APPEAL NO. 92432

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 July 16, 1992, a contested case hearing was held. The hearing officer determined that (claimant), the respondent, continued to have disability pursuant to the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.03(16) (Vernon's Supp. 1992) (1989 Act), and that the appellant was liable for temporary income benefits (TIBS) in accordance with the 1989 Act, specifically Art. 8308-4.23(a). However, the hearing officer also found that the employer had made a bona fide offer of employment which respondent did not accept. The decision does not, however, apply this conclusion by allowing credit pursuant to Art. 8308-4.23(f). The hearing officer found, although it was not in issue at the contested case hearing as reported out of the benefit review conference or by agreement, that a third doctor, Dr. RP, was respondent's treating doctor.

Appellant asks the Appeals Panel to reverse the determination that disability continued, arguing that the great weight of evidence is to the contrary, and noting that both the benefit review officer and the contested case hearing officer concluded that a bona fide job offer was made. Appellant protests that the respondent has unilaterally turned down employment even though she had an employer willing to "tailor-make a position for her disability." Appellant argues that the hearing officer's determination that disability continues to exist is against the thrust of the new law, which appellant argues is to try to get respondent back to work. Appellant asks the appeals panel to consider the negative message that is sent to employers who are making efforts to accommodate light duty status. Appellant argues the evidence it feels favors it position that the respondent is off work not due to an injury, but due to her unilateral refusal to return and financial disincentive. Appellant closes by asking that this panel impose a duty on all claimants to attempt light duty work when authorized by a credible physician and when a bona fide offer of employment is made and argues under this point that the injured worker should be put to the choice of accepting light duty or "facing cessation of benefits." The premise of several of the arguments in the appeal is that an offer of employment for light duty automatically cancels disability. Appellant also argues that the effect of the decision is to undermine employers' light duty programs (indicating that it interprets the hearing officer's decision to preclude, rather than authorize, the credit against TIBS set forth in Article 8308-4.23(f)).

Respondent asks that the decision of the hearing officer be upheld, arguing again her feeling that she cannot work due to her physical and mental state, and cannot accept the "bona fide offer" made by the employer.

DECISION

After reviewing the record of the case, we reverse and remand the case for further development and consideration of the evidence concerning the terms and wages of any bona fide offer of employment that was made by the employer, and whether such offer

complies with the requirements of Art. 8308-4.23(f) and Texas W.C. Comm'n, 28 TEXAS ADMIN. CODE § 12.5 (Rule 129.5).

Some clarification of the issues is in order. The benefit review officer's report indicates an unresolved issue as follows: "whether claimant [claimant] has disability entitling her to temporary income benefits after an offer of light duty." It is clear from reading the report that the benefit review officer considered both whether the respondent had disability, and whether the employer had made a bona fide job offer. These are related, but distinct, issues. *See* Texas Workers' Compensation Commission Appeal No. 91045 decided November 21, 1991; Texas Workers' Compensation Commission Appeal No. 92293 decided August 17, 1992.

It is worth repeating that a finding that disability has ended does not require proof of a bona fide job offer. Likewise, a bona fide offer of employment would not preclude a finding that disability continues, when, for example, the offered position is a light duty, part-time position at wages not equivalent to the preinjury wage.

At the hearing, after respondent's opening statement, the appellant stated that he wished to add another issue to the hearing, whether the respondent "exceeded the limit of doctors." The hearing officer declined to add this as an issue, stating only that she would make a finding on the identity of the treating doctor if necessary to resolve the other issues. The hearing officer has made such a finding, although the relevance is not established in the findings of fact or conclusions of law. The finding does, however, lend ambiguity to the effect of the hearing officer's conclusion concerning bona fide offer of employment.

I.

The facts developed at the short hearing are as follows. Respondent suffered a compensable injury to her neck while employed as a cook for (employer), on _____. Her first doctor was (Dr. B), to whom she was initially referred by her employer. She consulted Dr. B for approximately a month. A report by Dr. B dated April 27, 1991 described the injury as having occurred when heavy packages of frozen food fell on her head, neck and trapezius areas. The doctor noted pain at the base of the neck, some spasm, and mental confusion and sedation related to muscle relaxant prescriptions prescribed for her injury. The diagnosis was cervical strain. Pain and anti-nausea medication was given, and the doctor indicated respondent's ability to return to limited duty April 25, 1991.

