APPEAL NO. 92087
FILED APRIL 22, 1992

On January 30, 1992, following a three-week continuance, a contested case hearing was held in _____, Texas, with (hearing officer) presiding. He determined that the appellant, claimant herein, who, without dispute, had been injured on _____, in the course and scope of his employment with (employer), was released to return to light duty work by his treating physician, had been offered *bona fide* employment by his employer at his preinjury wage pursuant to Tex. W.C. Comm'n Rules, 28 TEX. ADMIN. CODE § 129.5 (Rule 129.5), and further that the claimant "presently" suffered no disability as defined by the Texas Workers' Compensation Act (the 1989 Act), Article 8308-1.03(16). The hearing officer made a finding as to which doctor was the claimant's treating doctor, which has not been appealed. The hearing officer wholly denied claimant's claim for benefits and ordered that he "take nothing."

The claimant, in a timely filed appeal of the hearing officer's decision, complains in many respects of the decision of the hearing officer. Claimant disputes the manner in which the hearing officer has weighed the medical evidence presented, essentially arguing that all doctors except the claimant's treating doctor are biased. Claimant argues that the evidence is inconclusive on claimant's medical condition. Claimant notes that the hearing officer has failed to consider in his *bona fide* job offer findings that a light duty release to work "as tolerated" leaves the hours of work to claimant's judgment. All findings of fact are appealed except for those which establish the fact of employment, coverage, the identity of the treating doctor, and the treating doctor's light duty release on July 17, 1991. Claimant further generally complains that the determinations of the hearing officer were based upon inadmissible, hearsay and self-serving evidence, and we are asked to base our determination upon admissible evidence, although no inadmissible evidence is specifically noted. Carrier asks that the decision be upheld entirely.

DECISION

Finding that the hearing officer has erred, as a matter of law, in his determination that the claimant take nothing as a result of a *bona fide* job offer made for preinjury wages, we reverse and remand the case for further consideration and development of the evidence on the issue of whether the carrier carrier should have suspended payment of temporary income benefits (TIBS) from July 23, 1991 until the date of the hearing. We further hold that the finding of the hearing officer that a *bona fide* offer of employment "at the preinjury wage" was made is against the great weight and preponderance of the evidence in the record, because the weekly wage that was offered by the employer was less than, not equivalent to, claimant's preinjury average weekly wage calculated in accordance with Art. 8308-4.10(a). Because all findings and conclusions of the hearing officer on the lack of disability are phrased in present tense, further clarification of the denial of TIBS is needed in light of the fact that there was a release to light, not full, duty in July and that a differential between pre- and post-injury wages existed even under the terms of the employer's *bona fide* offer of employment.

The disputed issues before the hearing officer were: 1) whether a release to light duty is a basis for suspending TIBS, and 2) who is the treating physician. On the first issue, the carrier also asserted that it made a *bona fide* offer of light duty employment that was not fully accepted by claimant. Although not clearly articulated, the issue of disability is included in claimant's statement of his position at the benefit review conference, because he argued that he could not obtain and retain employment at his preinjury wage.

Claimant injured his back on _____ when his left leg fell into a hole between 9 and 10 in the evening at the work site. The employer's wage statement that was put into evidence for the 13 week period prior to the injury shows that claimant worked a variable schedule which averaged slightly more than 49 hours per week, and that he normally worked overtime. His gross pay is shown as $4,688.39 for the period. Some weekly fringe benefits were also provided.

Immediately after the injury, claimant felt pain and went to (hospital) where he was given x-rays and pain medication. On March 22nd, when he came to work, he went to see Mr. F, the safety manager, who

referred him to a clinic used by the employer, (clinic) in (city). He was released to regular duty that day by Dr. M. That same day, claimant went to see his family doctor, Dr. O, who prescribed pain medication and advised him to see an orthopedic doctor. Claimant stated that he paid for Dr. O himself and did not intend to have workers' compensation pay for him. He saw Dr. O on March 26th, April 12th, and April 26th. Dr. O's diagnosis was acute lumbar strain. On March 26th, claimant also was examined by the physician he contended (and that the hearing officer found) to be his treating doctor, Dr. K.

