

APPEAL NO. 080031
FILED MARCH 13, 2008

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 December 12, 2007. The issues before the hearing officer were:

- (1) Did the respondent (claimant) have disability resulting from an injury sustained on _____, for the period from August 8, 2007, through the present?
- (2) Did the employer make a bona fide offer of employment (BFOE) to the claimant entitling the appellant (carrier) to adjust the post-injury weekly earnings and, if so, for what periods?

The hearing officer determined that: (1) the claimant had disability for 4 hours per day resulting from an injury sustained on _____, for the period from August 8, 2007, through November 28, 2007, and for no other times; and (2) the employer did not make a BFOE to the claimant entitling the carrier to adjust the post-injury weekly earnings. The carrier appealed the hearing officer's BFOE and disability determinations. The claimant responded, urging affirmance.

DECISION

Affirmed in part, reformed in part, and reversed and rendered in part.

BACKGROUND INFORMATION

The parties stipulated that the claimant sustained a compensable injury on _____. The claimant was employed as a driver and he drove cars from dealerships to the employer's auction lot and from the auction lot to dealerships. At the time of the claimed injury, the claimant was working part-time (3 days per week, 8 hours per day (a total of 24 hours per week)) as a driver for the employer. It is undisputed that on _____, while in the course and scope of employment, the claimant was assaulted at a gas station. The claimant testified that he sustained injuries to his arms, legs, right knee, left hip, and groin area.

In evidence are Work Status Report(s) (DWC-73) from the treating doctor, Dr. M that show he released the claimant to work with restrictions of 4 hours maximum per day of work, no kneeling/squatting, no bending/stooping, and no climbing ladders (from July 3, 2007, through January 5, 2008).¹ In a letter dated July 11, 2007, the employer made an offer of employment based on an "appropriate modified duty position" to the claimant offering him the job of "driving and parking cars out on the lot" working 3 days

¹ We note that the designated doctor released the claimant to work without an hourly restriction on November 28, 2007, which is the ending date of disability found by the hearing officer.

per week, 4 hours per day (a total of 12 hours per week) at the same hourly rate as his preinjury hourly wage. The claimant did not accept the offer of employment. The carrier suspended temporary income benefits on August 8, 2007, based on the employer's offer of employment. The hearing officer found that the employer's offer of employment did not include a copy of the DWC-73 on which the offer was made. The claimant testified that, as of the date of the CCH, he was capable of returning to his preinjury job, albeit at a slower pace due to his compensable injury.

CLERICAL CORRECTION

Stipulation No. 1 incorrectly states that venue is proper in (City 1) Field Office of the Texas Department of Insurance, Division of Workers' Compensation (Division). Review of the record indicates that the CCH was held in and that the parties stipulated that venue was proper in the (City 2) Field Office of the Division. We reform Stipulation No. 1 to state that venue is proper in the (City 2) Field Office of the Division, rather than the (City 1) Field Office of the Division.

BFOE

The hearing officer's decision that the employer did not make a BFOE to the claimant entitling the carrier to adjust the post-injury weekly earnings is supported by sufficient evidence and is affirmed.

DISABILITY

Section 401.011(16) defines "disability" as "the inability because of a compensable injury to obtain and retain employment at wages equivalent to the pre-injury wage." At issue at the CCH was whether the claimant had disability resulting from an injury sustained on _____, for the period from August 8, 2007, through the present (the date of the CCH). The hearing officer determined that the claimant had disability "for four hours per day" resulting from an injury sustained on _____, for the period from August 8, 2007, through November 28, 2007. The carrier contends on appeal that the employer made a BFOE of "light duty" to the claimant, that the claimant did not accept the offer of employment, and that the claimant had "an obligation to reasonably avail himself of the light duty work that he knew was available;" therefore, the hearing officer erred in determining that the claimant had disability from August 8, 2007, through November 28, 2007. There is no contention on appeal that the claimant had disability after November 28, 2007.

