APPEAL NO. 92248

A contested case hearing was held in (city), Texas on April 22, 1992, (hearing officer) presiding as hearing officer. He determined that a *bona fide* offer of employment was made to the appellant after a light duty work release and that he was not entitled to temporary income benefits (TIBS) under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq* (Vernon Supp. 1992) (1989 Act). Appellant urges that Finding of Fact 7 (sic) is incorrect and not supported by sufficient evidence. (There is no Finding of Fact Number 7; however, it appears that it is the finding of a *bona fide* offer that is under attack). Appellant also faults a Conclusion of Law urging it is not supported by any evidence or, alternatively, is not supported by sufficient evidence.

DECISION

Finding the evidence of record sufficient to support the determinations of the hearing officer, we affirm.

The issue considered at the contested case hearing and agreed to by all parties was whether a *bona fide* offer of employment was made to the appellant after a light duty work release and whether the appellant was entitled to TIBS as related to any *bona fide* offer of employment.

The appellant worked for (employer) who carried workers' compensation coverage with the appellant. There was no dispute that the appellant sustained an on the job injury on (date of injury), lifting 50 pound bags of flour. The injury was apparently to his knee with back pain manifesting itself some three weeks later. Appellant was seen by (Dr. H) on (date), and was placed on light duty restrictions limiting him to no prolonged walking, standing, or climbing for approximately 8 weeks. He was also told to come in for therapy for 30 days. He was seen at (Hospital) on January 22, 1992 because of his back pain. He was continued on light duty with restrictions of no lifting, bending or driving. The appellant also saw (Dr. T) on "2/21/92" pursuant to arrangements made by his attorney. A report dated "2/26/92" and signed by Dr. T indicates the appellant is under his "professional daily care" and noting "[p]atient is totally incapacitated at this time."

The appellant stated on cross examination that he called and talked with his employer at the end of December and they offered him a job in filing but that he did not go in. He acknowledged that he told the employer he would come in after a second phone call later in January 1992, but that he did not do so. He told the employer he did not have a baby sitter. He stated another reason he did not go in was because he was hurt. He also told them he had been hired as a truck driver and that he did not know much about filing. He claims that one of the owners, (Mr. V), told him sometime in February that they "didn't need me any more." He testified that he got a written letter from the employer which stated:

JAN 29, 1992

DEAR (MR A) (sic)

WE WERE INFORMED BY THE DOCTOR, THAT YOU WERE RELEASED TO GO BACK TO WORK, FOR LIGHT DUTY. I TOLD YOU THAT WE COULD PUT YOU BACK TO WORK DOING LIGHT DUTY. YOU CALL (sic) ME ON JAN 22 1992, AND SAID THAT YOU WERE COMMING (sic) BACK TO WORK.(sic) THURSDAY THE 23RD. I HAVE NOT HEARD FROM YOU, OR YOU HAVE NOT BOTHER (sic) TO CALL.

THANKS
(G S) OFFICE MANGER (sic)

Although the appellant acknowledges the oral and written information about the job offer, he denies that he was ever specifically told if he would have to stand, walk, lift, or bend in the offered position, or advised what his wage would be or if the employer was aware of the particular restrictions set by the doctor and any necessary accommodations. He acknowledged he knew there was a job for him at employer's place of business, some two to three miles from where he then lived, and that the employer did not indicate the pay would not be the same.

(GS) was called as a witness and testified that appellant had been offered light duty in the office doing such things as handling and filing documents and orders, answering the telephone, and taking out refuse. She stated she told the appellant what the job involved, to which he replied that he was hired to be a truck driver and not to do filing. She testified he subsequently stated he would be coming in to work but had to work out his baby sitting problem. She stated he never showed up nor did he ever call to let them know he would not be coming in. GS also stated the respondent never indicated any concern over the physical requirements of the job. She stated he was never terminated and the job continued to be available and that a letter had just recently been sent to him so advising.

Mr. V testified that he did not talk to the appellant about light duty as he does not handle these matters. He denied terminating the appellant in early February and stated that they had continued to offer him light duty employment. He stated the light duty job was still open and that it would be available to the appellant until he could return to his truck driving duties.

The hearing officer found as fact that within seven days of his injury, the employer offered appellant a position of employment that was:

a.a *bona fide* position which was and is still available to (appellant);

b.reasonably communicated to (appellant);

c.a position that (appellant) was and is reasonably capable of performing, given his physical condition; and

d.reasonably geographically accessible to the residences of (appellant) at the time of the offer and at all times to the date of this Benefit Contested Case Hearing.