A letter written by Dr. K about this examination states that his impression was one of lumbosacral strain. Ultrasound and diathermy were performed. On March 28th, claimant revisited the clinic, saw Dr. M again, and was put on light duty through April 1, 1991. Dr. M referred claimant to Dr. H. Claimant saw both Dr. K and Dr. H at various times from May to July 1991. There are numerous medical records in the record. According to these, the most pertinent are: 1) an MRI conducted at Brazosport Memorial Hospital May 9, 1991 was assessed as within normal limits except for a minimal disc bulge which was assessed to be of "doubtful significance;" 2) claimant was continued on a light duty recommendation by Dr. H until May 7, 1991 when Dr. H released him to full duty; 3) thereafter, Dr. H took him off work for the period from May 8th through May 13th, but released him to full duty effective May 14, 1991; 4) Dr. K, on May 22, 1991, maintaining his diagnosis of lumbosacral strain, released claimant to limited work May 22, 1991; 5) on June 3, 1991 Dr. H determined that claimant had reached maximum medical improvement on May 31, 1991 (although this was referred to in closing argument, there is no indication that carrier ever followed up on this report in the manner prescribed by the statutes and rules of the Commission); 6) an EMG taken July 3, 1991 was assessed as "essentially normal study" with some activity, characterized as "minimal and non-specific finding;" and, 7) on July 17, 1991 Dr. K released the claimant to light duty work, under the following conditions: "no prolonged standing or sitting, and a five pound lifting limit."

Claimant testified that he contacted Dr. H to question his May 14th full duty release, and Dr. H put him on a release for "sedentary work only" from July 18th through July 29th, and referred him to Dr. P, a neurologist; claimant never went to this doctor. On July 24, Dr. K wrote to the carrier, stating that claimant was unable to do regular duty and that the employer did not offer light duty.

Concerning the offer of light duty work, notes taken by Mr. F for the employer on April 10, 1991 indicate that claimant was offered light duty of "40 hours a week if he can stand it." Notes taken on July 30, 1991 indicate that Mr. F was asked by a supervisor, Mr. W, to offer light duty to claimant. A memo dated July 30, 1991 indicates that the employer acknowledges work restrictions of Dr. H as relayed to employer by claimant, and that "such duties are available for you at this time." Claimant was asked to report to work at 8:00 a.m., and told that his specific job instructions for each week will be discussed each Monday. On July 31, 1991 Dr. K executed another light duty release substantially like the one issued July 17th, only adding the words "as tolerated."

Although carrier characterized the employer's July 30, 1991 memo as a written *bona fide* job offer, it clearly falls far short of the criteria listed in Rule 129.5 (b) which would trigger a presumption of its validity as such. There is no rate of pay discussed, the hours of work are not mentioned, nor are the duties described. The employer's understanding of the nature of claimant's physical restrictions is not recited. Mr. F testified, however, that the hourly rate of pay would be "the same" as claimant made prior to his injury, that the work consisted of paperwork around the office that could be done sitting or standing, and that employer was willing to accommodate to his physical limits. Mr. F's notes and testimony indicated that the hours offered were 40 hours per week. He stated that his interpretation of the "as tolerated" language in Dr. K's release was that claimant could decide when he could work and when he couldn't. Mr. W, who became employer's safety director in September 1991, said it was his job to investigate medical restrictions and medication received by someone on light duty. He said that he considered the phrase "as tolerated" to be ambiguous; however, he never contacted Dr. K about what the words meant or what the effects of claimant's medication would be.

Mr. W stated that his interpretation of the light duty release was that it restricted the nature of the job claimant could perform, not the hours per day he could work.

Claimant testified that he worked roughly 10-12 hours a week light duty, working a few hours each day until he had to take his pain medication. He stated that the affect of the pain medication was to make him sleepy and that this was why he could not work afterwards. Although pharmacy bills show that Dr. K had prescribed much medication over several months, no evidence was presented by either party (aside from claimant's testimony) to describe the effects of such medicine, the interactions of the medicine, or the duration of any such effects as it would affect claimant's ability to work.

