APPEAL NO. 92181

On April 1 and 3, 1992, a contested case hearing was held at (city), Texas, (hearing officer) presiding as hearing officer. He determined that appellant's employer had made a *bona fide* offer of employment effective January 14, 1992 and that any applicable income benefits be adjusted accordingly under the provisions of the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN., art. 8308-1.01 *et seq* (Vernon Supp 1992) (1989 Act). Appellant complains that the hearing officer made insufficient Findings of Fact and erred in several of his Findings of Fact and Conclusions of Law and that his decision is against the great weight and preponderance of the evidence, "an abuse of discretion, clearly wrong, and manifestly unjust." Cross appellant/respondent, in its own request for review, faults the hearing officer for not entertaining an issue involving average weekly wage and, in its response to the appellant's request for review, urges that there is sufficient evidence to support and uphold the hearing officer's decision concerning the *bona fide* offer of employment on January 14, 1992.

DECISION

Finding no error in the hearing officer's determination that a *bona fide* offer of employment was made but finding error in the hearing officer's refusal to consider an issue in dispute and properly before him, we reverse and remand.

The single issue considered by the hearing officer was whether the employer made a *bona fide* offer of employment pursuant to Article 8308-4.23(f), 1989 Act. The cross appellant/respondent did urge and preserve a question concerning average weekly wage which had been the subject of two interlocutory orders by the benefit review officer and was apparently an issue still in dispute after the final of three benefit review conferences, although not so indicated in the benefit review officer's report. The cross appellant/respondent attempted to have the disputed matter brought before the contested case hearing by filing a response to the benefit review officer's report pursuant to Tex. W. C. Comm'n, TEX. ADMIN. CODE § 142.7(b) (TWCC Rule 142.7(b)). The hearing officer refused to consider a disputed issue concerning average weekly wage even though it had been the subject of two interlocutory orders and was an issue that had not been resolved at the benefit review conferences. In refusing to entertain the disputed issue of average weekly wage, the hearing officer indicated that he concluded he was:

> not going to certify that for disposition at this hearing, for the reason that's related to the next one, which has to do with the determination of whether or not the claimant has reached maximum medical improvement. [There is nothing in the record to indicate maximum medical improvement was an issue raised at or before the benefit review conference]. That's going to require a benefit review conference to be held on that, so they're going to have to go back to square one on the third request, anyway, so I'm going to let the disability termination (sic) officer, in the event I find claimant is entitled to benefits, make a determination as to the appropriate weekly compensation

> rate, and then if the carrier wants to appeal that, should that happen, then it can be combined with the benefit review conference that will need to be held with regard to the question of maximum medical improvement, so those are my rulings on those.

From the record before us, it is apparent that the issue of average weekly wage was ripe for resolution at the contested case hearing. We fail to see any reason that it was inextricably linked to some other issue particularly when it had been the subject of a distinct dispute before the benefit review officer and a resolution of the issue had never reached agreement between the parties. Accordingly, we determine the hearing officer was in error in refusing to entertain the disputed issue of average week wage, as raised by a party to the benefit review conference, since it was an issue raised at that level and remained unresolved. The issue was appropriate for a contested case hearing at that time. Article 8308-6.31(a); TWCC Rule 142.7(b).

The issue focused on at the contested case hearing was narrow in scope and concerned the meaning of the term "geographic accessibility" as it relates to a *bona fide* offer of employment. Article 8308-4.23(f); TWCC Rule 129.5. There was no issue of injury within the course and scope of employment. Succinctly, the appellant was hired around April 1991, by (employer). (a subsidiary and separate division of (employer) stores, Inc.), located in (city), Texas. At the time he got the job, he had been living with his grandmother in (city), Texas. He was injured on the job on (date of injury), has not worked since, and subsequently, "towards the end of July", moved back to his home (with his parents) in (city), Texas approximately 70 miles from his place of employment, the place where he was injured. The reason the appellant moved was because he and his grandmother had a falling out and he "wore out his welcome." Although the record is not clear, it appears he has been paid benefits from the time of the injury.

The employer made two written offers of employment, one dated October 14, 1991, and one dated January 14, 1992. The parties stipulated that the October 14, 1991 did not meet the requirements of TWCC Rule 129.5. It was further stipulated that the January 14, 1992, offer met all the requirements of that rule with the exception of paragraphs (a)(5) and (c) which provide as follows:

(a)In determining whether an offer of employment is *bona fide*, the commission shall consider the following:

(5)the distance of the position from the employee's residence.

