APPEAL NO. 92325

On June 3, 1992, a contested case hearing on remand from the Appeals Panel was held in (city), Texas, with (hearing officer) presiding. The issue on remand, as discussed in Appeals Panel Decision No. 92087, same docket number, decided April 22, 1992, was whether any amount of temporary income benefits (TIBS) were due for the period from July 24, 1991 through January 30, 1992 (the date of the prior hearing). All matters received in evidence at the prior hearing on January 30, 1992, were considered as well as new evidence admitted at the June 3rd hearing. (Mr. G) determined that the employer of (appellant) made a *bona fide* offer of employment to him effective July 24, 1991, for 40 hours per week, and that this offer accommodated the physical capabilities of the appellant. The hearing officer further found that the appellant had disability from the period July 24, 1991 through January 30, 1992. Having found entitlement to TIBS for this period, the hearing officer then ordered that the amount of TIBS be reduced by the amount of wage offered in the *bona fide* job offer, and that the TIBS be based upon the difference between appellant's pre-injury wage based upon a 49 hour work week, and the offered wages based upon a 40 hour week. The hearing officer repeated his determination from the first hearing, that disability had ended effective January 30, 1992.

The appellant disputes the manner in which the hearing officer has weighed the evidence presented, and argues that the respondent failed to present clear and convincing evidence that a *bona fide* offer of employment was made. Appellant argues that the hearing officer failed to consider appellant's physical capabilities. Appellant notes that the hearing officer has failed to consider, in his *bona fide* job offer finding, that the treating doctor's light duty release of appellant to work "as tolerated" leaves the hours of work to appellant's judgment, and that the employer failed to prove a job offer that would accommodate such. Appellant further complains that evidence showing the bias of (Dr. F), the doctor acting for the insurance company who performed an independent medical examination, was improperly excluded by the hearing officer. The appellant also argues that there is insufficient evidence to support the hearing officer's decision that disability ended January 30, 1992. Respondent asks that the decision be upheld entirely, although noting its unappealled disagreement with the conclusion that a *bona fide* offer was made for 40, not 49, hours.

DECISION

We affirm the decision of the hearing officer.

Appellant injured his back on (date of injury) when his left leg fell into a hole between 9:00 and 10:00 in the evening at the work site. This injury was not disputed. The physical injury suffered was lumbosacral strain.

The facts surrounding appellant's medical treatment, various releases to work, and the offer of employment have been described in Hearing No. 92087. On remand, the appellant attempted to introduce evidence concerning lawsuits against the insurance

carrier's doctor, Dr. F, which was not admitted after objection from respondent. Ostensibly, such evidence would prove that Dr. F was biased in favor of insurance companies because he received compensation from them for his evaluations, and that all such evaluations were basically the same.

On remand, appellant testified that he continued to experience pain and was unable to work. He stated that he had been shifted by the employer to work "outside" in the winter and exposed to "the elements" and cold weather which made his pain worse. However, upon examination by the hearing officer, appellant acknowledged that he was shifted to work in the back room of an enclosed office compartment, that there was a roof over his head, and that the room had an air conditioner and a heater. He acknowledged that he understood that light duty full-time work, meaning 40 hours a week, was offered by his employer from July 24, 1991 on. He stated under cross-examination that he worked light duty over the Thanksgiving holiday. On redirect examination, he qualified this and noted that he was paid for, but did not actually work, over that holiday. He stated that after the last hearing on January 30, 1992, he went to the employer to pick up the previous week's paycheck and, when it was not available, he "took it" to mean that he was terminated and did not return to work.

Respondent's witnesses undertook to qualify testimony from the prior hearing about the *bona fide* offer to expand the offered job from 40 to 49 hours per week. However, it was clear even from their testimony work in the range of 40-49 hours would have been available only if requested by appellant, and had not been a component of the original offer. (Mr. F), safety coordinator for the employer, testified that appellant could work at his own pace; that the employer did not pressure him to work beyond his capabilities; that they furnished him with a cushioned chair; and that he was not assigned to work outside but was in the back room of the office compartment. Mr. F noted that appellant could himself adjust the air conditioning or heating in that area as he desired. Mr. F related that appellant's work was meaningful work necessary to the employer. Mr. F stated that appellant was not terminated, and that, for some reason, his check had been misdirected on January 30th but that he was paid the next day. Although Mr. F and another witness for the employer, (Mr. W), both testified that neither had contacted the treating doctor regarding the words "as tolerated," it became evident from a letter of inquiry (put into evidence by the appellant) that an adjuster for the respondent had, on September 29, 1991, attempted to seek additional information from (Dr. K), the treating doctor, to determine whether or not the 40 hour job offered to appellant was inadvisable. The reply, if any, was not put into the record. Mr. W testified that the employer relied on the respondent to some extent to interpret what a doctor's release means.

A May 20, 1992, letter from Dr. K was made part of this record. It explains the words "as tolerated" on his previous release: "As tolerated in the medical field has a definite meaning in that the patient must limit his activities to the timing and activities that the patient himself can tolerate." Dr. K further states that the activities undertaken by the patient should be evaluated by the patient and physician. The doctor further notes that pain

medication, prescribed to decrease the amount of pain experienced, will "sometimes" have the effect of sedation. Lortab is described as having the side effect of nausea and sedation. Valium is described as causing problems with decreased physical reactions and drowsiness. However, Dr. K's letter is not specific as to why such side effects would have prevented appellant from working, at his own subjectively-determined pace, in accordance with the offer made by his employer.

The Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. Article 8308-4.23(f), (Vernon's Supp. 1992) (1992 Act) [relating to *bona fide* offers of employment], applies for purposes of subsections (c) and (d) of that statute, which have to do with computation of TIBS. If a *bona fide* job offer is made, then the employee's "weekly earnings after an injury," for purposes of calculating TIBS, are deemed equivalent to the "weekly wage for the position offered to the employee," even when the employee does not accept the job. The appellant correctly notes that an "offer" is simply not enough to cause a reduction in the TIBS benefit, but the offer must be one that the employee is "reasonably capable of performing," given his physical condition and the geographical accessibility of the position. Article 8308-4.23(f). As stated in Texas Workers' Compensation Commission Appeal No. 91045 (Docket No. redacted), decided November 21, 1991:

> We do not perceive the intent and purpose of the 1989 Act to impose on the injured employee the requirement to engage in new employment while still suffering some lingering effects of his injury unless such employment is reasonably available and fully compatible with his physical condition and generally within the parameters of his training, experience, and qualifications. On the other hand, we do not believe the 1989 Act is intended as 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.

Along these lines, we believe that the language "reasonably capable of performing," as used in Article 8308-4.23(f) indicates that a trier of fact, considering all the evidence, can determine the point at which the employee's failure to accept a tendered offer of employment crosses the line from inability to work because of the injury, to a choice not to work regardless of the ability to do so. The statutory language requiring that an offer take into account the physical condition of the worker indicates an understanding on the part of the legislature that persons who are offered work would not necessarily be pain free, or completely recovered to preinjury status.

It is clear from the record developed here that appellant's physical limitations were subject to differing medical opinion from his own various doctors, as well as the doctor arranged by the respondent. The record also indicates that, from July 24, 1991, appellant appears to have limited himself to a one-to-two-hours-a-day work schedule. We do not have, in this record, an indication that appellant ever once tried to work more than one or two hours a day, although Dr. K, according to appellant's testimony, urged him to work as

much as possible. Evidence of such efforts might have gone a long way in supporting appellant's generally subjective contention that he was unable to "tolerate" the light duty job offered. There is evidence that, although Mr. F and Mr. W didn't contact Dr. K, the adjuster for respondent sought clarification of Dr. K's release in September 1991. There was no evidence that, at this time, Dr. K limited his light duty release to one or two hours a day. Finally, it appears that appellant voluntarily left his light duty work altogether on January 30, 1992, because of a clerical mix-up with his check that was corrected forthwith. The hearing officer could well conclude that such evidence supported an inference that appellant was generally unwilling to work the light duty offered, rather than he was physically unable to do so.

We would note that the major reason given by appellant for inability to work more than one or two hours was "pain;" however, Dr. K's letter and appellant's testimony indicate that he was given medications specifically to diminish pain. The employer's representative stated that appellant could set his own work pace, so that a statement in Dr. K's May 20, 1992 letter that appellant "evidently" was not able to "accomplish any meaningful work activity" was something the employer was willing to accommodate. In short, although appellant argues that the employer's offer did not incorporate the treating doctor's "as tolerated" restriction, the flexibility of the offer set forth by the employer and the lack of hard-and-fast job performance demands appear to be responsive to that restriction.

We would further note that Dr. K's assessment is based on some subjective information provided by appellant. The assessment of appellant's credibility is therefore important to the hearing officer's decision. The hearing officer's assessment may well have been affected by appellant's changing testimony during the remand hearing, on comparatively minor matters, especially the impression that appellant may have initially created about being relocated "outside" by the employer.

The hearing officer is the sole judge of the weight, relevance, materiality, and credibility of the evidence presented at the hearing. Art. 8308-6.34(e). His decision should not be set aside because different inferences and conclusions may be drawn upon review, even when the record contains evidence that would lend itself to different inferences. Garza v. Commercial Insurance Co. of Newark, N.J., 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). Any conflicts in the testimony of medical witnesses is a matter to be resolved by the trier of fact. Highlands Underwriters Insurance Co. v. Carabajal, 503 S.W.2d 336 (Tex. Civ. App.-Corpus Christi, no writ). The trier of fact need not accept the testimony of a claimant at face value, but may weigh it along with other evidence. Presley v. Royal Indemnity Insurance Co., 557 S.W.2d 611 (Tex. Civ. App.- Texarkana 1977, no writ).

On the matter of evidence offered to impeach Dr. F, we agree that the hearing officer properly refused to allow this into evidence. Appellant cites no authority for his contention that such evidence was wrongfully denied admission. But it seems to us that the amount of income a doctor may derive in general from rendering opinions for insurance companies,

(or, for that matter, evidence an insurance company might attempt to offer concerning a treating doctor's income from the workers' compensation system at large), or the fact that a lawsuit has been filed which alleges bad medical judgment or collusion with insurance companies by a doctor, has little to do with the medical condition of a particular injured employee at a particular point in time. (In any case, Dr. F's January 1992 opinion was relevant primarily to the issue of disability.)

Finally, we would note that the hearing officer's determination that disability ended January 30, 1992, repeats the holding of the hearing officer to that effect in his previous decision. That determination was upheld in the earlier decision on this case, and was not an issue that was remanded for reconsideration.

The decision of the hearing officer is affirmed.

_____
Susan M. Kelley
Appeals Judge

CONCUR:

_____
Joe Sebesta
Appeals Judge

_____
Philip F. O'Neill
Appeals Judge