

APPEAL NO. 041283
FILED JULY 15, 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 May 6, 2004. The hearing officer determined that the (TEI) was the respondent's (claimant) employer for purposes of the 1989 Act at the time of the claimed injury, and that the claimant only had disability beginning on July 30, 2003, and continuing through April 14, 2004, and at no other time. The appellant (carrier) appealed the hearing officer's employer and disability determinations. Additionally, the carrier asserts that the hearing officer erred as a matter of law in determining post-injury earnings (PIE). The claimant responded, urging affirmance.

DECISION

Affirmed, as reformed.

We have reviewed the complained-of determinations and conclude that the issues of whether TEI was the claimant's employer for purposes of the 1989 Act and whether the claimant had disability involve questions of fact for the hearing officer to resolve. The hearing officer is the sole judge of the weight and credibility of the evidence, and, as the trier of fact, resolves the conflicts and inconsistencies in the evidence. Section 410.165(a). The hearing officer was persuaded by the testimony of both the claimant and the TEI representative that TEI was the claimant's employer for purposes of the 1989 Act at the time of the claimed injury. With regard to disability the hearing officer was persuaded by the claimant's testimony that he was unable to work after July 29, 2003, due to his injury. Disability is defined as the inability because of the compensable injury to obtain and retain employment at the preinjury wage. (Section 401.011(16)). The fact that the claimant received some kind of pay after his date of injury may affect the amount of temporary income benefits that he is paid but does not necessary preclude a finding of disability. The Appeals Panel has many times held that disability may be proven by the claimant's testimony alone if believed by the hearing officer. Gee v. Liberty Mutual Fire Insurance Company, 765 S.W.2d 394 (Tex. 1989). Texas Workers' Compensation Commission Appeal No. 92285 decided August 14, 1992. In view of the evidence presented, we cannot conclude that the hearing officer's 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).

As the issue of PIE under Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 129.2 (Rule 129.2) was not before the hearing officer and we do not find that this issue was actually litigated, the hearing officer exceeded her authority in making Finding of Fact No. 10. We, therefore, reform the decision and order of the hearing officer by striking this finding.

The hearing officer's decision and order are affirmed, as reformed.

The true corporate name of the insurance carrier is **AMERICAN STATES INSURANCE COMPANY OF TEXAS** and the name and address of its registered agent for service of process is

**LEON CROCKETT
1600 NORTH COLLINS BOULEVARD, SUITE 300
RICHARDSON, TEXAS 75080.**

Veronica L. Ruberto
Appeals Judge

CONCUR:

Judy L. S. Barnes
Appeals Judge

Chris Cowan
Appeals Judge