

## APPEAL NO. 92579

On May 11, 1992, a contested case hearing was held in (city), Texas, with (hearing officer) presiding as the hearing officer. The hearing was held under the provisions of the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq.* (Vernon Supp. 1992) (1989 Act). The appellant, hereafter the carrier, appeals the hearing officer's determination that the employer did not make a bona fide offer of employment to the claimant. Respondent, hereafter the claimant, filed an untimely response which is not considered on appeal.

### DECISION

The decision and order of the hearing officer are affirmed.

This case concerns an oral offer of employment made to the claimant by his employer. For purposes of Article 8308-4.23(c) and (d) relating to calculation of temporary income benefits, 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. Article 8308-4.23(f). Tex. Workers' Comp. Comm'n, 28 TEX. ADMIN. CODE Sec. 129.5 sets forth matters to be considered in determining whether an offer of employment is bona fide, and provides that a written offer of employment is presumed to be bona fide if it clearly states certain matters set forth in the rule. If the offer is not made in writing, then the insurance carrier must provide clear and convincing evidence that a bona fide offer was made. We observed in Texas Workers' Compensation Commission Appeal No. 91023, decided October 16, 1991, that 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." 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 claimant claimed that while he was working for his employer, (employer), on (date of injury), a heavy box fell on his right shoulder and neck. He was examined at a hospital on January 18th and was then examined by his treating doctor, (Dr. M), D.O., on January 29th. (Dr. M's) diagnosis was acute cervical sprain, radicular syndrome upper limbs, and myositis. He performed a functional capacities evaluation on the claimant and released the claimant to light duty work on March 11, 1991. Among other work restrictions, (Dr. M) indicated in his written work release that the claimant could "push/pull" and "reach" only occasionally. The work release indicated that "occasionally" meant "1%-33%" of the time.

The claimant went to his employer's place of business on March 11th and 12th and

asked for light duty work. He said he gave his employer (Dr. M's) work release.

The employer's dock supervisor, (Mr. W), testified that the claimant gave the doctor's work release to the plant manager who then told him to put the claimant on "light duty." He said that he was unaware of the restrictions in the work release and that he thought that light duty meant not lifting anything heavy. The dock supervisor told the claimant that he would be cleaning and sweeping the floors for eight hours a day, five days a week. He said that sweeping the floors required pushing a mop and broom and pulling or pushing a trash can that was on rollers. The claimant did not perform the work that was offered, but instead left the employer's place of business. The claimant did not contact the employer, and the employer did not contact the claimant after March 12th.

At the hearing, the claimant showed the dock supervisor a copy of the work release and then the following exchange took place:

Question by claimant: I'm just asking. I showed you here, sir, where it said that he's able to occasionally push and pull. Now, if he had been working on what you said you were going to work him at, he would have been doing that all day; right?

Answer by dock supervisor: Right.

The following exchange took place between the claimant and (Mr. F), a witness for the carrier who described his job position as a "hearing officer" for the carrier, after the claimant established that (Mr. F) had looked at the claimant's work restrictions:

Question by claimant: Do you remember any variation in the story of (Mr. W) that he told here today under oath?

Answer by (Mr. F): No sir. I talked with (Mr. W) prior to the hearing [referring to the benefit review conference], during the hearing, and after the hearing, and his testimony has been the same, that he offered light duty, that he left and looked for [the claimant] and couldn't find him, and that's it.

Question by claimant: But his idea of light duty was his alone, wasn't it? I mean, it didn't comply with what the doctor said, as far as you know?

Answer by (Mr. F): As far as I know, no.

Having reviewed the record, we conclude that the findings of fact made by the hearing officer are supported by the evidence and that the findings support the hearing officer's conclusion that the employer did not make a bona fide offer of employment to the claimant. See Texas Workers' Compensation Commission Appeal No. 92440, decided

October 8, 1992. It is undisputed that the employer made an oral offer of employment. Consequently, the carrier had to prove by clear and convincing evidence that a bona fide offer was made. It is also undisputed that the claimant's doctor restricted the claimant's work to, among other things, only pushing, pulling, and reaching occasionally, and that the job offered the claimant required him to push a broom or mop, and push or pull a trash can for eight hours a day, five days a week. It could reasonably be inferred from the evidence that the physical requirements and accommodations of the position offered to the claimant did not compare favorably with the claimant's physical capabilities as evidenced by the restrictions contained in his light duty work release.

The decision and order of the hearing officer are 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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Thomas A. Knapp  
Appeals Judge