

APPEAL NO. 030834
FILED MAY 30, 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 March 13, 2003. The hearing officer decided that the compensable injury of _____, includes a left testicular injury; that the appellant/cross-respondent (claimant) had disability, beginning January 14 and ending July 23, 2002; and that the employer did not make a bona fide offer of employment (BFOE) to the claimant on January 15, 2002. The respondent/cross-appellant (carrier) appeals on factual sufficiency grounds, and argues that the decision is clearly wrong and manifestly unjust. The carrier also raises the argument, for the first time on appeal, that the employer does not need to make a BFOE if the claimant has been released to work. The claimant challenges Finding of Fact No. 3 and Conclusion of Law No. 5 (each pertaining to the end date of disability). Neither party responded to the other's appeal.

DECISION

Affirmed, as reformed.

Whether the compensable injury includes the alleged testicular injury, whether the claimant had disability, and whether an employer makes a bona fide offer of employment, as defined by the 1989 Act and rules, are generally questions of fact for the hearing officer to decide. The hearing officer found that there was no BFOE made. Indeed, there was no written offer in evidence and no testimony that there was a written offer made. Conflicting evidence was presented at the hearing on these disputed issues. The hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). As the finder of fact, the hearing officer resolves the conflicts in the evidence and determines what facts have been established from the evidence presented. Nothing in our review of the record indicates that the hearing officer's extent-of-injury, disability, and BFOE determinations are 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, 176 (Tex. 1986). See Texas Workers' Compensation Commission Appeal No. 962197, decided December 16, 1996.

The carrier also contends that under Rules 129.5 and 129.6 of the 1989 Act, when a treating physician releases a claimant to work without restrictions, a BFOE is not required to end disability. The carrier did not make this argument at the CCH and the Appeals Panel generally does not consider an issue that is first raised on appeal. Texas Workers' Compensation Commission Appeal No. 961991, decided November 21, 1996; Texas Workers' Compensation Commission Appeal No. 91057, decided December 2, 1991. We do note that disability can be established by a claimant's testimony alone, even if contradictory of medical testimony. Texas Workers' Compensation Commission Appeal No. 92285, decided August 14, 1992; Texas Workers' Compensation Commission Appeal No. 92167, decided June 11, 1992.

On appeal, the claimant argues that due to the language in the hearing officer's decision that disability ended on July 23, 2002, the carrier has sought recoupment for temporary income benefits (TIBs) it had already paid after July 23, 2002. The claimant argues that this was an unintended consequence of the wording of the hearing officer's decision, as the claimant contends that the carrier had previously agreed to pay TIBs from July 24, 2002, through the date of maximum medical improvement. The parties stipulated on the record at the CCH that the only period of time in dispute, with respect to disability, was the period beginning January 14 and ending July 23, 2002. This is the only time period covered by the disability issue before the hearing officer and the only period upon which she had the authority to rule. We reform the decision of the hearing officer to read "through July 23, 2002" wherever it states "ending July 23, 2002."

The decision and order of the hearing officer are affirmed, as reformed.

The true corporate name of the insurance carrier is **TEXAS PROPERTY & CASUALTY INSURANCE GUARANTY ASSOCIATION for Colonial Casualty Insurance Company, an impaired carrier** and the name and address of its registered agent for service of process is

**MARVIN KELLY, EXECUTIVE DIRECTOR
T.P.C.I.G.A.
9120 BURNET ROAD
AUSTIN, TEXAS 78758.**

Gary L. Kilgore
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Margaret L. Turner
Appeals Judge