

APPEAL NO. 020799
FILED MAY 14, 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 held on February 26, 2002. The hearing officer determined that a psychological injury was part of the respondent's (claimant) _____, compensable injury, and that the claimant had disability for the period from _____, until February 4, 2002. There are no findings on a third issue of whether the employer made a bona fide offer of employment, perhaps due to the hearing officer's announcement that as the offer was accepted by the claimant, he recognized the appellant's (carrier) right to offset any temporary income benefits (TIBs) with the amounts actually received as post-injury earnings.

The carrier appeals the determinations made on psychological injury and disability. There is no appeal of any failure to make findings on the bona fide job offer issue. The claimant responds that the decision of the hearing officer is supported by the record.

DECISION

We affirm in part, and reverse and remand in part.

The claimant worked as a flight attendant when she was thrown around the cabin of an aircraft during turbulence on _____. She injured her knee and back, and there is psychiatric evidence supporting an anxiety/panic attack reaction to the episode.

The claimant accepted two light-duty employments from the employer. One period lasted from June 1 until around August 6, 2001, the date on which she was taken entirely off work, and the second period lasted from January 22 until February 17, 2002. She was released to full-duty work by her treating doctor. The claimant also testified about working brief periods for a temporary services company for less than half of her hourly wage for the employer after this date.

The Employer's First Report of Injury or Illness (TWCC-1) showed that the claimant's weekly wage was \$758.40. Testimony was not entirely clear on what the claimant's pay was during light duty; however, the wording of both offers would support the conclusion that it did not match her flight pay and was adjusted downward.

Finally, the claimant clearly testified (and pay records support) that she was off work and her pay docked for personal illness unrelated to her compensable injury and to attend to an ill family member for two days. She described a personal trip to a wedding in another state. At least some of these times appear to have occurred within the disability periods found by the hearing officer.

OCCURRENCE OF A PSYCHOLOGICAL INJURY

Essentially, the carrier quarrels with the manner in which the hearing officer gave weight and credibility to the evidence. The hearing officer is the sole judge of the relevance, materiality, weight, and credibility of the evidence presented at the hearing. Section 410.165(a). The decision should not be set aside because different inferences and conclusions may be drawn upon review, even when the record contains evidence that would lend itself to different inferences. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). An appeals-level body is not a fact finder and does not normally pass upon the credibility of witnesses or substitute its own judgment for that of the trier of fact, even if the evidence would support a different result. National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied); American Motorists Insurance Co. v. Volentine, 867 S.W.2d 170 (Tex. App.-Beaumont 1993, no writ). The record in this case presented conflicting evidence for the hearing officer to resolve, but the inferences drawn by the hearing officer are supported by the evidence.

DISABILITY

TIBs are due when an injured worker has not reached maximum medical improvement (MMI) and has disability. Section 408.101(a). Section 401.011(16) defines "disability" as "the inability because of a compensable injury to obtain and retain employment at wages equivalent to the pre-injury wage." The hearing officer need not have believed, as urged by the carrier, that the ability to travel on personal trips was antagonistic to a claim of disability. However, while most of the periods of disability seem supported by the record, the hearing officer has not accounted for the times that the claimant's decrease in pay was due to reasons other than the compensable injury, and he further appears to have ended disability prior to the end of the second transitional duty period, without explanation. (We would note that February 4, 2002, corresponds to a date that MMI was certified.) We therefore reverse and remand so that the appropriate periods of disability may be precisely sorted out by the hearing officer based on the evidence of record.

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 (amended June 17, 2001). See Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

The true corporate name of the insurance carrier is **INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA** and the name and address of its registered agent for service of process is

**TIM KELLY
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675 BERING, THIRD FLOOR
HOUSTON, TEXAS 77057.**

Susan M. Kelley
Appeals Judge

CONCUR:

Michael B. McShane
Appeals Judge

Philip F. O'Neill
Appeals Judge