(c)Employment is "geographically accessible" to the injured employer if it is within a reasonable distance from the employee's residence unless the employee establishes through medical evidence that the employee's physical condition precludes travel of that distance.

This rule implements the provisions of Article 8308-4.23(f) which provides for the potential reduction of temporary income benefits if a *bona fide* offer of employment is made "that the employee is reasonably capable of performing, given the physical conditions of the employee and the geographic accessibility of the position to the employee."

This provision is a change from the prior workers' compensation statute which provided that:

> If the injured employee refuses employment reasonably suited to his incapacity and physical condition, procured for him in the locality where injured or at a place agreeable to him, he shall not be entitled to compensation during the period of such refusal unless in the opinion of the Board such refusal is justified. Vernon Ann. Civ. Stat., art.8306, §12a. (Repealed)

Under the provisions of prior law, the job offer here would fit within the requirement that the employment offered be in the locality of the injury. However, that language is not found in the 1989 Act or implementing rules. Rather, in determining the subject of a *bona fide* offer, one matter that is to be considered is the distance of the job from the employee's residence, and the distance factor or "geographic accessibility" is to be tested on the basis of reasonableness of the distance. In this regard, the Commission has elected not to establish any certain number of miles as presumptive in establishing what is considered as reasonable or unreasonable. *See* 16 TexReg 316, January 18, 1991, comments on 28 TAC §129.5 where it is stated: "Finally, one commentor stated that the commission should create a presumption of a specific distance that would constitute a `reasonable distance.' The commission disagrees, noting that the determination of 'reasonable distance' should be based upon the facts of a particular case, and a presumption may work injustice in specific cases."

As indicated, the hearing officer found the January 14, 1992, job offer to meet the requirements of a *bona fide* offer under the 1989 Act and TWCC Rules including the requirements regarding "geographic accessibility."[1] The evidence touching on this matter before the hearing officer consisted of the appellant's testimony that he moved from his grandmother's home after his injury because of personal conflicts, that his only mode of transportation was an older model car that only got about 10 miles per gallon of gas, that the distance from his current residence to the place of employment and where he was hired

[1] TWCC Rule 129.5(b) provides that "[a] written offer of employment which was delivered to the employee during the period for which benefits are payable shall be presumed to be a *bona fide* offer, if the offer clearly states the position offered, the duties of the position, that the employer is aware of and will abide by the physical limitation under which the employee or his treating physician have authorized the employee to return to work, the maximum physical requirements of the job, the wage, and the location of employment."

was approximately 70 miles, and that his wage rate was so low that transportation would use up a significant portion of his pay. He testified on cross-examination that for a period of about 4 years during the mid 1980's he had worked as a "roughneck" in the oil fields and would travel 100 or more miles a day getting to and from work. He stated that the transportation was provided by the employer. He testified that he did not think

the distance to the oil fields was excessive but that he had never driven his own car. He stated he did not feel that the work location in issue was accessible to him.

The co-manager of (employer). testified that the job offered the appellant was made up for him and that to his knowledge, no such work was available at other (employer) stores closer to where the appellant was currently living. Also, he testified that (employer) was a different division of the (employer) Corporation and that he had not specifically inquired if there were any position at a (employer) store closer to the appellant's residence. He testified he did not consider 70 miles to be unreasonable and that he had commuted that distance before. He opined that he would not be able to keep many employees earning comparatively low wages if they had to travel a distance of 70 miles one way to work.

A medical record presented at the hearing contained a notation that appellant made an earlier statement "expressing that he would not go back to work at (employer) even if he did not have a physical problem." During cross examination, the appellant stated that he would go back to work for (employer) if he had a place to stay, but that he did not particularly get along well with (employer).

The Findings of Fact and Conclusions of Law with which the appellant takes exception are:

FINDINGS OF FACT

6.On October 14, 1991, (employer), the co-manager of the store in question, sent the Claimant a letter offering light duty at the (city) store, but failed to describe the position, give its limitations and requirements, or indicate the period of time for which the offer was made; the Claimant received this letter, but did not respond to it.

7.On January 14, 1992, (employer) sent the Claimant another letter offering light duty which set out the requirements and limitations of the job and requested the Claimant to report to work at 9:00 a.m. on January 22, 1992, at the (city) store; the Claimant received this letter, but did not respond to it.

8.At the time of (employer's) letter of January 14, 1992, the Claimant was still driving his 1973 Chevrolet Caprice, which consumed gasoline at the rate of 10 miles per gallon; the cost of gasoline for this vehicle on that date was $1.15 per gallon.

