APPEAL NO. 92637

On October 30, 1992, a contested case hearing on remand was held in (city), Texas, with (hearing officer) presiding. The hearing officer, who at the first hearing determined that the claimant (claimant), who was compensably injured (date of injury), 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), considered the issue on remand of whether the claimant had been offered a bona fide position of employment for purposes of applying the credit against temporary income benefits (TIBs) provided for in the 1989 Act, Article 8308-4.23(f). The hearing officer determined that two offers, one verbal and one written, that were made in May 1992 to the claimant were not bona fide offers of employment, and found that the carrier, who is the appellant, was liable for TIBs. The hearing officer made no express findings concerning a written offer of modified duty dated October 16, 1992.

The carrier has appealed, arguing that it did make a bona fide offer of employment in either May 1992 or in a October 16, 1992 letter; that it was error for the hearing officer to ignore the October 16, 1992 offer; and that it was error for the hearing officer to refuse to add an issue on disability. The carrier asks that it be allowed a credit against TIBs, under Article 8308-4.23(f). The claimant has not responded.

DECISION

After reviewing the record of the case, we affirm the determination of the hearing officer.

In the Appeals Panel decision on the first appeal, Texas Workers' Compensation Commission Appeal No. 92432, decided October 2, 1992, we reversed and remanded the case because of the ambiguity surrounding the hearing officer's determination that the claimant had been tendered a bona fide offer of employment which she had refused, when the hearing officer also ordered payment of TIBs with no apparent offset allowed. Because the record from the first hearing was essentially devoid of evidence concerning the terms of any offer, and because the claimant appeared to have been only released to part-time work, we could not determine the merits of the carrier's point on appeal that a bona fide offer had been made.

The facts of the prior hearing will not be repeated here. At the remand, the carrier presented the testimony of (Ms. D), the Occupational Manager for the employer. She stated that at the benefit review conference on May 22, 1992, she verbally told the claimant that the employer was told that she could come back to work at any job tailored to her restrictions, at $6.70 per hour. Upon further questioning by the hearing officer, Ms. D admitted that she did not specifically tell claimant how long the job would be open, how long it would last, or specifically what the job would be--all this was described as being "left open". Ms. D said that claimant rejected this, stating that she was in too much pain to work.

On May 27, 1992, Ms. D wrote what she characterized as a written verification of this verbal offer.[1] This says:

Our records from (Dr. PA)[2] indicate that you were released to modified duty in April 1992. The [employer] has an extensive modified duty program in which I oversee [sic]. We value your employment here and would like for you to return to modified duty as soon as possible. Please let us know if you are interested in returning to work here by June 5, 1992.

Please call me or [Human Resources Director] if you have any questions. I am enclosing copies of the letters I sent to your physicians for your records.

The claimant stated that she did not respond to this because, at the time, she was "very, very confused with my pain, not knowing what directions to take." She said that she decided she could not do light duty then on any basis.

On October 16, 1992, Ms. D sent another letter to the claimant, which says:

Our records from (Dr. RP) and (Dr. PA), including your functional capacity evaluation indicate that you should be able to return to some type of modified duty program in which I oversee [sic]. We value your employment here and would like for you to return to modified duty as soon as you are able.

We would like to offer you a modified duty position as a silver steward for a period of 90 days at the location of your previous job. After 90 days we would reevaluate your modified duty status in hopes of returning you to your training as a cook. You would be working four to six hours a day (your option), five days a week at the rate of $6.70 an hour.

Your job as a silver steward would entail no lifting over 10 lbs., any pushing over 50 lbs., and no bending, twisting or stooping. You would be allowed to sit or stand as you needed and take a 30 minute break the mid-point of your shift.

Please let [Director of Human Resources] know by November 16, 1992 if you are interested in this position or if you have any questions.