Respondent testified that she changed doctors after Dr. B could give her no more prognosis than "only the Lord could tell." She went to (Dr. PA), her family doctor, beginning in May 1991, and continued under his care until April 20, 1992 (according to his records). An April 20, 1992 discharge summary by Dr. PA states "[o]n April 15, 1992, patient was re-evaluated. I told her that she should work on light duty status on part-time basis. She became upset and underwent spastic movements claiming she could not

work at all." Dr. PA goes on to note that she may have psychological pain relative to the injury, and suggested that she consult a psychologist. Dr. PA notes that x-rays and CT scans of the cervical spine, and CT scans of the brain and lumbar spine, are all negative. The diagnoses recorded on this summary are: 1. Strain, musculoskeletal-neck, thoracic, and lumbosacral area; 2. Concussion with post-traumatic headaches; 3. Psychosomatic pain; 4. Discogenic pain.

Respondent asserted that she disagreed with Dr. PA about her ability to do light duty work because she could not stand on her own two feet, and felt because of pain and burning and shaking of her right side, she could not work. She stated that she began to experience depression after her injury due to her inability to work and perform activities around the home without assistance.

She consulted (Dr. RP), a neurosurgeon, after being discharged by Dr. PA. On May 4, 1992, Dr. RP observed that he thought there was "a lot of emotional overlay" with respondent. At his recommendation, respondent had a lumbar and cervical myelogram which were found to be "unremarkable." Cervical findings on that date from a "Post Myelogram Computed Tomogram" state an impression as follows: "small left paracentral osteophyte, multiple levels, most marked C4/5 level, where there may be contact with the left lateral aspect of the spinal cord. Small narrowing of subarachnoid space is also detected on the left at the C 3/4 and C 2/3 levels with minimal ventral ridging, C 5/6 level."

A letter dated July 14, 1992, to the appellant's adjuster from Dr. RP, is somewhat cryptic. It notes that on that date, she had multiple complaints and was being seen at (hospital) for pain and "situational depression." He recommends that she continue this, and notes she is undergoing functional capacity evaluation, and that she will be seen August 20 to review those findings. The letter closes with "[p]resently, the patient continues off work duty." Appellant argued that this was nothing more than an observation of her status; respondent argued that it meant he had taken her off work. Respondent testified that Dr. RP advised her to seek a second opinion, and that she has gone to the (health center) medical facility. Respondent stated that she had consulted with two doctors at (health center), (Dr. T), M.D., (clinic), and (Dr. S), Ph.D., Department of Psychiatry, paying them through her Medicaid coverage. On June 26, 1992, respondent was examined by appellant's doctor, (Dr. W), whose diagnosis was neck and back pain; he noted her depression, and stated that she could "definitely return to light duty and should be able to lift at least 25 lbs. and should be able to do repetitive light duty work."

Appellant brought out evidence concerning respondent's income and expenses before and after the injury, arguing that she is financially better off with workers' compensation than she was before the injury. However, this seems only minimally relevant to the issue of disability, given the facts that 1) no doctor, whether acting at the behest of the appellant or the respondent, has opined that respondent can do anything more than "light duty," and 2) the appellant had <u>suspended</u> payment of TIBs for nearly 6 weeks by the time of the hearing.

As previously noted by the Appeals Panel, a restricted release to work, as opposed to an unrestricted release, is evidence that the effects of the injury remain, and disability continues. Texas Workers' Compensation Commission Appeal No. 91045 decided November 21, 1991. The trier of fact is not restricted to the opinions of only the treating doctor in assessing whether disability continues, although the treating doctor's opinion may be given greater weight. Texas Workers' Compensation Commission Appeal No. 92299 decided August 10, 1992. Under the facts of this case, respondent's initial choice of doctor was Dr. PA, because Dr. B was her company's choice of doctor. See Rule 126.7(f). Dr. RP became her second choice of treating doctor. However, Dr. PA treated her for the longest period of time; his discharge summary dated April 20, 1992 indicates that he felt she could do light duty work part-time. It is his opinion upon which the appellant said the employer based its offer of employment. Assuming that a part-time job was offered, such offer would not preclude a finding that disability continued.

