APPEAL NO. 92293

This appeal arises under the Texas Workers' Compensation Act of 1989 (1989 Act), TEX. REV. CIV. STAT. ANN. arts. 8308-1.01 through 11.10 (Vernon Supp. 1992). On January 6, 1992, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. The hearing officer, in a decision issued nearly five months later, determined that the respondent's employer had not made a *bona fide* offer of employment that the respondent was reasonably capable of performing. He further ruled that her first choice of treating doctor was (Dr. S). The effect of this ruling was that the wages offered by the employer in the alleged *bona fide* offer of employment could not be credited as weekly earnings after the injury for purposes of computing the amount of temporary income benefits (TIBs) due. The compensability of the injury was not disputed.

Appellant asks that the decision be reversed, arguing two major points of appeal: (1) that findings and conclusions that no *bona fide* offer of employment was made by employer are against the great weight and preponderance of the evidence, and (2) that the conclusion that respondent was not reasonably capable of performing the tasks assigned to her is also against the evidence. The appellant further argues, on this second point, that the hearing officer's decision, if left intact, will allow employees who are unmotivated to work "to circumvent the law's provision regarding light duty by simply making a disingenuous attempt at returning to the light duty position." The hearing officer's findings on identity of the treating doctor were not appealed. No response was filed.

DECISION

After reviewing the record of the case, we affirm the determination of the hearing officer on the issues presented to him.

Some comment on those issues is in order because of confusion evidenced during the hearing as to the breadth of those issues. The benefit review officer's report indicates an unresolved issue as follows: "whether temporary income benefits are due to the claimant." The statements of each party's position, however, make clear that this rather broad statement of the issue essentially focused on two primary topics: whether the employer had made a *bona fide* offer of employment in accordance with the 1989 Act, Article 8308-4.23(f), and, less clearly stated but inherent in the arguments made, whether the respondent had "disability".[1] These are related, but distinct, issues. *See* Appeals Panel Decision No. 91045 (Docket No. redacted) decided November 21, 1991; Appeals Panel Decision No. 92087 (Docket No. redacted) decided April 22, 1992. A finding of an end to disability does not require that a *bona fide* job offer be proven.

At the hearing, the parties, for reasons not explained on the record, modified the unresolved issue into two discrete and narrow issues: whether respondent could perform

[1] Article 8308-1.03(16) states: "disability means the inability to obtain and retain employment at wages equivalent to the preinjury wage because of a compensable injury."

the light duty to which she had been assigned pursuant to the release she received from (Dr. H); and whether (Dr. H) was her treating doctor. Well into the hearing, the appellant argued that "disability" was also in issue. However, there was no clear concurrence of the parties on this. Although the hearing officer made no findings on disability as such, the appellant does not complain.

I.

The facts relating to matters in issue are as follows. Respondent, a 29 year old woman, was injured on (date of injury), while working as a door greeter at (employer). Another employee was pushing a line of shopping carts into the door, and the first cart struck her in the lower back. That day, she went to a clinic recommended by employer where she initially saw (Dr. C), but was treated over the next few weeks by (Dr. H). In brief, Dr. H diagnosed lumbar strain and back contusion. Respondent was taken off work. Although there were varied assessments of her future ability to return to work throughout his treatment, Dr. H last saw respondent on April 4, 1991; his subsequent medical report indicates anticipated ability to return to limited type of work by April 20, 1991, with estimated maximum medical improvement date of June 1, 1991. The report of a CT scan taken March 28th concludes a segmentation anomaly of the lumbosacral spine (not associated with any arthritic change), and no evidence of spinal stenosis or active disease of the spine. Minor bulging at L3-L4 and L4-L5 is noted, and a "minor indentation along the thecal sac at L3-L4." Respondent stated that in the weeks following the accident (to the date of the hearing) she has experienced burning between the shoulder blades, pain down one leg, and headaches that are different from migraines she experienced prior to the accident. These symptoms are noted on the medical records in evidence.

Both respondent and her store manager, (Mr. L) agreed that he telephoned her around April 11, 1991, to inquire as to her progress and likelihood of returning to work. The availability of light duty work was discussed. Respondent told him that she felt like she could not return because she was still in pain. Mr. L acknowledged that no specific time and day was established for her to return. Mr. L stated that he called her again about a week later, after he had been urged to do so by the carrier and told that the carrier had a "release" on her.

Mr. L stated that he then verbally offered her a "light duty" job in the fitting room. The hours were to be the same hours she worked before her accident, at the same rate of pay. Duties involved monitoring the fitting rooms, answering the telephone, checking customers and garments into the rooms, and collecting garments and rehanging them. As agreed, respondent returned April 29th, worked no more than two hours, then left because she was in pain. She stated that it was busy, and that she had to bend several times to pick up garments. She stated that the stool provided for her to sit was a "bar stool" with no back support. Mr. L stated that he checked on her once during that time and she was working. He said that another worker in the fitting room told him that respondent had an indifferent attitude and didn't seem to want to be there. He acknowledged that respondent told

another supervisor before she left that she was experiencing too much pain, and that this was conveyed to him. He stated that there had been no subsequent contact with respondent about returning to work. There was no evidence of any follow-up initiated by employer or appellant with respondent or her doctor concerning her ability to work. Mr. L stated that the original offer of light duty still stands.

