

APPEAL NO. 042498  
FILED NOVEMBER 22, 2004

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 September 14, 2004. The hearing officer determined that appellant/cross-respondent (claimant) sustained a compensable injury and that he had disability from April 22 through May 17, 2004. Claimant appealed, contending that he sustained a compensable injury and that he had disability from May 18 through August 23, 2004. Respondent/cross-appellant (carrier) responded that the hearing officer did not err in making her determination that claimant did not have disability after May 17, 2004. Carrier filed an appeal, contending that the evidence shows that claimant did not sustain a compensable injury and that he did not have disability at all. Claimant responded that the evidence shows he did sustain a compensable injury and that he had disability from May 18 through August 23, 2004.

DECISION

We affirm in part and reverse and remand in part.

We have reviewed the complained-of determinations regarding whether claimant sustained a compensable injury and whether he had disability from April 22 through May 17, 2004, and conclude that the issues involved fact questions for the hearing officer. The hearing officer reviewed the record and decided what facts were established. We conclude that the hearing officer's determinations that claimant sustained a compensable injury and that he had disability from April 22 through May 17, 2004, are supported by the record and are not 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).

Claimant contends the hearing officer erred in determining that he did not have disability from May 18 through August 23, 2004. Claimant testified that he had been earning close to \$10.00 per hour before his injury. Claimant said that his employer offered him a job making \$5.15 per hour, but he declined the job. Claimant said that his former employer, Mr. T offered him full-time work, but that he could not do the work because of his restrictions. Claimant said Mr. T also offered him part-time work which would pay more than the job offered for \$5.15 per hour. Claimant said he thought he could make a higher wage with Mr. T, though that did not come to pass because the work with Mr. T was not available. Claimant said Mr. T did not get the contracts that he thought he would have.

The hearing officer noted that claimant continued to work in a light-duty capacity after his \_\_\_\_\_, injury, but that the employer was unable to accommodate claimant's light duty restrictions beginning April 22, 2004. The hearing officer noted that, "the employer made an offer to claimant on May 17, 2004, and the claimant

testified that he could have returned to work but it was not financially lucrative for him to accept a low paying job when he could go work for [Mr. T].” The hearing officer then cut off disability after the May 17, 2004, job offer. The hearing officer may, of course, consider an offer of employment as evidence that the claimant had an ability to obtain and retain employment at the preinjury wage. Texas Workers' Compensation Commission Appeal No. 042385, decided November 19, 2004. However, the evidence shows that the offer of employment was at a rate of \$5.15 per hour, which appears to be less than the preinjury wage, which claimant said was close to \$10.00 per hour. It appears that even if claimant had accepted the May 17, 2004, offer of employment, he would not have been making his preinjury wage.

Disability is defined as the inability because of a compensable injury to obtain and retain employment at the preinjury wage. The 1989 Act does not “impose on an injured employee the requirement to engage in new employment while still suffering some lingering effects of his injury unless such employment is reasonably available and fully compatible with his physical condition and generally within the parameters of his training, experience, and qualifications.” Appeal No. 042385, *supra*. The Appeals Panel has also said that the 1989 Act is not intended to be a shield for an employee to continue receiving temporary income benefits where, taking into account all the effects of his injury, he is capable of employment but chooses not to avail himself of reasonable opportunities. . . .” Texas Workers' Compensation Commission Appeal No. 91045, decided November 21, 1991.

In this case, there was evidence that claimant sustained a compensable injury and that he was placed on restricted duty. A light-duty or conditional work release is evidence that disability continues. Appeal No. 91045, *supra*. It appears that the only reason the hearing officer ended the period of disability is because of the May 17, 2004, offer of employment. Because the offer of employment was at wages that were less than the preinjury wage, we must reverse the hearing officer's disability determination and remand this case for further proceedings consistent with this decision. The hearing officer should reconsider the issue of whether claimant had disability from May 18 through August 23, 2004, based on the evidence that was admitted at the hearing.

We affirm that part of the hearing officer's decision and order that determined that claimant sustained a compensable injury and that he had disability from April 22 through May 17, 2004. We reverse that part of the hearing officer's decision and order that determined that claimant did not have disability from May 18 through August 23, 2004, and remand the issue of disability for that period to the hearing officer for reconsideration.

According to information provided by carrier, the true corporate name of the insurance carrier is **FINANCIAL INSURANCE COMPANY OF AMERICA** and the name and address of its registered agent for service of process is

**ALBERT SCOTT TAYLOR, PRESIDENT OR  
KENNETH RANDALL BERRY, TREASURER  
12225 GREENVILLE AVENUE, SUITE 490  
DALLAS, TEXAS 75243.**

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Judy L. S. Barnes  
Appeals Judge

CONCUR:

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Veronica L. Ruberto  
Appeals Judge

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Margaret L. Turner  
Appeals Judge