APPEAL NO. 92297

On March 4, 1992, a contested case hearing was convened at (city), Texas, with (hearing officer) presiding. The hearing was continued at the request of the claimant (respondent herein), and reconvened on June 3, 1992. Two issues were before the hearing officer: whether the respondent was capable of returning to light duty work, and whether a *bona fide* offer of employment had been made by the employer.

The hearing officer found that respondent's treating doctor disagrees with the opinion of the referral doctor that respondent was capable of light duty work, and concluded that the respondent is not capable of returning to light duty employment. He also found that neither of two letters from employer were sufficient to convey a *bona fide* offer of employment. Appellant (employer's workers' compensation insurance carrier below) argues that the evidence at the hearing conclusively shows the respondent could perform light duty work, and that appellant has communicated a *bona fide* offer of employment to respondent. No response was filed on behalf of the respondent.

DECISION

We affirm the decision and order of the hearing officer.

Respondent was working for (employer), on (date of injury), when he slipped and fell while pulling a loaded pallet. He fell to a sitting position and got up with difficulty. He reported the injury to the employer that day.

In the course of his treatment for his injury, respondent saw several doctors, who have disagreed over the findings from various tests and his ability to return to work. Respondent first saw employer's physician, (Dr. P), on (date). Dr. P's impression was lumbar strain and possible compression fracture L4-L5 and S-1. He was taken off work for one week and re-evaluated on March 19th, when Dr. P found him to have "significant paraspinal muscle spasm despite a full range of motion." Dr. P saw respondent until April 1, 1991, and did not return respondent to work.

Respondent first saw his treating doctor, (Dr. G) on April 11th, and was continuing to see him at the time of the hearing. Dr. G, a general practitioner, referred respondent to specialists, including (Dr. Ku) and (Dr. R), both neurosurgeons, and (Dr. F), a radiologist. Respondent also saw (Dr. Kr), an orthopedic surgeon, at appellant's request. Over approximately a one year period, respondent had MRIs, a discogram, and an EMG. Because of conflicting doctors' reports interpreting these procedures, Dr. G on March 5, 1992 recommended that respondent stay off work for two to three months, until the conflicting reports were resolved. Dr. G had returned respondent to work in October 1991, after the insurance carrier had called him and recommended he release respondent to light duty. However, Dr. G said on his next visit respondent's pain was worse and he had weakness in his upper right leg.

On April 29, 1991 Dr. R concluded respondent had low back syndrome with L5 radicular radiation on the right side. On May 30th, Dr. R said respondent's MRI was normal, and in an unsigned noted dated May 31st, he returned him to light duty work as of June 30, 1991. A June 27th letter from Dr. R requested the results of an EMG. On August 23rd Dr. R noted that the EMG was apparently negative for nerve damage. He said since respondent's condition did not require surgery he recommended returning him to Dr. G for continued conservative treatment. His conclusion was that respondent suffered a lumbosacral sprain "which has persisted and still needs treatment." If his condition did not improve, Dr. R recommended reevaluation with another MRI.

A March 10, 1992 letter from Dr. R said respondent's condition was worse than before regarding low back pain which had radiated to his right leg. He also said he reviewed a later MRI which was reported by Dr. F as having fragmented L5-S1 disc. Dr. R did not see fragments of disc, but he agreed with Dr. F's recommendation that respondent see another physician.

On August 15, 1991, (Dr. M), a neurologist, performed an EMG examination and nerve conduction velocities on respondent. Both were found to produce results within normal limits. The same was true of a neurological exam performed by Dr. M August 20th.

Dr. F, a radiologist, on October 28, 1991, and March 3, 1992, reported the results of lumbar spine MRIs which had been performed on respondent. Both reports identified fragmentation in the L5-S1 intervertebral disc space. He suggested respondent have a discogram to verify a disc herniation. A May 1, 1992 report from a discogram CT scan disclosed a degenerative disc.

