APPEAL NO. 92440

On July 23, 1992, a contested case hearing was held in (city), Texas, with (hearing officer) presiding as the hearing officer. There were two issues to be decided at the hearing: (1) whether the claimant, (claimant), respondent herein, received a bona fide offer of light duty work in April, 1992 that he was physically capable of performing; and (2) whether respondent was entitled to select (Dr. S) as his second choice of treating doctor. The hearing officer determined that appellant, the workers' compensation carrier for the employer, (employer), did not establish by clear and convincing evidence that the employer made a bona fide offer of employment pursuant to Tex. Workers' Comp. Comm'n, 28 TEX. ADMIN. CODE Sec. 129.5 that respondent was reasonably capable of performing, and that respondent was not entitled to select (Dr. S) as a third choice of treating doctor. (The hearing officer found that respondent had made a first and second choice of treating doctors so that (Dr. S) would be his third choice of doctor rather than his second choice as indicated by the wording of the issue). The hearing officer determined that respondent is entitled to payment of all unpaid, accrued temporary income benefits (TIBS), with interest, and that he is entitled to TIBS as and when they accrue from the date of the decision in accordance with the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq*. (Vernon Supp. 1992) (1989 Act).

Appellant contends that it has met its burden of proof by clear and convincing evidence that the employer made a bona fide offer of employment to respondent, and asks that we reverse the decision of the hearing officer on this issue and render a new decision denying respondent temporary income benefits. Appellant does not appeal the decision regarding the second issue on choice of doctors.

We have considered that portion of respondent's response which responds to appellant's request for review; however, we do not address that portion of the response which indicates disagreement with the hearing officer's determination regarding the second issue on choice of doctors since that is in the nature of an appeal and it was not timely filed as an appeal in accordance with Article 8308-6.41(a). *See* Texas Workers' Compensation Commission Appeal No. 92289 (Docket No. redacted) decided September 28, 1992.

DECISION

The decision of the hearing officer is affirmed.

At the hearing, appellant contended that on March 9, 1992, respondent was offered a bona fide position of employment with the employer that respondent was reasonably capable of performing. Appellant acknowledged that it was an oral offer of employment. It is not clear from the record why the disputed issue refers to an offer in April 1992 instead of March 1992. Respondent contended that the position offered did not comply with the restrictions set forth in his medical release to return to work, and that he was not capable of performing the offered position given his physical condition. On appeal, appellant contends that the hearing officer erred in concluding that it had not established by clear and convincing

evidence that the employer made a bona fide offer of employment that respondent was reasonably capable of performing.

An employee who has sustained a compensable injury and who has disability and has not attained maximum medical improvement is entitled to TIBS in accordance with applicable provisions of the 1989 Act. *See* Articles 8308-4.21, 8308-4.22, and 8308-4.23. TIBS are payable at the rates provided by Article 8308-4.23(b) and (c) which take into account the difference between the employee's average weekly wage and the employee's weekly earnings after the injury. However, under Article 8308-4.23(f), 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. Tex. Workers' Comp. Comm'n, 28 TEX. ADMIN. CODE Sec. 129.5(b) provides that 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. We have observed in a previous decision that according to case law, clear and convincing evidence requires sufficient proof to give the trier of fact a firm belief or conviction as to the truth of the allegation, and that clear and convincing evidence is intermediate proof, between "a preponderance of the evidence" and "beyond a reasonable doubt." *See* Texas Workers' Compensation Commission Appeal No. 91023 (Docket No. redacted) decided October 16, 1991. Rule 129.5(a) provides that in determining whether an offer of employment is bona fide, the Commission shall consider, among other things, the physical requirements and accommodations of the position compared to the employee's physical capabilities.

The parties stipulated that respondent sustained a compensable injury on (date of injury) while working for the employer, that on that date appellant was the employer's workers' compensation insurance carrier, and that appellant paid respondent TIBS from the date of injury to March or April, 1992.

In (month year), respondent worked full-time from 8:00 a.m. to 5:00 p.m. as a receiver in the employer's store. His duties included unloading merchandise from trucks, moving fixtures, ordering supplies, and cleaning the store with a broom, mop, and buffing machine.

