APPEAL NO. 92603

This appeal arises under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq*. (Vernon Supp. 1992) (1989 Act). A contested case hearing was held on October 7, 1992, in (city), Texas, (hearing officer) presiding. The original issue presented was whether the carrier was entitled to a benefit review conference (BRC) based on its request of May 13, 1992. By agreement of the parties, a second issue was added: whether the claimant had disability based on a (date of injury), compensable injury, after April 27, 1992. The hearing officer concluded that the carrier was entitled to a BRC because the request raised the issue of whether the claimant has or had disability. He also held that from (date of injury) through October 7, 1992, the claimant was unable to obtain or retain employment at his preinjury wage based upon his compensable injury, and thus had disability and was owed temporary income benefits (TIBs) during that period and thereafter until he reaches maximum medical improvement or no longer has disability as defined by the 1989 Act.

Appellant carrier contends that the hearing officer erred by his findings of fact and conclusions of law concerning the existence of claimant's disability. The claimant maintains that the hearing officer's decision is supported by the evidence.

DECISION

We affirm the decision and order of the hearing officer.

There was no dispute that the claimant, who was an employee of (employer), suffered a compensable injury to his back on (date of injury). He was seen on that date, and on January 8, 1992, by employer's doctor, (Dr. M), who stated on an Initial Medical Report (Form TWCC-61) that claimant could return to limited type of work 1/2/92. A notation on that form dated 1/8/92 says, "Patient comes in today with same complaints-no change in pain in R sacroiliac area. Didn't go to work yesterday and didn't come here. Does not want to work at light duty and chooses to see `his own doctor' at this time."

Thereafter, claimant began seeing (Dr. M), who on January 9th diagnosed lumbar radiculopathy and lumbar sprain and took claimant off work. Claimant continued to see Dr. M, who kept him off work at least through June 4th. Dr. M ordered tests on January 15, 1992; an x-ray showed an unremarkable lumbar spine, and a CT scan showed L4-5 approximately 5-6mm left lateral bulging annulus encroaching on left neural foramina and L5-S1 trifoliate appearance of bony spinal canal with lateral-recess stenosis (with clinical correlation suggested). Testing by Psychometric Medical Services, Inc., found claimant's pain intensity high, with no emotional overlay evident.

At the carrier's request, claimant was seen on April 27th by (Dr. W). Dr. W stated his diagnostic impression as follows: congenital spinal stenosis at L4-5 and L5-S1; disc bulge at L4-5, further compromising the AP diameter of the canal and encroachment upon the left neural foramen as demonstrated on the CT scan of the lumbar spine; bilateral hamstring contractures; postural low back pain; and aerobic deconditioning. He stated that

claimant could return to light work with the lifting restriction of 35 pounds (regular) and 50 pounds (occasionally). Dr. W also completed and signed a Report of Medical Evaluation (Form TWCC-69) which stated "unknown" in response to the question, "Has employee reached maximum medical improvement," but which assigned a whole body impairment rating of 7 percent.

(Mr. R), employer's project superintendent, testified at the hearing that the employer made an offer of light duty work to the claimant after finding out he had been released to light duty by Dr. W. Mr. R stated that employer first attempted unsuccessfully to contact claimant by telephone, through an employee who speaks Spanish. On May 14th, Mr. R sent a letter to claimant at "(address), (city), Texas." The letter stated that employer had been notified that claimant had been released to light duty work, and that employer had full time light duty work available. The letter instructed claimant to call for further assistance.

On June 15th, Mr. R sent another letter to claimant at "(address), (city), Texas, (zip code)." That letter notified claimant that employer "had several different tasks that you can perform with no additional risk of injury to your back." These jobs included traffic flagging and fabrication of modular glare screens used on concrete traffic barriers, neither of which required excessive bending or lifting weight in excess of five pounds. The letter concluded by asking claimant to phone Mr. R to schedule a time to begin work or if claimant had any questions. At the hearing, Mr. R testified that he did not know whether the letters were sent by certified mail. He stated that the light duty positions were still available to claimant.

The claimant testified through an interpreter that his address in mid-May of 1992 was (address), (city), Texas, (zip code). He said he had previously lived at (address) in (city), but that he could not remember when he moved. Until June 3rd, he said, he continued to receive benefit checks at the (city) address. He said he did not remember anybody ever telling him anything about light duty work except for Dr. W, although he stated on cross-examination that he understood his employer had a job available for him which was within Dr. W's limitations. However, he said, "I am afraid that if I don't pick up a certain amount of things as they ask me to, I could get fired." In answer to a question from the hearing officer, the claimant said he did not believe he could do any of the jobs offered because of his back pain.

