APPEAL NO. 022047
FILED SEPTEMBER 20, 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 was held on July 16, 2002. The hearing officer determined that the appellant/cross-respondent's (claimant) compensable right knee bruise does not extend to and include bursitis; that the claimant's average weekly wage (AWW) was $500.00; and that the claimant did not have disability from January 9 through February 18, 2002.

The claimant appealed the hearing officer's determinations on the issues of extent of injury and disability, contending that a release to full-duty work by the then treating doctor was in error and that the compensable injury "extends to the diagnosis of bursitis." The respondent/cross-appellant (carrier) appeals the AWW determination, contending that the AWW should be $297.80, which was the AWW of "a same or similar employee." The carrier responds to the claimant's appeal urging affirmance on the extent-of-injury and disability issues.

DECISION

Affirmed on all the issues.

The claimant was a supervisory salesperson and on _____, slipped and fell, striking her right knee on the floor. The claimant had only been employed a little over three weeks. The carrier accepted liability for a sprain/strain of the right knee.

AWW ISSUE

The claimant testified that she worked 40 hours a week at $12.50 an hour for an AWW of $500.00. The carrier submitted the Employer's Wage Statement (TWCC-3) of a "same or similar" employee. The hearing officer rejected the wage statement offered for an alleged "same or similar employee" and used the fair, just, and reasonable method discussed in Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 128.3(g) (Rule 128.3(g)) to calculate the claimant's AWW. The hearing officer determined the established methods for calculating AWW, as prescribed in Rule 128.3, could not be applied in this case due to the fact that claimant had worked only three weeks preceding the date of injury. The hearing officer, after reviewing the TWCC-3 in evidence, determined that because the wage information provided for the "same or similar employee" "varied dramatically from work period to work period, whereas the Claimant's hours were stable," the same or similar employee was not, in fact, a same or similar employee. The hearing officer's determinations on this point are supported by the evidence.

EXTENT OF INJURY

Although an early report from the treating doctor had a diagnosis of bursitis, there was little, if any, evidence establishing how a blow to the knee causes bursitis. The hearing officer determined that a preponderance of the evidence failed to show the claimant had bursitis and if she did, there was a lack of evidence to show a casual relationship to the compensable injury. The hearing officer's determination is supported by the evidence.

DISABILITY

Claimant's treating doctor was Dr. L. Dr. L's progress notes showed the claimant was making good progress and an MRI was normal. In a report dated January 3, 2002, Dr. L released the claimant to return to full duty without restrictions beginning January 7, 2002, and the claimant, in fact, returned to work on January 7, 2002. The claimant worked until January 9, 2002, when she returned to Dr. L's office. Dr. L apparently was not available, and another chiropractor revised the release to work with a five-pound lifting restriction, retroactive to January 7, 2002. The employer was apparently unwilling or unable to accommodate the claimant's new restriction and sent her home. In a letter dated January 22, 2002, Dr. L stated that his Work Status Report (TWCC-73) of January 3, 2002, was "an error" and the claimant should not have been "released for full-unrestricted duty." The claimant testified that she wanted to work full time but not at full unrestricted duty. In another letter dated January 29, 2002, Dr. L stated that he no longer desired to be the claimant's treating doctor and recommended the claimant "seek medical care elsewhere." The claimant returned to work on restricted duty on February 19, 2002.

The claimant contends that the hearing officer erred in not considering or giving greater weight to a designated doctor's assessment in June 2002 that the claimant was not at maximum medical improvement. We disagree. Disability is defined as the inability because of a compensable injury to obtain and retain employment at the preinjury wage. Section 401.011(16). Whether the claimant had disability, as defined, in the light of conflicting evidence, is a factual determination for the hearing officer to resolve.

The hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). As the fact finder, the hearing officer was charged with the responsibility of resolving the conflicts and inconsistencies in the evidence and deciding what facts the evidence had established. Texas Employers Ins. Ass'n v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). Nothing in our review of the record reveals that the challenged determinations are so against the great weight of the evidence as to be clearly wrong or manifestly unjust. Accordingly, no sound basis exists for us to disturb those determinations on appeal.

The hearing officer's decision and order are affirmed.

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

PRENTISS-HALL CORPORATION SYSTEM, INCORPORATED
800 BRAZOS
AUSTIN, TEXAS 78702.

_____
Thomas A. Knapp
Appeals Judge

CONCUR:

_____
Michael B. McShane
Appeals Judge

_____
Margaret L. Turner
Appeals Judge