Respondent testified that on the day of his injury he felt a sharp pain in his left shoulder when he threw a box into a dumpster at work. The employer suggested that respondent visit (Dr. M). (Dr. M) referred respondent to (Dr. D) whom he saw from January 31, 1991 to sometime in June, 1991. (Dr. D) advised that respondent should remain off work and, after tests were done, diagnosed respondent as having symptomatic cervical spondylosis, possible cervical radiculopathy, and possible neurological disorder. Respondent underwent several months of physical therapy on (Dr. D's) recommendation. In July 1991, respondent began treatment with (Dr. M). Respondent completed a work hardening program and his physical capabilities and return to work status were then assessed by a physical therapist in January 1992. The physical therapist reported to (Dr. M) that he was not confident that respondent would be able to tolerate the requirements of

his job as a maintenance/stock man that he previously worked at, that respondent would benefit from a continued strengthening program, and that respondent was looking into retraining to move into another form of employment. Respondent said that he began taking chef classes in January 1992 while he was off work.

In January 1992, (Dr. M) advised that respondent could return to light duty work starting February 3, 1992, and that respondent could probably return to regular work in a couple of months. In February 1992, (Dr. M) clarified for appellant what he meant by light duty. (Dr. M) wrote that respondent should not be permitted to perform any duty which will be for periods of more than three hours in any of the bending, stooping, or climbing activities, that he should not be permitted to do lifting over 25 pounds, and that if he was given a task to perform, he should be permitted to have three hours work and one hour rest. Respondent said that he disagreed with (Dr. M's) assessment of his ability to do light duty work because his condition had not improved.

In response to respondent's release to light duty work, the employer offered respondent a position of employment in March 1992. The testimony concerning the physical requirements of the position is reviewed in the paragraphs which follow. The employer was aware that respondent was attending chef classes in the mornings so it accommodated respondent by offering him a position from 3:00 p.m. to 9:00 p.m. three days a week. In response to the offer of employment, respondent worked only two days, March 11th and 12th. In May 1992, (Dr. M) again issued a work release advising that respondent was released to work light duty with no lifting over 25 pounds, and no sustained bending, stooping, or climbing. The reason for the second light duty release is not clear as there was no evidence adduced to the effect that (Dr. M) had ever taken respondent completely off work after he issued the release to light duty in January 1992. On July 16, 1992, seven days before the date of the contested case hearing, the employer wrote to respondent stating that it would "like to re-enforce that we have modified a position and light duty is available." The employer went on to state that it was more than willing to stay within the 25 pound restriction and it would modify the receiver's duty to fit the description (apparently referring to (Dr. M's) light duty work releases). Respondent had a motorcycle accident on June 26, 1992, in which he broke his right ankle. He had a cast on his right leg at the hearing.

The employer's store manager, (KB), testified that he made an oral offer of employment to respondent on March 9, 1992, when respondent showed up at work with (Dr. M's) light duty release of January 1992. This witness testified that he knew about the work restrictions imposed by (Dr. M) and that he discussed the restrictions with respondent and then modified the receiver position to not only accommodate respondent's chef classes, but also to fit within all of the restrictions set forth by (Dr. M). He said that the modified position did not require respondent to lift anything over 25 pounds and that respondent was not required to climb or to do sustained bending or stooping. He further testified that on the two days respondent returned to work, respondent never complained to him or anyone else at work about not being able to do the work or about the job duties not being in compliance with the work restrictions. He said that all that was required of respondent in the modified

position was sweeping, spot mopping, some buffing with a machine that was on wheels, and emptying light trash cans.