On November 22nd and December 5th respondent saw Dr. Ku, a neurosurgeon, on Dr. G's referral. On the first visit, Dr. Ku found a "complete normal neurological examination" and requested the MRI films. On the follow-up visit, Dr. Ku found both MRIs normal, with no evidence of disc, fracture, or nerve root compression. On December 19th respondent saw Dr. Kr, an orthopedic surgeon, at appellant's request. Dr. Kr said respondent "demonstrated a very functional range of motion in the lumbar spine." Upon review of the MRI he found no herniation and no surgical lesion. He said the respondent was capable of doing light duty work, with limitation of lifting and pushing up to 30 pounds. In a May 29, 1992 letter Dr. Kr said he had reviewed respondent's MRI and found no evidence of disc herniation. He also had the scan reviewed by two radiologists, whom he said agreed that no significant disc problems were present. He said they also reviewed the results of respondent's discogram CT examination and said that in the absence of MRI findings the scan, which was reported as showing an internal annular disruption, was false positive. He reiterated that the respondent was "capable of returning to work."

Because of Dr. Kr's December 19th letter releasing respondent to light duty work, employer's personnel director, (Ms. B) on January 17, 1992 sent respondent a letter stating as follows: "We have been advised by the insurance company that you have been released

to light duty. This letter is to advise that light duty is available." Ms. B testified that the light duty work would involve folding cardboard boxes; that respondent could sit or stand and that there was no lifting involved; that the pay would be the same; and that the number of hours would depend on what his doctor said he could do. She said respondent did not come back to work after this letter was sent. Ms. B said that because employer had heard respondent was doing work at his house, they hired a private investigator to videotape him. The videotape dated February 15, 1992, which was made a part of the record, shows respondent repairing his son's bicycle. It discloses respondent bending forward at the waist, and working with something in his lap with his neck bent forward, but it also shows him walking with some difficulty and at times leaning against a tree or the porch for support.

Introduced into evidence on June 3rd when the hearing was re-convened was a June 2, 1992 letter from Ms. B to respondent, advising him that employer has light duty work available as soon as he is physically able to perform it. The letter quotes an hourly rate of $4.25 and says the work is located at employer's plant in (city). Three jobs are described in terms of their physical requirements: box making, temperature checking, and vending machine package assembling. As of the time of the hearing the letter had not been mailed to respondent, but was given to respondent's attorney that day. Ms. B testified that the employer would make certain accommodations based on respondent's needs and conditions, such as hours of work and the ability to work at his own speed; however, she said the letter itself does not specifically mention the employer's willingness to abide by the physical limitations under which the respondent has been returned to work. She said the light duty offer would remain open until he was released to full duty work.

Dr. G testified at the hearing that he disagreed with Dr. Kr's opinion of December 19th that respondent was capable of light duty work with a 30 pound lifting restriction. He also disagreed with Dr. Kr's May 29th letter because he said it implies full-time employment which he felt respondent was not capable of. Upon reviewing Ms. B's June 2nd letter he said respondent could not do box making, but that respondent could perform the vending machine and temperature checking jobs so long as he could work at his own speed. He said he had not released respondent to work because he is still in pain, and because he needs the opinion of a neurosurgeon who has reviewed the discogram report and has determined whether the respondent needs surgery or conservative treatment.

Respondent testified through an interpreter that he continues to feel a cold sensation in both legs, pain down his right side, and pain in his back. He said when sitting he has to support his body weight with his arms, and does not believe he can do even light duty work. He said the first time he had seen employer's June 2nd letter was the day of the hearing, and that no one had translated or explained it to him.

Appellant contends that Finding of Fact No. 8 and Conclusions of Law Nos. 2, 3, 5, and 6 are totally unsupported by the evidence in the case. The disputed finding of fact and conclusions of law are as follows (citations to statute and rules omitted):

FINDINGS OF FACT

8.[Respondent] has a herniated intervertebral disc at L5-S1 which causes him incapacitating pain.

CONCLUSIONS OF LAW

2.[Respondent] has been and continues to be incapacitated by back and leg pain as well as his progressively deteriorating physical condition resulting from an L5-S1 herniated intervertebral disc from his (date of injury) injury; therefore, [respondent] has damage and harm to the physical structure of his body, thus, he is incapable of performing light duty.

3.[Respondent's] treating doctor has not agreed nor does he agree with the opinion of the referral doctor that the [respondent] is capable of light duty work, thus, the [respondent] is not capable of returning to light duty employment; therefore, the [respondent's] treating doctor has not approved or recommended that the [respondent] return to light duty.

5.The employer's offer of June 2, 1992, which is insufficient in several material elements was not communicated to the [respondent], thus, it constitutes an undelivered offer incapable of being accepted; therefore, it does not constitute a bona fide offer of employment.