An EMG administered December 4, 1991 was assessed by Dr. K to be within normal limits. Dr. K. stated in his December 1991 assessment that claimant had not reached MMI and would not be able to return to his preinjury ability to do heavy physical labor. Dr. K has continued to see claimant every two weeks for what he characterizes as a lumbosacral strain.

The hearing was continued to enable the claimant to submit to a medical examinations agreed at the Benefit Review Conference with a doctor chosen by the carrier. Dr. F states that he examined claimant January 22, 1992; he reviewed his medical records. He notes that claimant complains of off-and-on pain and numbness. Dr. F notes that "I do not find any objective ongoing demonstrable neuromuscular dysfunction." Dr. F further opines that the treatment by Dr. K has been unreasonable, unnecessary and inappropriate. He states that he feels that claimant has reached MMI and is physically capable of employment. A Report of Medical Evaluation completed by him shows an MMI date of January 22, 1992, with a zero percent impairment rating assigned.

Entitlement to TIBS matures on the eighth day of disability after a compensable injury. Art. 8308-4.22. Such benefits may be paid to an employee who has disability and additionally has not reached MMI. Art. 8308-4.23(a). Disability is defined as the "inability to obtain and retain employment at wages equivalent to the preinjury wage because of a compensable injury." Art. 8308-1.03(16). As we have previously stated, disability and MMI are defined differently. *See* Texas Workers' Compensation Commission Appeal No. 91045, decided November 21 1991; also Texas Workers' Compensation Commission Appeal No. 92064, decided April 3, 1992. An analysis of whether disability exists after an injury consists of comparing the wages before and after the injury, and then identifying the compensable injury as a cause for diminished wages after the date of injury.

The definition of wage in Art. 8308-1.03(47) includes remuneration payable for "a given period." We would note that the 1989 Act as a whole generally refers to use of weekly wages or earnings as the basis for calculating benefits. *See* Article 8308-4.10; 4.11; 4.12; 4.23; 4.26; and 4.28. It therefore is logical that the comparison of wages to evaluate equivalency (as set forth in the definition of disability) would be done on a similar weekly basis. The wage statement for the 13 weeks prior to the injury indicates that claimant worked an average of 49 hours per week; the job offered by employer, even though at the same hourly pay, was for 40 hours per week. Given what claimant earned on an average weekly basis prior to his injury, neither claimant's actual earnings nor the "offered" earnings after his injury were equivalent to his preinjury wages.

As the Appeals Panel noted in Appeal No. 91045, ascertaining the point at which disability ends is not always clear. We have noted, however, that the existence of release to work *with restrictions* indicates that the impact of an injury as a factor in disability continues, unless other evidence shows otherwise. *See* Appeal No. 91045; also Texas Workers' Compensation Commission Appeal No. 91091, decided January 13, 1992.

The statute having to do with *bona fide* job offers, Art. 8308-4.23(f), notes that it applies for purposes

of subsections (c) and (d) of that statute, which have to do with computation of TIBS. The use to be made of the *bona fide* job offer is that the employee's "weekly earnings after an injury," for purposes of calculating TIBS, are deemed equivalent to the "weekly wage for the position offered to the employee," even when the employee does not accept the job. We have said that the existence of a *bona fide* job offer has little to do with disability. Appeals No. 91045, *supra.* We do recognize, however, that a *bona fide* offer of employment at the preinjury average weekly wage is evidence that disability has ended.

In the case under consideration here, however, the hearing officer did not find that disability ended at some point prior to Dr. F's examination. Instead, it appears he based the denial of TIBS from July 24, 1991 to the hearing on his finding and conclusion that the employer made a *bona fide* offer of employment at the preinjury wage, effectively creating a credit under Art. 4.23 against the entire amount of benefit. This finding is against the great weight and preponderance of the evidence which shows that a differential between pre- and post-injury wage would still remain under the terms of the job offer, and it was error to eliminate the TIBS solely due to the offer.

