APPEAL NO. 042385
FILED NOVEMBER 19, 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 (CCH) was held on August 26, 2004. The hearing officer determined that the respondent's (claimant) compensable injury of ____________, extends to and includes right carpal tunnel syndrome and right cubital tunnel syndrome; that the claimant had disability from April 21, 2004, through the date of the CCH; and that the claimant's average weekly wage (AWW) is $311.45. The AWW determination has not been appealed and has become final. Section 410.169.

The appellant (carrier) appeals the extent-of-injury and disability issues, contending that the hearing officer failed to give sufficient weight to the reports from its doctors and that the hearing officer erred in failing to consider evidence that the employer "offered a Bona Fide Job Offer within Claimant's restrictions." The claimant responds, urging affirmance and asserting that a bona fide offer of employment (BFOE) is a separate issue from disability, was not an issue before the hearing officer and the job offer letter does not meet the requirements of a BFOE.

DECISION

Affirmed in part and reversed and remanded in part.

The parties stipulated that on ____________, the claimant sustained a compensable injury and the carrier accepted a low back injury, a right wrist contusion, and a right knee contusion. The parties also stipulated that no doctor has certified that the claimant had reached maximum medical improvement. It is undisputed that the claimant was a cashier and on ____________, she sustained a compensable injury in a slip and fall.

EXTENT OF INJURY

There was conflicting medical evidence regarding the extent of injury. With the evidence in conflict it is the responsibility of the hearing officer, as the sole judge of the weight and credibility of the evidence, to resolve the conflicts and inconsistencies in the evidence in deciding what facts the evidence had established. This is equally true of medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). The hearing officer's determination on the extent of injury is supported by sufficient evidence and is affirmed.

DISABILITY

The carrier paid temporary income benefits (TIBs) to April 21, 2004, when it discontinued TIBs based on a peer review doctor's opinion. The hearing officer notes

that opinion is “given no credibility,” that the claimant could not return to her preinjury employment due to “the long standing and heavy lifting of items into shopping bags” and that a doctor’s “medical notes in 2004 fully confirm her disability.” Nonetheless, the claimant saw her treating doctor on June 1, 2004, and the treating doctor released the claimant to light duty as of June 2, 2004, working a maximum of 8 hours a day with certain posture and lifting restrictions. On June 2, 2004, the claimant obtained a position as a parking garage attendant earning $6.25 an hour working 27 hours a week. There was no evidence that the reduced hours were due to the claimant’s compensable injury as opposed to limited available work hours. By letter dated June 3, 2004, the employer offered the claimant a position as a people greeter and “handing out shopping carts” at $7.54 an hour and agreeing to meet all the treating doctor’s restrictions, effective June 7, 2004. At the CCH the employer’s representative also testified that jobs as “demonstrators,” handing out samples, were available. The hearing officer, in his Background Information section acknowledged that the employer sent the claimant a letter offering her employment to meet her restrictions, but stated “there was no issue of an offer of *bona fide* employment; and the Claimant received the letter after she was already working in her new job.”

We agree that a BFOE issue was not before the hearing officer and that probably the offer of employment does not meet the standards of a BFOE set out in Tex. W.C. Comm’n, 28 TEX. ADMIN. CODE § 129.6 (Rule 129.6). However, disability as defined in Section 401.011(16) was an issue before the hearing officer. Disability is defined as the inability because of a compensable injury to obtain and retain employment at the preinjury wage. In this case the treating doctor released the claimant to light duty 8 hours a day, and in fact, the claimant found light duty but worked fewer than 8 hours a day. The employer then offered the claimant light duty for presumably her regular full-time hours and presumably her preinjury wage. The Appeals Panel has held that 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.” The Appeals Panel has also gone on to state they do not believe the 1989 Act is intended to be a shield for an employee to continue receiving TIBs 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, we believe that the hearing officer refused to consider the employer’s offer of employment as evidence that the claimant had an ability to obtain and retain employment at the preinjury wage simply because a BFOE issue was not before him, that the letter offer did not meet the requirements of a BFOE and that because the claimant received the letter “after she was already working in her new job” it somehow should not be considered. We reverse the hearing officer’s decision on disability and remand the case for the hearing officer to consider the offer of employment letter in the context of the disability issue.

We affirm the hearing officer's decision on the extent-of-injury issue and reverse the hearing officer's decision on the disability issue and remand the decision for consideration of the employment offer letter in the context of disability as defined in Section 401.011(16).

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Texas Workers' Compensation Commission's Division of Hearings, pursuant to Section 410.202 which was amended June 17, 2001, to exclude Saturdays and Sundays and holidays listed in Section 662.003 of the Texas Government Code in the computation of the 15-day appeal and response periods. *See* Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

The true corporate name of the insurance carrier is **AMERICAN HOME ASSURANCE COMPANY** and the name and address of its registered agent for service of process is

CORPORATION SERVICE COMPANY
800 BRAZOS, SUITE 750, COMMODORE 1
AUSTIN, TEXAS 78701.

Thomas A. Knapp
Appeals Judge

CONCUR:

Judy L. S. Barnes
Appeals Judge

Daniel R. Barry
Appeals Judge