APPEAL NO. 92235

On May 7, 1992, a contested case hearing was held in (city), Texas, with (hearing officer) presiding as the hearing officer. The issue at the hearing was whether the claimant, (claimant), respondent herein, is entitled to further temporary income benefits (TIBS). The hearing officer determined that respondent had disability as defined by the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.03(16) (Vernon Supp. 1992) (1989 Act), from (date of injury), to the date of the hearing, and that he was entitled to TIBS for that period. The hearing officer also determined that appellant had not proved by clear and convincing evidence that a *bona fide* offer of light duty employment was communicated to respondent prior to or after December 23, 1991, which is the date of a letter from the employer, (employer), to respondent concerning the availability of restricted or light duty employment. Although the hearing officer made no finding concerning maximum medical improvement (MMI), she stated during the hearing that an MMI certification raised the day of the hearing, was premature for her consideration.

Appellant, the employer's workers' compensation insurance carrier, contends that the decision of the hearing officer is so against the great weight and preponderance of the evidence as to be manifestly unjust, and contends that the hearing officer relied on hearsay in making Finding of Fact No. 4 concerning the unavailability of light duty employment. Appellant asks that the decision of the hearing officer be reversed, or in the alternative, that the case be remanded. No point of error is raised regarding a possible MMI certification. Respondent did not file a response to appellant's request for review.

DECISION

The decision of the hearing officer is affirmed.

The parties stipulated that on (date of injury), respondent suffered a compensable injury while in the course and scope of his employment with the employer; that appellant was the employer's workers' compensation insurance carrier on the date of injury; and that (Dr. A) is respondent's treating doctor. The issue at the hearing was respondent's entitlement to further TIBS.

"Disability" means the "inability to obtain and retain employment at wages equivalent to the preinjury wage because of a compensable injury." Article 8308-1.03(16). An employee who has disability and who has not attained MMI is entitled to TIBS. Article 8308-4.23(a). TIBS continue until the employee has reached MMI. Article 8308-4.23(b). TIBS are payable at the rates specified in Subsections (c) and (d) of Article 8308-4.23, the rates being a percentage of the difference between the employee's average weekly wage and the employee's weekly earnings after the injury not to exceed the maximum weekly benefit or be less than the minimum weekly benefit. For purposes of Subsections (c) and (d) of Article 8308-4.23, if the employee is offered a *bona fide* position of employment that the employee is reasonably capable of performing, given the physical condition of the employee and the geographic accessibility of the position to the employee, the employee's weekly earnings after the injury are equivalent to the weekly wage for the position offered to the employee.

Article 8308-4.23(f). Tex. Workers' Comp. Comm'n, 28 TEX. ADMIN. CODE §129.5, sets forth matters to be considered in determining whether an offer of employment is *bona fide*, and provides that a written offer of employment is presumed to be a *bona fide* offer if it clearly states certain matters set forth in the rule. If the offer is not made in writing, then the insurance carrier must provide clear and convincing evidence that a *bona fide* offer was made.

Respondent's position at the hearing was that he has had disability since (date of injury), the date of his work-related accident; that the employer did not have light duty work available for him when (Dr. R) released him to return to work with restrictions on November 5, 1991; that he was unable to accept the employer's written offer of light duty or restricted work of December 23, 1991, because he had been taken off work by his treating doctor, (Dr. A), as of December 3, 1991; that his treating doctor has not released him to return to work; and that he is entitled to TIBS. Appellant's position at the hearing was that respondent's disability stopped on November 5, 1991, when (Dr. R) released him to return to work with restrictions and the employer had such restricted work available.