6.The positions of light duty employment purportedly offered the [respondent] are beyond his physical capabilities to perform because of his compensable injury; therefore, the employer's letters of January 17 and June 2, 1992, do not constitute offers of bona fide positions of employment.

With regard to Conclusion of Law No. 2, the hearing officer appears to hold that the damage and harm to the physical structure of respondent's body--the statutory definition of "injury," Article 8303-1.03(27)--necessarily results in an inability to perform light duty work. This is not an accurate statement of the law. Whether an employee can perform limited work, for purposes of analyzing the existence of disability or a *bona fide* offer of employment, must be determined in accordance with the 1989 Act and the applicable rules. Article 8308-1.03(16); 4.23(f); Tex. Workers' Comp. Comm'n, 28 TEXAS ADMIN. CODE §129.5 (Rule 129.5). We find this misstatement of the law to be harmless error, because of our holdings herein. However, we will also address appellant's contention that Finding of Fact No. 8 and this conclusion are totally unsupported by record evidence. The record shows conflicting opinions of medical experts regarding the respondent's MRIs and other tests: Dr. F found fragmentation at the L5-S1 interval, Dr. Ku disagreed, and Dr. G stated he believed respondent's symptoms were consistent with a disc herniation. The hearing officer, as sole judge of the relevancy and materiality of the evidence, may give greater weight to one

expert's medical testimony over another's. Houston General Insurance Co. v. Pegues, 514 S.W.2d 492 (Tex. App.-Texarkana 1974, writ ref'd n.r.e.) We find there was sufficient evidence to support this statement in Finding of Fact No. 8 and Conclusion of Law No. 2.

Article 8308-4.23(f), concerning Temporary Income Benefits (TIBs), requires that a *bona fide* offer of employment, which the employee is reasonably capable of performing, must be found in order to adjust the amount of TIBs. Rule 129.5(a) sets out the elements by which the Commission shall determine whether an offer is *bona fide*. Rule 129.5(b) distinguishes between verbal and written offers of work. A written offer that is delivered to the employee is presumed to be a *bona fide* offer if it contains all the requirements of that subsection. Verbal offers require that the carrier provide "clear and convincing evidence" that the offer was made. A written offer that is not sufficient to qualify for the presumption can be used in conjunction with a verbal offer to determine whether a *bona fide* offer was made, based on clear and convincing evidence. We have previously determined that under Rule 129.5(b) only the employee or his treating physician may provide a basis for the physical limitation under which the employee has been authorized to return to work in an offer of limited work. *See* Texas Workers' Compensation Commission Appeal No. 91023 (Docket No. redacted) decided October 16, 1991.

Appellant does not argue with the hearing officer's determination that the January 17, 1992 offer does not qualify as a *bona fide* offer. However, the sequence of events surrounding the June 2nd offer calls into question whether it constituted a *bona fide* offer in compliance with the regulatory requirements. At the June 3rd hearing, Dr. G disagreed with Drs. Kr and R that respondent was capable of doing light duty work. Yet, when presented with employer's June 2nd letter, Dr. G said in his opinion, the respondent could perform two of the three jobs listed, provided certain conditions were met. Appellant appears to argue that Dr. G's testimony with regard to the two light duty jobs constitute "physical limitations under which the . . . treating physician has authorized the employee to return to work," Rule 129.5(b), renders this conclusion of law erroneous. We do not need to address this issue, however, because of our ruling on Conclusion of Law No. 5, herein. Conclusion of Law No. 5 finds the June 2nd letter was insufficient in several material aspects (Finding of Fact No. 12 lists these as: failure to state the expected duration of the offered positions; the length of time the offer was to be kept open; the employer's awareness and willingness to abide by the physical limitations under which the respondent would be allowed to return to work; and the maximum physical requirements of the job). Conclusion of Law No. 5 also says the offer was not communicated to the respondent, and thus it was an undelivered offer incapable of being accepted.

Appellant argues that the June 2nd letter conveys a *bona fide* offer of employment "in accordance with the spirit and true purpose of" Rule 129.5 in that it addresses all the substantive issues and/or limitations mentioned by the referral physician in sufficient description to allow Dr. G, upon cross-examination, to testify that respondent could perform two of the jobs mentioned. Alternatively, appellant argues that the rule is oppressive, burdensome, and unconstitutional if the true spirit and purpose of the rule is to make

insufficient any offer of employment to a claimant unless every single matter addressed within the rule are specifically set forth in the offer. Appellant also argues that if the physician's medical release is not broad enough to cover each and every one of the matters to be addressed in Rule 129.5, then complete compliance with the rule would be impossible and the true spirit and purpose of the rule would be undermined.

