

APPEAL NO. 021696
FILED AUGUST 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 June 5, 2002. The hearing officer determined that the employer had not tendered a bona fide offer of employment (BFOE) to the appellant (claimant) and that the claimant had disability from January 16, 2002, and continuing through May 1, 2002. The hearing officer's determination on the BFOE issue has not been appealed and has become final. See Section 410.169.

The claimant appeals the disability issue, contending that her doctors have given her certain restrictions and that since there was no BFOE, the claimant has disability. The claimant appeals the hearing officer's various other determinations. The file does not contain a response from the respondent (carrier).

DECISION

Affirmed.

At issue is whether the claimant had disability for the period of February 5, 2001, through January 15, 2002. It is undisputed that the claimant sustained a right shoulder and right elbow injury on _____, when some merchandise fell off a shelf onto her right shoulder. The claimant continued to work her regular duties with the employer, a large retail store, until December 27, 2000, when she saw a doctor who released her to return to work with a 10-pound lifting restriction on her right arm and recommended use an arm sling. The employer accommodated the claimant, and although the offer of employment was invalid as a BFOE, the claimant accepted an offer of employment and returned to work as a sales associate. Whether the claimant's duties as a sales associate exceeded her restrictions is disputed. Sometime in January 2001, the employer further accommodated the claimant by assigning her even lighter duty as a door or people "greeter." The claimant, particularly in her appeal, contends that even this position also did not meet her restrictions because it "also required her to use her right arm." However on cross-examination at the CCH, the claimant testified that she pushed carts while working as a greeter and this exceeded her restrictions because no one ever "stopped her from moving carts" or ordered her not to do so. On February 4, 2001, the claimant arrived for work and, due to a scheduling error, she and another employee had both been scheduled for work as greeters. The claimant was allowed to go home and did so and never returned to work. The employer's human resources manager testified that in the weeks following February 4, 2001, she attempted numerous times (estimated 15 times during one week) to contact the claimant without success. The claimant testified that she did not contact the employer because she was not going to "beg for a place on the work schedule." The claimant was terminated for job abandonment on March 13, 2001. The claimant's doctor took the claimant off work altogether on June 22, 2001.

Disability is defined in Section 401.011(16) as the inability because of a compensable injury to obtain and retain employment at the preinjury wage. The claimant argues that because the employer's job offers did not qualify as BFOEs and because the claimant has restrictions, the claimant has disability, citing authority that a restricted release to work is evidence that disability continues, that "an employee under a conditional work release does not have the burden of proving inability to work," and that where the claimant is released to return to work at light duty there is no requirement that the claimant look for work. We disagree with the claimant's position in her appeal that it was uncontroverted that the positions offered by the employer violated the claimant's restrictions. The human resources manager testified that the positions were within the restrictions and pointed out that whenever there was lifting or pushing to be done, help was available. In any event whether the duties of the offered positions exceeded the claimant's restrictions were factual determinations for the hearing officer to resolve and the hearing officer obviously believed that the claimant was capable of performing the duties of a greeter.

In this case, as opposed to the cases cited by the claimant, the claimant was offered, and in fact performed, the duties of a greeter until the schedule mix-up on February 4, 2001. The hearing officer further found, and is supported by the evidence, that the claimant performed the greeter duties until she "walked off the job on February 4, 2001," and that subsequently the claimant "has voluntarily decided not to re-enter the workforce after May 2, 2002.

In a similar case in Texas Workers' Compensation Commission Appeal No. 020526, decided April 10, 2002, we noted that while it is true that "a release to light duty is evidence that disability continues [in that case] the employer offered the claimant employment within her restrictions at the preinjury wage [and that] offer constitutes evidence that disability, as defined in Section 401.011(16) had ended." We make the same holding here and affirm the hearing officer's decision as not being against the great weight and preponderance of the evidence.

The claimant also contends that the Hearing Officer's Finding of Fact No. 4, where the hearing officer recites that the claimant did not maintain communication with her employer after February 4, 2001, and did not provide the employer with a work status report or evidence of a change in her condition "impermissibly added an additional requirement" that the claimant must present that information. We disagree. We read Finding of Fact No. 4 as merely making a factual finding of what occurred. The hearing officer did not err in doing so.

For the reasons stated the hearing officer decision and order are affirmed.

The true corporate name of the insurance carrier is **AMERICAN HOME ASSURANCE COMPANY** and the name and address of its registered agent for service of process is

**ROBERT PARNELL
8144 WALNUT HILL LANE
SUITE 1600
DALLAS, TEXAS 75231-4813.**

Thomas A. Knapp
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Philip F. O'Neill
Appeals Judge