APPEAL NO. 022989
FILED JANUARY 8, 2003

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 October 21, 2002. The hearing officer determined that the appellant's (claimant) compensable injury of _____, extends to and includes an injury to the thoracic and cervical spine, but does not extend to and include an injury to the claimant's bilateral shoulders and the findings to the right shoulder shown in the MRI done on August 16, 2002; that the employer tendered a bona fide offer of employment (BFOE) to the claimant on April 29, 2002, and that the respondent (carrier) is entitled to adjust the claimant's post-injury earnings (PIE) from April 30, 2002, to the date of the CCH; that the claimant had disability from May 1, 2002, through the date of the CCH; and that the claimant is not entitled to change her treating doctor from Dr. W to Dr. G. The claimant appeals the determination that the compensable injury does not include the bilateral shoulders and the findings to the right shoulder shown in the MRI of August 16, 2002, and the determination that the carrier is entitled to adjust the claimant's PIE, asserting that such determinations are contrary to the great weight and preponderance of the evidence. The carrier responds, urging affirmance. The determinations that the compensable injury does extend to and include the thoracic and cervical spine, that the employer tendered a BFOE to the claimant, that the claimant had disability from May 1, 2002, through the date of the CCH, and that the claimant was not entitled to change her treating doctor from Dr. W to Dr. G, have not been appealed and have become final. Section 410.169.

DECISION

Affirmed.

The hearing officer did not err in reaching the complained-of extent-of-injury determination. The issue of extent of injury involves a question of fact for the hearing officer to resolve. The evidence before the hearing officer was conflicting. The hearing officer is the sole judge of the weight and credibility of the evidence (Section 410.165(a)) and, as the trier of fact, resolves the conflicts and inconsistencies in the evidence, including the medical evidence (Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ)). In view of the evidence presented, we cannot conclude that the hearing officer's determination on extent of injury is so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986).

The claimant was released to modified duty (four hours per day, no lifting or carrying) on April 29, 2002, by Dr. W, her treating doctor at the time. There was a BFOE tendered to the claimant on April 29, 2002, which was accepted by the claimant on that same date. The claimant worked on April 29, 2002, but did not return to work thereafter, asserting that she was unable to perform the light duty work provided under

the terms of the BFOE. The hearing officer specifically noted that the claimant was not persuasive on this point. The claimant went to see Dr. G, who took her off work completely as of May 1, 2002, even though he was not then the claimant's treating doctor. The hearing officer found that the claimant had disability beginning on May 1, 2002, because she was under restrictions, had not been released to work full-time, and the BFOE was for less hours than she normally worked. The hearing officer went on to find that the carrier was entitled to adjust the claimant's PIE by the amount that she would have earned had she worked the four hours per day offered to her under the terms of the BFOE.[1]

In her appeal, the claimant agrees that the employer tendered a BFOE, but argues that the BFOE became void once the claimant was taken off work completely by Dr. G. This circumstance, however, does not automatically void the BFOE. Since the hearing officer was not persuaded that the claimant could not perform the work provided under the light-duty restrictions of the BFOE, the hearing officer could conclude that the BFOE remained valid and that the carrier was entitled to reduce the claimant's income benefits by the amount deemed to be PIE in accordance with Rule 129.6(g). We perceive no error in this finding. Cain, *supra*.

[1] We note that it would have been more accurate for the hearing officer to find that the "carrier was entitled to adjust the claimant's temporary income benefits by the amount deemed to be PIE offered by the employer through a BFOE," rather than referring to "adjusting PIE," but that finding is appealed by the claimant on the basis that the claimant proved disability, not on the basis that Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 129.6(g) (Rule 129.6(g)) was improperly applied.

We affirm the decision and order of the hearing officer.

The true corporate name of the insurance carrier is **LUMBERMENS MUTUAL CASUALTY COMPANY** and the name and address of its registered agent for service of process is

CORPORATION SERVICE COMPANY
800 BRAZOS
AUSTIN, TEXAS 78701.

_____
Michael B. McShane
Appeals Panel
Manager/Judge

CONCUR:

_____
Daniel R. Barry
Appeals Judge

_____
Gary L. Kilgore
Appeals Judge