Ms. D stated that it was her understanding that the claimant had not moved since her

[1] Although the claimant indicated at the July 16, 1992 hearing that she had received only one job offer from the employer, and that it was at the benefit review conference, and she further testified that the offer at the benefit review conference was verbal, she admitted at the remand hearing that she had received the May 27, 1992 letter, and certified mail delivery to her was also proven. However, the carrier did not ask the direct question whether a written offer had been received by claimant after the benefit review conference, and did not offer the May 27th letter at that time. Thus, the impression left by the claimant's testimony was that she denied receiving a written offer.

[2] [Dr. PA] was the claimant's first treating doctor, as noted in Appeal No. 92432.

injury, and the claimant did not contend that she did or that the position was otherwise geographically inaccessible. At the time of her injury, the claimant stated that she had worked for employer for three years, in the kitchen area.

The claimant stated to the hearing officer that she did not object to the October 16, 1992 letter being considered as evidence. The carrier's representative asked the claimant if she intended to accept this position; the claimant pointed out that the offer gave her until November 16, 1992 to decide. When asked whether she thought she could polish silver, claimant was initially nonresponsive, expressing concern about safety in the area of employer's location. She then said that she could not polish silver because she was too nervous. Claimant stated also that her physical condition that would preclude her from taking advantage of the offer related to muscle spasms in her neck and her need to lay down, as well as weakness and fatigue. Claimant stated that her physical ability to get around had been severely limited by her accident. She indicated that she did not resort to bed rest so much anymore because this depressed her too much. She stated that she had made no decision whether to accept or reject this offer at the date of the second hearing.

As noted in the previous Appeals Panel decision, (Dr. PA) indicated that he felt claimant's pain might have a psychological basis, and that he released her to light duty work. Her next doctor, (Dr. RP), a neurosurgeon found by the hearing officer to be the claimant's treating doctor, noted that the claimant had "a lot of emotional overlay". There was evidence at the first hearing that Dr. RP conducted a functional capacity evaluation which he would be reviewing with the claimant on August 20, 1992. At the remand hearing, the results of this test were apparently reduced to writing, and at the hearing, but neither party offered this report. The claimant denied that she had seen this written report or that she had reviewed it with Dr. RP on August 20th, although she admitted that she met with Dr. RP on that date and was curious about the results of the testing. She said that Dr. RP told her that day to stay off work duty. The claimant also testified that her physical condition had not changed in degree from the situation she described in July 1992 in answer to carrier's interrogatories in which she described pain, cramps, numbness, and shakiness. By contrast, an October 22, 1992 letter from the Pain Clinic at the (center) to Dr. RP, which was put into evidence by the claimant, stated that the claimant reported to them a 50% reduction in pain since attending the clinic. The diagnosis was myofascial pain syndrome.

The carrier introduced, with no objection from the claimant, a videotape and still photographs from it that show certain actions by the claimant on September 24, 25, and 28, 1992. She is shown carrying and stooping to pick up a plastic basket of materials, as well as squatting and bending from the waist to pick up what the claimant identified as a "whole bunch of money". At least twice during the tape, while walking and while backing her car, she looks back over her shoulder. The neck movements portrayed in the videotape are made smoothly, and, at the point at which claimant searches the ground, could be characterized as unrestricted side-to-side movements, which appear to be made without restraint or pain. The record of both hearings indicates that the claimant is 28, and the single mother of an eight year old child and a twelve year old child. During her closing argument, the claimant indicated that "as long as I'm feeling this pain real strong, I'll continue

not to accept the job offer."

I.

POINT OF ERROR RELATING TO DENIAL OF ADDING NEW ISSUE ON CONTINUING DISABILITY

We noted in Appeal No. 92432 that there was sufficient evidence to support the hearing officer's previous determination that, up to and as of the date of that first hearing (July 16, 1992), the claimant had disability. We remanded the case to the hearing officer to clarify her findings and conclusions relating to the bona fide job offer. The hearing officer determined to hold a second hearing, as was within her discretion to do, and gathered more evidence.