In order to suspend entirely the payment of TIBS, the hearing officer would have had to find that the compensable injury was not a cause of the claimant's failure to obtain and retain employment equivalent to the preinjury wage. As the decision presently stands, all actual findings and conclusions on disability are phrased in terms of the claimant's status at or around the time of the hearing. If the hearing officer was of the opinion that disability continued, then he should have directed that the weekly wage "offered" by employer (hourly rate times 40 hours per week) should be attributed to the claimant as "weekly earnings after the injury," and then adjusted the TIBS based upon the computations set forth in Art. 8308-4.23(d) and Rules 129.2 and 129.4. If the hearing officer was of the opinion that a compensable injury was not a cause of the inability to obtain and retain employment at a point earlier than Dr. F's examination, it is not stated in the decision. We cannot draw an inference or conclusion on the hearing officer's opinion as to the existence of disability during this period, because it appears that the hearing officer didn't reach this issue based upon his erroneous conclusion that the *bona fide* offer was made in the full amount of the preinjury wage. It is appropriate for the trier of fact, not this tribunal, to reconsider these issues.

We recognize the position of the claimant to be that the *bona fide* offer could not exceed the physical capabilities of claimant to work only two to four hours per day. On this point, we note that the hearing officer is the sole judge of the weight, relevance, materiality, and credibility of the evidence presented at the hearing. Art. 8308-6.34(e). His decision should not be set aside because different inferences and conclusions may be drawn upon review, even when the record contains evidence that would lend itself to different inferences. Garza v. Commercial Insurance Co. of Newark, N.J., 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). Any conflicts in testimony of medical witnesses is a matter to be resolved by the trier of fact. Highlands Underwriters Insurance Co. v. Carabajal, 503 S.W.2d 336 (Tex. Civ. App.-Corpus Christi, no writ). The rules of evidence do not strictly apply to contested case hearings under the 1989 Act, and written reports signed by health care providers "shall" be accepted into the record. Article 8308-6.34(e).

Because the written offer of employment by the employer could not be presumed as *bona fide* under Rule 129.5(b), it had to withstand scrutiny under a"clear and convincing" standard; the hearing officer could consider all evidence submitted, and not just that by the treating doctor, in assessing whether the offer made was within the physical capabilities of the claimant. *See* Texas Workers' Compensation Commission Appeal No. 91023, decided October 16, 1991. There is probative evidence to support the hearing officer's findings that a *bona fide* job offer was made under Article 8303-4.23(f) and Rule 129.5. There was also probative evidence to support his finding that claimant is currently (from the time of the hearing) not disabled.

However, the hearing officer's error concerning his finding of the payment offered by *bona fide* job offer, combined with the absence of a finding on the existence or absence of disability for the time from July

24, 1991 to the "present" date of the hearing, leaves unresolved one of the main issues of the hearing and the benefit review conference: whether the release to light duty could be a basis for carrier to adjust the payment of TIBS in this case on July 23, 1991. (We would note that specific findings as to the effective date of the employer's light duty offer must be made to support any adjustment to the TIBS that the hearing officer may determine on remand).

One point must be clarified as to the "take nothing" order, which taken literally would appear to end payment of medical benefits. We would note that the hearing officer described the issue in terms of suspension of the TIBS. Because the claimant suffered an injury in the course and scope of employment, he is entitled to medical benefits under the Act without regard to disability. Art. 8308-4.61. Disputes over the cost or entitlement to payment for certain health care services must be handled primarily in accordance with Art. 8308-4.68, 8.62, and applicable rules. The hearing officer's order should be read as an adjudication only as to the TIBS, and not medical benefits.

For reasons stated herein, we reverse the decision of the hearing officer to the extent that it disallows any TIBS after July 23, 1991 based upon the existence of a *bona fide* job offer of 40 hours per week and the erroneous findings and conclusions that this was an offer at the preinjury wage. We remand the decision for further consideration and development of the evidence on the issue of whether any amount of TIBS were payable from July 24, 1991 until the date of the hearing, in light of the discussion of the law in this decision.

_____
Susan M. Kelley
Appeals Judge

CONCUR:

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Joe Sebesta
Appeals Judge

_____
Robert W. Potts
Appeals Judge