9.The light duty offered on January 14, 1992 was for a position especially "made up" by the store manager (employer) to meet the requirements imposed on the Claimant by his treating physician; no other such position was available at any other of the Employer's stores, including any which might have been located closer to the Claimant's residence in (city).

CONCLUSIONS OF LAW

4.The Employer's offer of employment by its letter of January 14, 1992, was a *bona fide* offer of employment.

5.Although possible economic hardship to the Claimant is an element to be considered in determining "geographic accessibility," it is not solely determinative where the existence of the additional distance to the offered position is caused by events which are unrelated to the injury in question.

6.The economic hardship to the Claimant in this case is the difference between the cost of travel to the work location to and from his grandmother's house versus the cost of travel to and from his present residence in (city), based on the fuel consumption of his automobile ($16.10 per day minus $2.30 = $13.80 per day).

7.Although having to drive to the (city) store would increase his daily travel expense from 6% to 40% of his gross daily income, such is insufficient, in and of itself, to constitute a lack of "geographic accessibility," as defined.

Our review of the record discloses several inaccuracies in the Findings of Fact of the hearing officer. First, with regard to finding No. 6, the record indicates that the appellant attempted to contact his employer following the October 14, 1991, job offer. He testified that he called (employer) on one occasion and was put on hold and didn't talk to anybody. He hung up after a "long time" because it was long distance. With regard to finding No. 7, the appellant testified that after he talked to his attorney about the letter, he understood the letter was "ruled in his favor" by the Texas Workers' Compensation Commission and that he did not have to respond to it. Regarding his finding No.9, the record indicates that the co-manager testified that he was not aware of any other job like the one he made up for the appellant but also stated he had not specifically inquired of other stores. We do not find these inaccuracies to be of any great significance warranting corrective action. With regard to No. 9, we note there is no evidence to establish that (employer) and (employer) are one and the same employer for purposes of a job offer in this case. Indeed, the co-manager testified they were different divisions or subsidiaries. The only connection made in the record of this case is that they are both "owned by a fellow named Mr. W" as far as the co-manager knows.

With regard to the hearing officer's Conclusions of Law, with some exception, we find they are basically supported by the evidence and his essential Findings of Fact and are an appropriate application of the law to those findings. We do not embrace the concept that economic hardship is appropriately based only upon the fuel consumption of a particular vehicle presupposing that economic hardship is a determinative element in measuring the requirement that for the employment to be "geographically accessible," it must be within a reasonable distance. We cannot say, as a matter of law, that the distance involved, under the circumstance of this case, was unreasonable. Reasonableness becomes a question of law, as opposed to fact, when only one reasonable inference can be drawn from the evidence. *See* State Farm County Insurance Co. of Texas v. Plunk, 491 S.W.2d 728 (Tex. Civ. App.-Dallas 1973, no writ) where the court, stating questions of reasonableness are ordinarily matters of fact and must be determined in light of all the circumstances, upheld a determination that notice given over a month after an accident, where the policy requires notice to be given "as soon as practical," was reasonable; Fisch v. Transcontinental Insurance Co., 356 S.W.2d 186 (Tex. Civ. App.-Houston 1962, writ ref'd n.r.e.) where the court, in noting that ordinarily what is a reasonable time is a question of fact, stated "we can not say one or even two years after the loss would be unreasonable as a matter of law" in a situation involving an insurance policy which stipulated replacement costs "within a reasonable time after loss." Clearly, the circumstances relating to potential transportation cost factors give rise to some degree of hardship on the part of the appellant. However, there is no indication that such hardship was intended or otherwise provoked by the employer, or that some degree of hardship negates the reasonableness of the distance involved. On the other hand, there is no indication that the appellant is seeking to intentionally stay outside the reach of a "reasonable distance" although his move from the vicinity where he procured the job initially was occasioned by personal conflicts unrelated in any way to his job or the subsequent injury he suffered.

Other than the less critical matters discussed above, we believe the hearing officer has taken into consideration appropriate facts and circumstance in arriving at his decision that there was a *bona fide* job offer extended by the January 14, 1992, letter from the employer and that it was within the term "geographically accessible." Only if we were to determine that his essential determinations were so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust would we be warranted in reversing his decision on this issue. See TWCC Appeal No. 92146 (Docket No. DA/91-082068-01-CC-DA42) decided May 27, 1992; TWCC Appeal No. 92142 (Docket No. FW/91144927-02-CC-FW41) decided May 26, 1992. We do not find that to be the case here nor do we find an erroneous application of the law on this issue.

