate name of the insurance carrier is **TEXAS PROPERTY AND CASUALTY INSURANCE GUARANTY ASSOCIATION for Reliance National Indemnity Company** and the name and address of its registered agent for service of process is

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Susan M. Kelley
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Chris Cowan
Appeals Judge