There is sufficient medical and lay testimony that is uncontroverted that the respondent's depression is a direct result of her compensable injury; as such, it could appropriately be considered by the hearing officer as part of her injury as a cause of continued disability. Colonial Penn Franklin Insurance Co. v. Mayfield, 508 S.W.2d 449 (Tex. Civ. App.-Amarillo 1974, writ ref'd n.r.e.). We find that the record supports the hearing officer's determination that respondent's disability has continued.

II.

It is clear that appellant has interpreted the hearing officer's decision as a total negation of the employer's light duty job offer. If the decision clearly allowed a credit under Art. 8308-4.23(f), its argument that light duty programs would be undermined would have no merit, as the express intent of that statute would have been effectuated notwithstanding the finding of continued disability. The decision is ambiguous. Thus, although the hearing officer's findings and conclusions that a bona fide offer of employment was made are not directly contested, they necessarily must be reviewed to evaluate the appellant's arguments that the existence of a bona fide offer equates to an end to disability in this case, and that the decision as written would negate an employer's willingness to offer "light duty" employment. Those findings and conclusions are:

FINDINGS OF FACT

7. The Employer gave the Claimant a written offer of light duty employment on May 22, 1992, based upon the April 20, 1992, release to return to work of [Dr. PA].

8. The Claimant did not accept the Employer's offer of light duty employment.

CONCLUSION OF LAW

4. The Employer made a bona fide offer of light duty employment to the Claimant on

May 22, 1992, which the Claimant did not accept, pursuant to 28 T.A.C.§ 129.5.

The hearing officer further finds that Dr. RP is respondent's treating doctor and he has not released her to work. The hearing officer reverses in total the order of the benefit review officer suspending payment of TIBS.

We note that the recommendations of the benefit review officer are not evidence of the truth of the matters stated therein nor *res judicata*, but are recommendations based upon unsworn statements that are made part of the hearing record to establish the parameters of the issues before the contested case hearing officer. *See* Art. 8308-6.13(c) and (d). Thus, the existence of a bona fide job offer must depend upon the evidence developed in the contested case hearing. The only testimony concerning a job offer by the employer is as follows:

HEARING OFFICER: They offered you a job to go back to work. What have they told you you would do?

CLAIMANT: Modified duty.

Q: Do you know what that would be?

A: No.

Q: Would you be a cook?

A: I don't think so. There's too much lifting and too much walking involved, too much stretching.

Later, during a brief passage of cross-examination testimony, respondent agreed that she had been offered "light duty" by employer, but only once, verbally, at the benefit review conference. She denied that she had received an earlier job offer, or that she had received a written offer:

CLAIMANT: You talked about a letter that she had tried to reach me that I wasn't aware about. And so that day she was offering me the light duty position.

CARRIER: So you deny receiving a letter of light duty prior to the benefit review. And do you deny having it in your possession at the benefit review conference?

A: Yes, I do.

Q: So that's probably the reason, is it not, that the offer of light duty was given to you verbally at the benefit review conference, and you do

recall that you were verbally told that you could come back to do light duty; is that correct?

A: Correct."

Respondent at this point further testified that it was "correct" that employer offered to "make whatever accommodations were necessary to accommodate your light duty."

At the end of the hearing, the appellant's counsel stated:

COUNSEL: Since the claimant has, more or less, admitted that she has been offered a light duty job and that that light duty job is still open, I think we're going to waive the testimony of [employer's representative], who is here prepared to testify that that light duty job has been offered to her. If the claimant will admit to that once more in open court, that she knows the job has been offered to her, then there will be no sense in taking up the court's time with additional testimony. Do you so admit that, that you have been offered this job by [employer] and that it is a continuing offer?"

CLAIMANT: "Yes."

Appellant offered into evidence a March 26, 1992 letter described as the written offer of employment. In fact, it is a letter from the employer to Dr. PA, not to respondent, indicating that the company "would like to bring her back to some type of work when you believe she is ready. I oversee our modified duty program and will ensure that she adheres to, any type of restrictions that she might have. We can also provide sedentary duty of necessary." Plainly, this letter is not an offer of a position to the respondent; it is, at best, an expression of intent to make an offer once respondent's physical restrictions are known. No evidence of any follow-up to this letter was developed.