Respondent stated she didn't feel like she was getting better under Dr. H's treatment and selected Dr. S, a chiropractor, out of the telephone book. She began treatments with him April 12th. She stated that it was her understanding that Dr. S returned a questionnaire he had been mailed by the employer about the types of jobs the store had available, and had been asked to check-off the tasks he felt she could perform. She recalled that he may have said something on that about "fitting room." (This questionnaire, however, was not offered into evidence). She stated that Dr. S urged her to "try" the April 29th position.

She stated that when she left early on the 29th, she returned to Dr. S. His notes indicate that she suffered a setback. Two releases from work (from another doctor at the same clinic) kept respondent off work until June 7, 1991. A letter from Dr. S to the adjuster, dated 7/31/91, indicates that respondent was, in the doctor's opinion, "clinically disabled" at that time. On referral, respondent consulted during this time also with (Dr. N). Notes dictated by him on August 21, 1991 indicate that both clinical and some objective information keeps her from work.

A doctor for the appellant, (Dr. ST), examined respondent August 7, 1991. He notes, based upon his examination and review of her records, no contraindications for her to return to work. He states that she has incurred 1% degree of permanent impairment to her lumbar spine, and that she has reached maximum medical improvement. Respondent stated that she sought no further medical treatment for her (date of injury) injury after August, because she had been so advised by counsel. She was injured and hospitalized for a week and a half due to an automobile accident that occurred in September, after the benefit review conference. She denied, however, that her disability related to such, and attributed it solely to the accident at work.

II.

The amount of TIBs paid during a period of disability may be reduced if it is determined that an injured worker receives a *bona fide* offer of employment that the employee "is reasonably capable of performing, given the physical condition of the employee and the geographical accessibility of the position . . ." Whether or not the position is accepted, the offered wage will be imputed to the employee. Article 8308-4.23(f). The ability of the employee to perform the job must be analyzed with reference to physical condition of the employee at the time that the offer is made. The elements that the Commission will consider to determine if an offer is a *bona fide* offer are described in Texas W.C. Comm'n, 28 TEXAS ADMIN. CODE §129.5(a) (Rule 129.5).

The evidence indicates that, notwithstanding the assertion of a "standing" offer of light duty work, the only time that an offer was communicated to respondent (outside the forum of a contested proceeding where same was being asserted to reduce TIBS) was the week before April 29th. Consequently, it is with reference only to this time period that the trier of fact must evaluate whether the offer was within respondent's physical capabilities. The evidence is uncontroverted that she in fact returned that date, worked almost two hours, then left stating that she was in pain. This was communicated to Mr. L, the store manager. The employer was thus, in our opinion, put on notice at this time that its job offer may not have been in the nature of that described in Article 8308-4.23(f): one that "the employee is reasonably capable of performing, given the physical condition of the employee . . ." There is no evidence of any follow-up at this time on the part of the appellant or the employer to determine what modifications could be made with the objective of returning respondent to the work place. There is testimonial evidence and medical evidence that, as of April 29th, respondent could not work the duties assigned for the entire work day. While the evidence indicates that respondent might have been able to handle similar duties over a shorter work day, such is not the "offer" that the trier of fact was asked to evaluate. There is no evidence that another offer was made after Dr. ST, on behalf of the appellant, stated that respondent could return to work. Rather, appellant's argument appears based upon the premise that it is the employee that must accommodate to the job offer, or seek out the continued existence of an offer, once it is made. This is not what the statute says; rather, it is the offer that must be proven to meet the standards of Article 8308-4.23(f) before the TIBs payment can be reduced. It is appellant's burden to establish that a verbal job offer is *bona fide* under a "clear and convincing" standard of proof. Rule 129.5(b); Appeals Panel Decision No. 91023 (Docket No. redacted) decided October 16, 1991.

The hearing officer is the sole judge of the relevance and materiality, as well as the weight and credibility of the evidence offered in a contested case hearing. Article 8308-6.34(e), 1989 Act. In this case, his conclusions that no *bona fide* job offer was made that

respondent was reasonably capable of performing is not so against the great weight and preponderance of the evidence so as to be manifestly wrong or unjust. Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986).

The decision of the hearing officer is affirmed.

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Susan M. Kelley
Appeals Judge

CONCUR:

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Stark O. Sanders, Jr.
Chief Appeals Judge

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Philip F. O'Neill
Appeals Judge