In contrast to the store manager's testimony, respondent testified that the store manager never told him about modifying the receiver position except for changing his work hours. He said that when he returned to work on March 11th and 12th he was required to do all of his regular work duties except for unloading trucks. Apparently, trucks are received and unloaded at the store only during the mornings. He said that he was required to lift and move fixtures and racks that were not on wheels and which weighed more than 25 pounds. He also said that he was required to do extensive bending and stooping in sweeping under clothes racks and in picking up clothes that had fallen off of the racks. He said he had to bend over and pick up an item about every five feet while he was cleaning the store. He further stated that the buffing machine was heavy and required him to physically strain to move it about. Respondent testified that the "tremendous" amount of stooping and bending he was required to do caused him pain and that the pain caused him not to be able to do the work. He said that the week following March 12th, he called the store and told the assistant manager, (Ms. F), that he was not refusing to do the work, but that he could not do the work. No statement from (Ms. F) was offered into evidence.

After reciting the restrictions in (Dr. M's) light duty work release effective February 3, 1992, the hearing officer made the following findings of fact:

Finding No. 6. The work offered by employer in March, 1992 did not match the restrictions of (Dr. M's) light-duty work release because it required the use of a heavy buffer and moving and lifting fixtures weighing more than twenty-five pounds.

Finding No. 7. Claimant attempted to perform the work offered by employer in March, 1992, but was not physically cable of performing the work.

The hearing officer also found that the employer did not make a written offer of employment in March 1992, and concluded from her findings that appellant did not establish by clear and convincing evidence that the employer made a bona fide offer of employment pursuant to Rule 129.5 that respondent was reasonably capable of performing.

The hearing officer is the sole judge of the weight and credibility to be given the evidence. Article 8308-6.34(e). As the trier of fact, the hearing officer weighs all the evidence and decides what credence should be given to the whole, or to any part, of the testimony of each witness, and resolves conflicts and inconsistencies in the testimony. Texas Workers' Compensation Commission Appeal No. 92435 (Docket No. redacted) decided October 5, 1992. That different inferences might reasonably be drawn from the evidence is not a basis to set aside the hearing officer's decision. Appeal No. 92435, *supra*. The decision of the hearing officer will only be set aside if the evidence supporting the hearing officer's determination is so weak or against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Appeal No. 92435, *supra*. In this

case, appellant contended that it made a bona fide offer of employment to respondent in March 1992. Since the offer was not in writing, appellant had the burden to prove by clear and convincing evidence that a bona fide offer was made.

Apparently, the hearing officer chose to believe respondent's testimony concerning the physical requirements of the position offered to him over the testimony of the store manager. The hearing officer is in the best position to judge the credibility of witnesses and that is why she is the judge of the credibility of the witnesses and the weight to be given the testimony. Respondent's testimony supports Findings of Fact Nos. 6 and 7, and those findings support the hearing officer's conclusion that appellant did not establish by clear and convincing evidence that the employer made a bona fide offer of employment that respondent was reasonably capable of performing. Having reviewed the record, we conclude that the hearing officer's determination concerning the issue of bona fide offer of employment is supported by sufficient evidence and is not against the great weight and preponderance of the evidence. *See* Texas Workers' Compensation Commission Appeal No 91024 (Docket No. redacted) decided October 23, 1991.

Appellant asks that we consider on appeal the fact that respondent was attending chef school at the time he was offered employment in March 1992, and the fact that respondent broke his ankle on June 26, 1992 in a motorcycle accident unrelated to work. Much to its credit, the employer accommodated respondent by scheduling his work around his classes; however, the dispute at the hearing concerned the physical requirements of the offered work and whether respondent was physically capable of performing the work. That respondent was attending school during hours other than work hours does not add materially to help appellant meet its burden of proof, especially considering that respondent testified that thus far his classes have not required him to stoop, bend, or lift. The motorcycle accident occurred several months after the March 1992 offer of employment on which appellant relies, and thus can not be considered as having had any bearing on respondent's physical capabilities at the time of the offer. Furthermore, no evidence was adduced as to whether respondent's motorcycle injury in June 1992 was the sole cause, much less a cause, of his asserted inability to perform the offered work after the date of the motorcycle accident.

The decision of the hearing officer is affirmed.

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Robert W. Potts
Appeals Judge

CONCUR:

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Stark O. Sanders, Jr.
Chief Appeals Judge

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Joe Sebesta
Appeals Judge