We believe Rule 129.5 makes it clear that the hearing officer should not be constrained by the sequence of words on a piece of paper in determining whether an offer is *bona fide*. As noted above, when no presumption attaches to a written offer of employment, the written material merely adds to the evidence to be weighed to determine if there was a clear and convincing *bona fide* offer under Rule 129.5. (The Texas Supreme Court has characterized clear and convincing evidence as intermediate proof, between "a preponderance of the evidence" and "beyond a reasonable doubt." State v. Addington, 588 S.W.2d 569 [Tex. 1971].) Under our prior interpretations of this rule, the hearing officer can consider the totality of the offer--both verbal and written elements--to see whether the elements of Rule 129.5(b) were met. Appeal No. 91023, *supra*. Once this determination is made, the hearing officer may examine the written and verbal elements of the offer to see if the requirements of Rule 129.5(a) are met.

Under the particular facts of this case, however, we agree with the holding of Conclusion of Law No. 5 that the June 2nd letter was not a *bona fide* offer because it was not communicated to the respondent. Rule 129.5(b) requires that a written offer be "delivered" to the employee; a verbal offer must merely be "made." Both, however, imply a communication; indeed, among the elements which must be considered under Rule 129.5(a) is the manner in which the offer was communicated to the employee. Appellant claims the June 2nd letter was physically delivered to respondent by and through his attorney of record, and that there was good cause for the nature of the tender because appellant was not able to obtain a new report from the referral physician, Dr. Kr, until June 2nd. We cannot agree. Contract law generally defines delivery of a written instrument as parting with the possession or custody of the instrument, with evidenced intention that it become operative. Garcia v. Villarreal, 478 S.W.2d 830 (Tex. App-Corpus Christi 1971, no writ). It is also true that notice to an attorney is notice to the client employing him. Sheehan v. Driskell, 465 S.W.2d 402 (Tex. App.-Houston [14th Dist.] 1971, writ ref. n.r.e.). However, the facts of this case, in which the June 2nd letter appeared for the first time at the hearing of June 3rd, more closely demonstrate an exchange of evidence rather than delivery or communication of an offer of employment. Respondent's attorney was surprised by the letter, and objected to its admission; respondent testified that he did not read English and that no one had translated the letter for him. The hearing was not recessed for any period of time to allow for the assimilation of the information in the letter. Under these circumstances, we think the hearing officer properly held in Conclusion of Law No. 5 that the offer was not communicated to respondent, and that for that reason it did not constitute a *bona fide* offer of employment.

Conclusion of Law No. 6 is that because the positions offered respondent are beyond

his physical capabilities to perform, the offers of employment are not *bona fide*. It is not clear whether this conclusion disregarded Dr. G's testimony that respondent could perform two of the jobs in the June 2nd letter; however, this is immaterial since we have already held the offer was not communicated to respondent.

With regard to appellant's claim that Rule 129.5 is oppressive and burdensome, we can only refer to our prior holding in Texas Workers' Compensation Commission Appeal No. 92004 (Docket No. redacted), decided February 20, 1992:

> The statute and implementing rules specify reasonable requirements for establishing offers of employment. These requirements are not intended to elevate form over substance but rather to define requirements that must be met in an attempt to avoid disputes. If there were no definitive guidelines, determining what must be done to effect an offer of employment would be

fraught with uncertainty. The rules promulgated by the Commission attempt to remove that uncertainty and avoid disputes; but, to do so, the necessary steps must be taken.

We emphasize with this opinion that we are not retreating from that position, and that we are not attempting to turn a process for getting injured employees back to work into a strictly circumscribed exercise. Rather, we are holding that the surprise appearance at a contested case hearing of a written offer of employment, with no opportunity for meaningful consideration, cannot be a properly communicated offer.

With regard to appellant's constitutional argument, we have held previously that this is not the proper forum to determine the constitutionality of the statute or rules. Texas Workers' Compensation Commission Appeal No. 92094 (Docket No. redacted), decided April 27, 1992.

The decision and order of the hearing officer is affirmed.

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Lynda H. Nesenholtz
Appeals Judge

CONCUR:

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Robert W. Potts
Appeals Judge

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Susan M. Kelley
Appeals Judge