Because of the matter discussed at the outset, the case is reversed and remanded for an expedited hearing. Pending resolution of the remand, a final decision is not rendered in this case.

_____
Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

_____
Philip F. O'Neill
Appeals Judge

FILING A DISSENTING OPINION:

_____
Susan M. Kelley
Appeals Judge

CONCURRING IN PART, DISSENTING IN PART:

I concur with the opinion above only insofar as it reverses and remands the case for consideration of the issue of average weekly wage. However, I respectfully dissent from the portion of the majority decision that affirms the hearing officer's decision that a *bona fide* job offer was made. In my opinion, such a finding under the facts of this particular case is so against the great weight and preponderance of the evidence so as to be manifestly unjust.

The issue of whether a *bona fide* job offer may be used to offset the amount of temporary income benefits (TIBs) assumes, of course, that there is at least threshold entitlement to TIBs - in other words, that the injured employee is disabled as a result of a compensable injury. The TIBs benefit is geared to serve as a partial replacement of the wages lost because of an injury. The effect of Art. 8308-4.23 (f) is to impute wages which may not actually be received by an employee to that employee, for purposes of calculating how much the temporary income benefits should be. However, the primary purpose of that section, in my opinion, is to restore employees to the work place if possible, not to reduce the TIBs payment.

This primary purpose is served by imputing offered wage to an employee, undeniably a powerful incentive to return to work. The statute makes clear, however, that this cannot be done simply because an employer makes a job offer. The job offered must be one that an employee is "reasonably capable of performing," given two major criteria: the

employee's physical condition, and the "geographic accessibility" of the position to the employee. Clearly, given the present tense language used in the statute, such attributes are evaluated using facts at the time the offer is made, not facts existing in the past or perhaps in the future.

For purposes of this discussion, I will assume that the offered position is within the physical capabilities of the employee, as was stipulated in the case under consideration. Given the state of the highways and public transportation today, virtually any portion of the United States could be deemed, in a literal sense, "geographically accessible." Employing statutory construction to avoid an absurd result, however, requires that geographic accessibility must be evaluated in terms broader than the mere physical possibility of arriving at a certain destination. In my opinion, a job offer, before it can be used as a reduction of the TIBs entitlement, must be evaluated in terms of facts such as: the distance of the work from the residence; comparison of that distance to the distance previously traveled; the availability of transportation to the work location; and the modes and cost of available transportation. These objective facts are essential to determine whether, in the practical sense, the employee is "reasonably capable of performing" the offered job.

I believe that the great weight and preponderance of the relevant evidence in this case is against the determination that the offered job complied with the statutory and rule requirements regarding geographic accessibility. In addition to the 70 miles distance between the appellant's residence and the offered position, and the hour-and-a-half one-way travel time that is indicated, the overwhelming evidence (even using the conservative calculations of the hearing officer) proved that the employee, against a gross salary of $200 per week, would incur at least $90.50 per week in transportation expense, representing $69.00 more he had previously incurred to get to and from his employment. In the context of the objective standards set forth in Art. 8308-4.23(f), inquiry into the subjective reasons why an employee resides at a certain distance from the offered job is, I believe, not supported under the statute. Consequently, I feel that the hearing officer's Conclusion of Law No. 5, which offsets the obvious economic hardship to the appellant with the observation that the "existence of the additional distance to the offered position is caused by events which are unrelated to the injury in question" employs an inappropriate standard, and applies irrelevant evidence, to analysis of geographic accessibility. The evidence otherwise points inexorably, I feel, to a conclusion that the location of the offered job was not reasonably accessible to the appellant.

I would further hold that doubts about the reasonable capability of an employee to perform the offered job, or its geographical accessibility, should be resolved in favor of the injured employee. I would hold this based upon the historical remedial purpose of the workers' compensation statutes, the TIBs statute in particular, and longstanding liberal construction accorded by the courts to the right of an injured employee to compensation, which I do not believe were changed by the 1989 Act. *See* Bailey v. American General Insurance Company, 279 S.W.2d 315 (Tex. 1955); Hargrove v. Trinity Universal Insurance Company, 256 S.W.2d 73, 75 (Tex. 1953) [rationale for liberal construction is denial of

common law rights for employees coming under workers' compensation act]. *See also* V.T.C.A., Government Code §312.006 (1988).

For these reasons, I would reverse and render a decision that the employer had not proved that it had made a *bona fide* job offer that was geographically accessible to the appellant.