Respondent testified that on (date of injury), he hurt his back while working on a construction job for his employer in (city), Texas, immediately reported his injury to his employer, and has been unable to work since that day because of his back injury. The next day he saw a (Dr. G) in (city), Texas, who gave him pills and told him to see a doctor near his home in (city), Texas, which respondent said was about 75 miles from (city). Consequently, on September 13th and 20th respondent said he went to (Dr. V) who recommended physical therapy. Respondent said that on each of these visits (Dr. V) gave him a slip to stay off work for one week. Respondent denied that (Dr. V) ever told him he was released to light duty work. On September 27th, (Dr. V) referred respondent to (Dr. R) who he saw on October 7th and who also recommended physical therapy, as well as a magnetic resonance imaging (MRI) test. Respondent became dissatisfied with (Dr. R) on his second visit to him on November 5th, because, according to respondent, (Dr. R) did not remember who respondent was and did not have his medical chart with him. Respondent said he told (Dr. R) he didn't know what he was doing and (Dr. R) then told him he could return to light duty work. On November 5, 1991, (Dr. R) issued a release to return to work with a lifting restriction of 30 pounds. Respondent asked Dr. Villarreal for another referral, so he was referred to (Dr. A) who he first saw on December 3rd. Respondent said that (Dr. A) recommended more physical therapy and also recommended back surgery, and took him completely off work as of December 3rd. Respondent said he has continued to see (Dr. A) and that (Dr. A) has not released him to regular work or light duty work. Respondent stated that he has not had back surgery because appellant has denied the surgery.

Respondent testified that he did not personally deliver the slips his doctors gave him concerning his ability to work to his employer. Instead, he gave the doctors' slips to (Mr. G) who was a foreman for the employer, although he was not respondent's foreman, because (Mr. G) lived in the same town as respondent and respondent said he could not afford to drive the 75 miles to the construction site. He said he talked to (Mr. G) about the availability

of light duty work in November, and asked (Mr. G) to take the light duty work slip issued by (Dr. R) to the employer and bring a response back from the employer. Respondent said that (Mr. G) took the slip to (JH), the project manager, and reported back that (Mr. H) said that there was no light duty work available. Respondent said that he did not go out to the work site to see if there was light duty work available because of what (Mr. G) had reported to him. Respondent also said that he knew of another injured employee who sought to return to light duty work for the employer, but was sent home instead.

Respondent further testified that he asked (Dr. G) to take the off-work slip (Dr. A) gave him on December 3rd to the employer. He said he could not introduce the slip into evidence because the employer had it. He said that on December 30th he received the employer's letter dated December 23, 1991, concerning the availability of restricted or light duty work, and that he called Barabara Yarbrough, the project administrative manager, and told her that he could not go back to work because (Dr. A) did not want him to go back to work. Respondent said that he did not feel like he could have done light duty work at any time from the date of the accident to the date of the hearing because he was hurting a lot. He said he is still in pain but would try light duty work if (Dr. A) releases him to limited work status.

(J G) testified that he was a foreman for the employer until March 1992. He said he had no direct supervision over respondent and that his mother is related to respondent's father. He testified that he delivered respondent's doctors' slips to the employer at respondent's request. However, he forgot to deliver (Dr. A's) off-work slip, until respondent reminded him of it. He eventually delivered it to (B Y) after December 23rd. Over appellant's hearsay objection, (Dr. G) testified on direct examination that (J H) said that no light duty was available. (Dr. G) also testified that he knew of another injured worker for whom no light duty was made available. On cross examination, (Dr. G) explained that at respondent's request, he had told (Mr. H) that a doctor had released respondent to work light duty, and that (Mr. H) responded that there was no light duty and for respondent to come back to work when he was 100 percent well. Without objection, respondent introduced into evidence a signed written statement of (Dr. G) which was to the same effect as his testimony concerning what (Mr. H) had told him.

(Mr. G), the employer's senior project manager, first said that he was sure there was light duty work available in November, but then stated that since he had not worked on the project in November he did not know if light duty work was then available. However, he testified that the employer did have light duty work available for respondent following the employer's letter to respondent of December 23rd. He did not describe the type of light duty work that the employer had available. (Mr. G) said he had not received an off-work slip from (Dr. A) and was not aware whether (B Y) received that slip.

The employer's December 23, 1991, letter to respondent, which was signed by Barbara Yarbrough, reads as follows:

We have been notified by (Dr. R) that you were released for light duty on 11/5/91. This release had a restriction of "no lifting over 30 lbs."

