APPEAL NO. 021773
FILED AUGUST 13, 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 February 26, 2002. The decision of the hearing officer was reversed and remanded for the hearing officer to clarify the disability periods found, in light of the definition of disability set forth in Section 401.011(16) and its application to evidence that the respondent (claimant) worked during some of the period found or was off work for reasons other than her compensable injury. The hearing officer nevertheless found, as he did previously, that the claimant had disability from her injury for the entire period from May 3, 2001, until February 4, 2002.

The appellant (carrier) has appealed, arguing that the decision has contradictory findings and conclusions, and that it is so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. The carrier also appeals, asserting that there is no medical basis for finding a link between the claimant's psychological problems and her injury.

DECISION

Reversed and rendered.

The hearing officer's decision on remand essentially did not address the reason for remanding the case which was our expressed concern about the unbroken period of disability originally found by the hearing officer, notwithstanding testimony concerning two periods of actual work in a light-duty program, work for another employer, and times when the claimant did not work, primarily due to reasons not involving the compensable injury. The claimant bears the burden of proving that she had the inability because of the compensable injury to obtain and retain employment at wages equivalent to the preinjury average weekly wage (AWW).

At the beginning of the hearing on remand, the claimant's attorney stated that the period of disability sought ran from August 6, 2001 (after the claimant's first stint working "transitional duty," the term for the employer's light-duty program), to January 25, 2002 (the day before she began working a second period of transitional duty), and then began again February 17, 2002 (when the transitional duty ended), through the date of the CCH. It was also acknowledged in a discussion between the hearing officer and the claimant's attorney that the wages paid for transitional duty were adjusted to be essentially equivalent to the preinjury weekly earnings. When the claimant offered brief testimony, she said that she was paid $21.68 per hour for transitional duty, and worked eight hours a day, four days a week. The claimant worked for some days beginning in January 2002 as a temporary services employee, at a $10 per hour rate, with work assigned as available.

In Montford, Barber, Duncan, A Guide to Texas Workers' Comp Reform, Vol. 1, § 4.22(a), p. 4-86, the authors, in discussing disability under the 1989 Act, state that:

> Income benefits accrue only if there is *disability* for at least one week. "Disability" is different from "incapacity for work," which triggered temporary disability benefits under the prior law. As defined in Section 1.03(16) of the new Act, "disability" means "the inability to obtain and retain employment at wages equivalent to the pre-injury wage because of a compensable injury." Incapacity, under the prior law, measured the ability to obtain and retain employment performing the *usual tasks of a workman*. Hence, *the capacity to perform usual tasks of a workman*, important under the prior law, *is no longer relevant*. Instead, the new disability concept measures post-injury wages against *pre*-injury wages instead of physical limitations to perform an occupational task. (Emphasis in the original.)

The hearing officer erred in holding that the claimant had disability for periods of time when she was employed under a "transitional" light-duty program by the employer. The hearing officer notes in his decision, with no citations, that "[t]here are numerous Appeals Panel decisions reciting that working at modified duty position even earning preinjury wages does not amount to an end to disability." To the contrary, the Appeals Panel has made clear that it is error to include in a period of disability those periods of time when an employee is working for wages equivalent to the preinjury AWW. Texas Workers' Compensation Commission Appeal No. 020203, decided March 6, 2002. We have likewise indicated that periods of time within such employment that consist of sick or vacation time are not periods of "disability." Texas Workers' Compensation Commission Appeal No. 950753, decided June 23, 1995.

It appears to us that the hearing officer analyzed the disability issue only in terms of whether the claimant could return to her previous job as a flight attendant, an analysis parallel to the now-rejected notion of incapacity. The date he determined that her disability ended was the date he concluded that she could resume these previous duties. His explanation for not finding that the light-duty program was a temporary end to disability during those time periods appears to be based upon the fact the claimant was still under medical restrictions, and that the light duty program is part of a contract between the employer and the union.

Whether the light-duty program offered by the employer was the result of a union contract does not result in a different application of the definition of disability in 401.011(16). *See* Texas Workers' Compensation Commission Appeal No. 961729, decided October 18, 1996. Furthermore, virtually any "light duty" program would be based in part upon a doctor's restrictions.

Accordingly, we reverse the hearing officer's determination that the claimant had disability during the periods of time she worked in the transitional-duty program, and render a determination that the claimant did not have disability for the periods from June

1, through August 6, 2001, and from January 26, 2002, through February 4, 2002. The claimant showed that she worked for a lower AWW earlier in January. We are unable, due to a lack of evidence, to further address the periods that the claimant was on personal travel.

We affirm the other periods that the hearing officer found that the claimant had disability. Reasonable minds could differ on whether the incident in question should have logically resulted in several months' worth of inability to work, and on whether the incident would have given rise to a debilitating psychological injury, but the differing of reasonable minds is not our standard of review. We will reverse a determination only if the decision is so against the great weight and preponderance of the evidence so as to be manifestly unfair or unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). In this case, except for the periods of time reversed above, we cannot say that the great weight is against the hearing officer's findings.

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, AIG
675 BERING, THIRD FLOOR
HOUSTON, TEXAS 77057.

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Susan M. Kelley
Appeals Judge

CONCUR:

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Michael B. McShane
Appeals Judge

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Philip F. O'Neill
Appeals Judge