The amount of TIBs paid, or payable, 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 such a position is accepted, the offered wage will be imputed to the employee. Article 8308-4.23(f).

While a job offer may be "bona fide" in the layman's sense that the employer is sincere, the statute plainly requires more than a sympathetic motive before the TIBS benefit can be reduced. The elements that the Commission will consider to determine if an offer of employment is "bona fide" for purposes of Art. 8308-4.23(f) are described in Texas W.C. Comm'n, 28 TEXAS ADMIN. CODE § 129.5(a) (Rule 129.5). Because the offer made in this case was verbal (notwithstanding the findings of the hearing officer), the

appellant was required to prove by "clear and convincing" evidence that a bona fide job offer had been made. Rule 129.5(b); Texas Workers' Compensation Commission Appeal No. 91023 decided October 16, 1991. The testimony in the record above indicates, at best, that an offer of "light duty" was made, but the particular position to be performed, the wage to be paid, the hours to be worked, or the physical requirements of that position were not conveyed to the respondent (according to her testimony), nor developed in the record. Moreover, respondent's unwavering posture at the hearing, uncontroverted, was that whatever was offered was not within her physical capabilities to perform. Absent a commonly understood definition in the law of what constitutes "light duty," we are unable to ascertain how the hearing officer determined that the generalized "offer" was one meeting the requirements of the statute and rules. In addition, although a legal conclusion that a bona fide job offer was made would seem to allow the appellant to take some credit against TIBS under Art. 8308-4.23(f), the hearing officer's finding that Dr. RP was the treating physician and that he has not released respondent to work make the hearing officer's order ambiguous, because she also finds that there was a written offer of employment which must be made according to physical limitations set forth by the treating doctor. Rule 129.5(b).

Appellant's burden of proof is not discharged by respondent's admission that she had received a general offer, verbally, of "light duty" work when it is also her assertion she cannot do the work. The ability of the employee to perform an offered job must be analyzed with reference to the physical condition of the employee at the time that the offer is made. Dr. PA, whose recommendation appellant claimed was the trigger for the offer, stated that respondent could only perform a light duty, part-time position. Therefore, a light duty full-time position, notwithstanding the general offer of the employer to "accommodate" respondent, would arguably exceed the physical capabilities of respondent as set out by Dr. PA.

The evidence indicates that, contrary to the hearing officer's findings that a written offer was made, the only time that an offer was communicated to respondent was verbally at the benefit review conference on May 26, 1992. The respondent did not admit, but expressly denied, that she received a written offer, and the appellant never proved a written offer. The document it characterized as the written offer in the record was the letter to Dr. PA described above.

In the absence of a written offer (or given a written offer lacking the elements of Rule 129.5(h)), it was appellant's burden to establish that the job offer was bona fide under a "clear and convincing" standard of proof. Rule 129.5(b); Texas Workers' Compensation Commission Appeal No. 91023, cited above. The evidence contained in this record does not rise to a preponderance level, let alone "clear and convincing" evidence.

The hearing officer's erroneous conclusion that respondent received a written offer, not supported by this record, may have lead to application of the wrong legal standard for assessing whether a bona fide job offer was made (the hearing officer may

have determined that no TIBS offset was due because a written offer was not made based upon the treating doctor's recommendation). If the hearing officer, upon further development of the evidence, determines that a bona fide offer meeting the standards of Rule 129.5 was made, and refused, then the appellant is entitled to an offset against TIBS pursuant to Art. 8308-4.23(f). If the hearing officer meant, however, that an offer was made but it was not one that the respondent was reasonably capable of performing, then this needs to be articulated in findings and conclusions to that effect. We are unable to ascertain from the facts in this record whether such was the case.

We reverse and remand the case for the purpose of allowing the hearing officer to clarify her findings and conclusions relating to the bona fide job offer. While there is sufficient evidence to support her findings that respondent's disability has continued, there is insufficient evidence that would allow us to assess and rule on the impact of her findings and conclusions that a bona fide job offer was made as it affects her order relating to payment of TIBS. Pending final resolution of the remand, no final decision is rendered.

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Susan M. Kelley
Appeals Judge

CONCUR:

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Joe Sebesta
Appeals Judge

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Lynda H. Nesenholtz
Appeals Judge