This letter is to inform you that we have work available for you within the restrictions set by (Dr. R).

You are to report to work on December 30, 1991.

Respondent introduced into evidence numerous medical records and reports. Among these was a note from (Dr. R) dated November 5, 1991, which stated in the space provided to record work limitations "no lifting over 30 lbs." In reports dated December 18, 1991, February 11, 1992, and March 10, 1992, (Dr. A) stated that respondent was to be "off work." In a report dated April 16, 1992, (Dr. A) recommended that respondent have a lumbar laminectomy. (Dr. H) examined respondent on March 12, 1992, and stated in his report that he would not recommend surgery, and that respondent should undergo functional capacity evaluation and return to work based on the level of that evaluation.

Also in evidence was a letter dated April 8, 1992, from the benefit review officer to respondent, appellant, and (Dr. Ar). This letter stated that (Dr. Ar) "is the doctor in this case and is required to determine work status, if MMI has been reached and if so, the degree of permanent impairment." (Dr. Ar's) Report of Medical Evaluation (TWCC-69) was introduced into evidence by respondent. In that report, (Dr. Ar) certified that respondent had reached MMI on April 15, 1992, stated that respondent had a whole body impairment rating of eight percent, and referred to his narrative report of April 15, 1992. In the narrative report, (Dr. Ar) stated: "He [respondent] could possibly improve with a surgical procedure but I'm very pessimistic as he does not have the personality to do well with surgery. For that reason, at the present time, I would not recommend the surgical procedure." It is evident from the record that respondent did not have a copy of the report until the day of the hearing and that he disagreed with the MMI certification and negative recommendation on back surgery.

On appeal, appellant contends that Finding of Fact No. 4 that "the employer had no light duty work available commensurate with the release issued by (Dr. R) on November 5, 1991," was made in error because it was based on hearsay testimony from (Dr. G) concerning what (Mr. H) told him and which testimony was timely objected to. To obtain reversal of a judgement based upon error of the trial court in the admission as exclusion of evidence, appellant must first show that the trial court's determination was in fact error, and second, that the error was reasonably calculated to cause and probably did cause the rendition of an improper judgement. Hernandez v. Hernandez, 611 S.W.2d 732, 737 (Tex. Civ. App.-San Antonio 1981, no writ). Reversible error is not ordinarily shown in connection with rulings on questions of evidence unless the whole case turns on the particular evidence

admitted or excluded. Atlantic Mutual Insurance Company v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.). We are not convinced that the hearing officer erred in admitting the complained of testimony. (Mr. H's) statement to (Dr. G) could arguably be in the nature of an admission or declaration against interest. Furthermore, conformity to legal rules of evidence is not required in a contested case hearing held under Article 6 of the 1989 Act. Article 8308-6.34(e). If there was error in the admission of such testimony, it was harmless since the complained of finding is supported by the testimony of respondent and by (Dr. G)'s signed written statement which were not objected to. Thus, (Dr. G)'s live testimony as to what (Mr. H) told him about the unavailability of light duty work was merely cumulative of other evidence on that matter. Moreover, regardless of whether light duty work was available, appellant still had to show that it made a *bona fide* offer of employment to respondent under Article 8308-4.23(f) and Rule 129.5 in order to equate respondent's weekly earnings after his injury to earnings he could have made working light duty. Appellant's contention concerning Finding of Fact No. 4 is overruled.

Appellant also contends that the hearing officer was confused as to whether (Dr. G) was respondent's boss. We disagree. The hearing officer clearly states in the "Statement of Evidence" portion of her decision that (Dr. G) did not supervise respondent, but was employed by the employer as a foreman. The family relationship between respondent and (Dr. G) was a matter for the hearing officer to consider in assessing the credibility of (Dr. G). *See* Lindley v. Transamerica Insurance Company, 437 S.W.2nd 371, 375 (Tex. Civ. App. - Fort Worth 1969, no writ).