He concluded in his Conclusion of Law No. 3 that the appellant "has not sustained a disability by virtue of the injury which occurred on (date of injury), from (date of injury), to the date of this Benefit Contested Case Hearing."

Article 8308-4.23 (f) of the 1989 Act provides in pertinent part that "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." That is, if the wages remain the same, the offset against any temporary income benefits due would result in no temporary income benefits during such period of time that these conditions were met. There is no disability, by definition, during such periods of time the employee is able to obtain and retain employment at wages equivalent to the preinjury wage. Article 8308-1.03(16), 1989 Act.

In implementing Article 8308-4.23 (f), the Texas Workers' Compensation Commission promulgated Rule 129.5, Tex. W. C. Comm'n, 28 TEX. ADMIN. CODE §129.5 which provides:

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

(1)the expected duration of the offered position;

(2)the length of time the offer was kept open;

(3)the manner in which the offer was communicated to the employee;

(4)the physical requirements and accommodations of the position compared to the employee's physical capabilities; and

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

(b)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 limitations 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. If

> the offer of employment was not made in writing, the insurance carrier shall be required to provide clear and convincing evidence that a *bona fide* offer was made.

It appears clear that the written letter to the respondent concerning the job offer did not fulfill all the requirements set forth above to qualify for the presumption of a *bona fide* offer. However, where, as here, there is both written communication and oral communication involved in offering employment, both may be considered. As we stated in Texas Workers' Compensation Commission Appeal No. 91023 (Docket No. redacted) decided October 16, 1991, "[i]nformation provided in writing that is not sufficient to qualify for the presumption can be used in conjunction with information provided verbally to determine whether a *bona fide* offer was made based on clear and convincing evidence." In discussing "clear and convincing" evidence in that case we noted, citing State v. Addington, 588 S.W.2d 569 (Tex. 1979), that such required sufficient proof to give the trier of fact a firm belief or conviction as to the truth of the allegation. It was also said to be intermediate proof between "a preponderance of the evidence" and "beyond a reasonable doubt." *See also* Black's Law Dictionary, Sixth Edition, West Publishing Co., at page 251.

In assessing whether the evidence in this case measures up to the clear and convincing evidentiary standard, we observe that the hearing officer, as the finder of fact, is the sole judge of the relevance and materiality of the evidence offered and of the weight and credibility to be given to the evidence. Article 8308-6.34(e). When the information contained in the written letter to the appellant is combined with the telephonic conversations between GS and the appellant, and his own acknowledgement of the office nature of the position being offered, together with his agreement to accept the position only later hampered by a baby sitting problem, it is sufficient evidence , when considered as a whole, to meet the clear and convincing test necessary to determine that the offer was a *bona fide* offer. Texas Workers' Compensation Commission Appeal No. 91127 (Docket No. redacted) decided February 12, 1992. *See also* Texas Workers' Compensation Appeal No. 92087 (Docket No. redacted) decided April 22, 1992. *Compare* Texas Workers' Compensation Commission Appeal No. 92184 (Docket No. redacted) decided June 25, 1992; Texas Workers' Compensation Commission Appeal No. 92235 (Docket No. redacted) decided July 20, 1992. We do not believe the offer of employment, under the circumstances present, had its character as a *bona fide* offer diminished because of appellant's personal scheduling difficulties or because he was initially hired as a truck driver. As we stated in Texas Workers' Compensation Commission Appeal No. 91045 (Docket No. redacted) decided November 21, 1991, "[o]n the other hand, we do not believe the 1989 Act is intended to be a shield for an employee to continue receiving temporary income benefits where, taking into account all the effects of his injury, he is capable of employment but chooses not to avail himself of reasonable opportunities or, where necessary, a *bona fide* offer."

It was not an issue specified nor was it urged at the contested case hearing that the appellant's status regarding disability or his capability to perform light duty changed

or was otherwise altered on February 26, 1992, when Dr. T checked on his form report that "[p]atient is totally incapacitated at this time." Consequently we do not address this matter in this opinion and decision.

Finding the decision of the hearing officer sufficiently supported by the evidence and that there was clear and convincing evidence that a *bona fide* offer of employment was made, we affirm.

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Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

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Philip F. O'Neill
Appeals Judge

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Lynda H. Nesenholtz
Appeals Judge