The hearing officer's determination of disability from August 8, 2007, through November 28, 2007, is supported by the evidence, but the hearing officer erred in limiting disability to 4 hours per day. In the Background Information section of the decision, the hearing officer states that there was "little difference in the jobs" between the claimant's preinjury job and the job offered by the employer, that medical evidence shows that the claimant "could return to work at his job doing at least light duty at four hours per day and as much as medium duty, which would be a greater work duty than

his job required,” and that it is credible the claimant “should be limited to four hours of work a day based upon the pain that was in part caused by the injury.” The hearing officer commented that the claimant had disability beginning on August 8, 2007, and ending on November 28, 2007, when the designated doctor released the claimant to return to work without hourly restrictions.²

In Appeals Panel Decision (APD) 042385, decided November 19, 2004, we held that a hearing officer may consider an offer of employment as evidence that the claimant had an ability to obtain and retain employment at the preinjury wage. In the instant case, the evidence shows that even if the claimant had accepted the offer of employment working 3 days per week, 4 hours per day (for a total of 12 hours), at the same hourly wage as his preinjury wage, he would not have been making his preinjury wage when he was working 3 days per week, 8 hours per day (for a total of 24 hours).

In APD 94859, decided August 16, 1994, the hearing officer determined that the claimant had disability from February 24, 1994, through June 1, 1994; however, the hearing officer concluded that the claimant had only half-days of disability through March 1994. In that case, the Appeals Panel noted that it was a misnomer for the hearing officer to conclude that the claimant had “half-days of disability,” because the statute does not break down the concept of “disability” into half-day increments. The Appeals Panel stated that what the hearing officer intended to conclude, as evidenced by his order, was that the claimant had disability for the entire month of March, based upon the fact that the claimant obtained and retained employment at only half of her preinjury wage. In the instant case, the hearing officer erred in determining that the claimant had only 4 hours of disability per day from August 8, 2007, through November 28, 2007.

There is no evidence in the record that the claimant was released to return to work without restrictions from August 8, 2007, through November 28, 2007. The evidence establishes that the claimant had disability from August 8, 2007, through November 28, 2007, because of his inability due to the compensable injury to obtain and retain employment at wages equivalent to his preinjury wages. Based on the evidence in the record, and the definition of disability, the hearing officer erred in determining that the claimant had disability limited to 4 hours per day from August 8, 2007, through November 28, 2007. Accordingly, we reverse the hearing officer’s determination that the claimant had disability for 4 hours per day resulting from an injury sustained on _____, for the period from August 8, 2007, through November 28, 2007, and for no other time, and we render a new decision that the claimant had disability resulting from an injury sustained on _____, for the period from August 8, 2007, through November 28, 2007.

² We note that the hearing officer’s Finding of Fact No. 5 conflicts with Conclusion of Law No. 3 and the Decision regarding the ending date of disability. Finding of Fact No. 5 states: “Beginning on August 08, 2007, and **continuing through the date of this hearing**, the work injury of _____, was a cause of Claimant’s inability to obtain and retain employment at wages equivalent to his pre-injury wage for four hours per day and for no other time since November 28, 2007.” Conclusion of Law No. 3 and the Decision state that: “Claimant had disability for four hours per day resulting from an injury sustained on _____, for the period from August 08, 2007, through November 28, 2007 and for no other time.”

SUMMARY

We reform the hearing officer's decision by correcting a clerical error in Stipulation No. 1 to state that venue is proper in the (City 2) Field Office of the Division. We affirm the hearing officer's decision that the employer did not make a BFOE to the claimant entitling the carrier to adjust the post-injury weekly earnings. We reverse the hearing officer's determination that the claimant had disability for 4 hours per day resulting from an injury sustained on _____, for the period from August 8, 2007, through November 28, 2007, and for no other time, and we render a new decision that the claimant had disability resulting from an injury sustained on _____, for the period from August 8, 2007, through November 28, 2007.

The true corporate name of the insurance carrier is **NEW HAMPSHIRE INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**CORPORATION SERVICE COMPANY
701 BRAZOS STREET, SUITE 1050
AUSTIN, TEXAS 78701.**

Veronica L. Ruberto
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Margaret L. Turner
Appeals Judge