Appellant next contends that respondent failed to produce evidence of probative value on the issue of whether he is entitled to TIBS from the date of the written offer of employment. We disagree. The burden was on appellant to prove that a *bona fide* offer of employment was made. Under Rule 129.5(b) a written offer of employment must clearly state the matters set forth in that rule in order for the written offer to be presumed to be a *bona fide* offer. One of the requirements is that the offer must clearly state that the employer is aware of and will abide by the physical limitations under which the employee or his treating physician have authorized the employee to return to work. And under Rule 129.5(a) the Commission must consider the physical requirements of the position compared to the employee's physical capabilities. Given the present tense language of Article 8308-4.23(f) and Rule 129.5, this should be done with reference to the physical condition of the employee at the time the offer is made. The uncontradicted evidence is that respondent was on off-work status per his treating doctor when the employer issued its letter of December 23, 1991, informing respondent that work was available within the restrictions set by (Dr. R) on November 5, 1991, when respondent last saw that doctor. Respondent testified that he was unable to do light duty work from the date of his injury. There is no evidence that (Dr. A), the treating doctor at the time the employer issued its letter, or respondent had authorized respondent to return to work on December 23, 1991, or thereafter. Consequently, the letter of December 23rd cannot be presumed to be a *bona fide* offer of employment. Neither respondent nor his treating doctor at the time of the employer's letter triggered a *bona fide* offer of employment under Rule 129.5(b) because

respondent was on off-work status at the time. *See* Texas Workers' Compensation Commission Appeal No. 91023 (Docket No. redacted) decided October 16, 1991. The physical limitations set by (Dr. R) seven weeks before the employer's offer were not the same physical limitations respondent had at the time of the offer. Thus, the hearing officer in weighing the evidence could properly find that the offer of employment was not made within respondent's physical limitations and therefore, was not a *bona fide* offer.

We would also note that the written offer failed to state a number of matters required to be stated in order for it to be presumed *bona fide* under Rule 129.5(b). For example, it does not state the position offered, the duties of the position, the wage, nor the location of the job. Consequently, clear and convincing evidence under Rule 129.5(b) was required. *See* Texas Workers' Compensation Commission Appeal No. 91023, *supra*.

We note that the record contains the report of (Dr. Ar), who is described as "the doctor in this case" by the benefit review officer, and that he certified that respondent reached MMI and assigned an impairment rating. However, appellant does not complain on appeal of the absence of findings on MMI or challenge the hearing officer's decision on the basis of (Dr. Ar's) certification that respondent reached MMI on April 15, 1992. Consequently, we will not address this. We do note by way of explanation that MMI was not specifically in dispute at the benefit review conference or the contested case hearing, which focused on disability and job offer issues. The hearing officer didn't get a response from the parties when she discussed the possibility of adding MMI and impairment rating to the issues at the hearing, and neither party specifically requested that those issues be added (contrary to the hearing officer's statement in her decision that appellant asked that those issues be added). However, in closing argument appellant did ask the hearing officer to consider the report of the "designated doctor." (We cannot tell from the record whether (Dr. Ar) was a designated doctor selected by the Commission under Article 8308-4.25(b), or was a doctor the Commission required respondent to see under Article 8308-4.16(a)). After appellant's closing argument, the hearing officer advised that there appeared to be a conflict between (Dr. A) and (Dr. Ar) over whether respondent needed spinal surgery and that that dispute should be referred to the Division of Medical Review before a decision on MMI and impairment rating are made. Appellant then stated that that was "entirely appropriate."

If (Dr. Ar) is a designated doctor under Article 8308-4.25(b), it is not clear why the benefit review officer selected a designated doctor to determine MMI in the first place as there did not appear to be a ripe dispute concerning MMI. Also, we note that (Dr. Ar's) certification of MMI appears to conflict somewhat with his finding that respondent could possibly improve with surgical procedure. In any event, since appellant has not raised the issue of MMI on appeal, we need not determine that issue.

Finding the decision of the hearing officer to be supported by sufficient evidence, and finding her decision not to be so against the great weight and preponderance of the evidence as to be manifestly unjust, we affirm.

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Robert W. Potts
Appeals Judge

CONCUR:

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Joe Sebesta
Appeals Judge

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Susan M. Kelley
Appeals Judge