On May 11th the carrier filed with the Commission a request for a BRC (Interim Form TWCC-45), on the grounds the claimant had been released to work light duty and that light duty work had been tendered by the employer. By letter of May 21st, a Commission disability determination officer denied the request because it did not indicate a disputed issue. Carrier's position at the hearing was that pursuant to Article 8308-4.16(e) it was entitled to a BRC on the next available docket, and that the carrier would have been entitled to suspend TIBs at that BRC. The carrier thus asked for a decision and order confirming its right to a BRC, ordering the suspension of TIBs, and allowing it to recoup TIBs paid since May 21st.

In his discussion, the hearing officer cites both Article 8308-4.16(e) and Tex. W.C.

Comm'n, 28 TEX. ADMIN. CODE § 126.6(e) (Rule 126.6(e)), noting that neither specifies whether a full release to work is necessary to trigger a BRC. (We observe that there is nothing in the record that indicates that Dr. W examined claimant under an Article 8308-4.16 order.) In his conclusions of law, however, the hearing officer stated that the carrier was entitled to a BRC because his request raised the issue of whether the claimant had disability. However, the hearing officer stated that the issue of the BRC was largely moot because of his finding that the claimant has been and still is unable to obtain and retain employment at his preinjury wage based on his compensable injury. It is this determination on which the carrier's appeal is centered. While the carrier's entitlement to a BRC was not an issue on appeal, we wish to reiterate at this point our endorsement and full support for the dispute resolution process of the 1989 Act as a means of bringing disputes of this nature to the table. It is the purpose and function of a BRC to mediate and resolve disputed issues, if possible and, if not, to frame the issues in dispute. *See* Texas Workers' Compensation Commission Appeal No. 92049, decided March 16, 1992, which states it is appropriate, and generally advisable, for a carrier to seek a BRC and an interlocutory order to suspend benefits rather than to unilaterally take such action. We agree with the hearing officer's determination that the carrier in this case was entitled to a BRC because its May 11th request stated a disputed issue.

In its appeal, the carrier challenges the hearing officer's findings and conclusions on disability, based upon the employer's tender of an offer of employment. The 1989 Act provides that an employee who has disability and who has not attained MMI is entitled to TIBs. Article 8308-4.23(a). As noted earlier, "disability" is defined by the Act as the inability to obtain and retain employment at wages equivalent to the preinjury wage because of a compensable injury. Article 8308-1.03(16). The Act further provides that for purposes of computing TIBs, if an employee is offered a bona fide position of employment that he 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. Article 8308-4.23(f).

Rule 129.5 provides that a written offer of employment which was delivered to the employee during the period for which benefits are payable shall be presumed to be a bona fide offer, if the offer clearly states the position offered, the duties of the position, that the employer is aware and will abide by the physical limitations under which the employee or his treating physician have authorized the employee to return to work, the maximum physical requirements of the job, the wage, and the location of employment. *See* Rule 129.5(b). The hearing officer declined to address whether a bona fide offer of employment had been made, because of his determination that the claimant could not perform any work. We agree with the carrier's statement that "there can be no more laudable goal under the 1989 Act than to return employees to work at preinjury wages for their previous employer." However, we observe in passing that it does not appear from the record below that all the conditions contained in Rule 129.5(b) for a bona fide offer were present. There was no release to work by the employee's treating physician, and certainly a fact issue was raised as to whether the offer was "delivered to the employee."

In addition, this panel has held that disability may be established by a variety of means. For example, we have held that a claimant's own testimony can establish disability, even where contradicted by other evidence. Texas Workers' Compensation Commission Appeal No. 91083, decided January 6, 1992. Further, we have held that even an unconditional medical release to full duty does not, in and of itself, end disability. Texas Workers' Compensation Commission Appeal No. 91045, decided November 21, 1991. Where a release is conditional, there must be evidence to show there is employment at preinjury wage levels reasonably available to the employee meeting the conditions of the release, taking into consideration reasonable limitations on the type of work suitable within the framework of the employee's abilities, training, experience and qualifications, and that the employee has not availed himself of such employment opportunities. Appeal No. 91045, *supra*.

In the instant case, the hearing officer had before him medical evidence concerning the claimant's condition and the fact that the claimant's treating doctor had not released him to return to work. He also had the claimant's own testimony regarding his back pain, which we have held may be considered in determining disability. Texas Workers' Compensation Commission Appeal No. 91024, decided October 23, 1991. While the opinion of the carrier's doctor is also probative evidence, Texas Workers' Compensation Commission Appeal No. 91060, decided December 12, 1991, we cannot say from the record in this case that the hearing officer's determination that claimant had disability was so against the great weight of the evidence as to be clearly wrong or unjust. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986).

The decision and order of the hearing officer are accordingly affirmed.

Lynda H. Nesenholtz
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Joe Sebesta
Appeals Judge