Prior to the remand hearing, the carrier made a motion on October 20, 1992, to add three new issues. The issues it sought to add were whether the claimant had reached maximum medical improvement, whether the claimant has a continuing disability, and designation of a treating doctor. By order dated October 23, 1992, the hearing officer denied the motion because of the failure of the carrier to provide good cause for adding these issues. The carrier has appealed only the denial of the issue relating to disability.

When a case is remanded, it is done so that additional development and consideration can be made as to issues dealt with at the first hearing. The purpose of a remand, which may be viewed as the second session of the contested case hearing, is not to try new issues that have come up since the first session of the hearing without following the dispute resolution step of the benefit review conference, especially when the Appeals Panel is prohibited from remanding a case more than once under Article 8308-6.42 (b)(3). Arguably, Article 8308-6.31(a) means that new issues should be added at the beginning of the hearing, which is the first session, and *cannot* be added on remand. In any case, the hearing officer did not abuse her discretion by not allowing an express issue on "continuing disability".

II.

WHETHER THE MAY 1992 OFFERS CONSTITUTE A "BONA FIDE OFFER" OF EMPLOYMENT FOR PURPOSES OF CREDIT AGAINST TIBS

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). The testimony of Ms. D and the May 27th letter indicate, at best, that an offer to consider a return by claimant to modified duty was made, but the particular position to be performed, the hours to be worked, or the physical requirements of that position were not described. While a general expressed desire to work with an injured worker is commendable, such desire as reflected in the May 27th letter simply does not rise to the level of a bona fide offer for purposes of ordering a credit

against the TIBs under Article 8308-4.23(f). We find that the hearing officer's determination and findings of fact relating to the May 22 and May 27, 1992 offers are sufficiently supported by the evidence.

III.

WHETHER IT WAS ERROR OF THE HEARING OFFICER TO OVERLOOK THE OCTOBER 16, 1992 OFFER

The carrier argues, in essence, that the hearing officer's conclusion of law that a bona fide offer of employment was not tendered is plainly erroneous as to the October 16, 1992 written offer, and that the hearing officer had the jurisdiction and duty to consider this offer. Under the facts of this case, we cannot agree.

The issue of bona fide offer of employment, as articulated at the beginning of the remanded hearing, was "whether or not the claimant received a bona fide offer of light-duty employment." The October 16th job offer was admitted without objection from the claimant. However, midway through the hearing, the hearing officer reminded the attorney for the carrier that the purpose of the hearing was to determine if a bona fide offer of employment had been made prior to the date of the first hearing (July 16, 1992). Consequently, the hearing officer did not recite the substance of the October 16 letter in her statement of evidence or make express findings of fact regarding that offer. We cannot imply that she made any findings about this offer to underlie her conclusion of law that "[t]he claimant was not tendered a bona fide offer of light duty employment, pursuant to 28 T.A.C. § 129.5."

As noted earlier in this opinion, the hearing on remand should be confined to the issues from the first session of the hearing. However, the evidence on these issues need not be limited in time to that developed only before the first hearing, so long as it relates to the issues dealt with at the first hearing. The same rules for exchange of evidence and witnesses apply to the reconvened hearing, and will work to minimize the element of surprise to either party. In this case, our remand related to the lack of evidence of a bona fide offer, and the claimant's physical capacity to perform it, at the time of the first hearing. Given that, the October 16, 1992 letter in this case presented new issues relating to the offer and physical ability (on October 16, 1992) of the claimant to perform the task.

The carrier is not without remedy because, if a controversy developed, the benefit dispute resolution process remains available. Parties who wish to avoid piecemeal proceedings on the various issues can do so by swiftly bringing forward the various issues relating to the particular benefit, and fully developing the facts relating to those issues, early in the process. We would note that the October 16th offer presents a marked contrast to the alleged offers made in May 1992, and is of the character that could arguably trigger the presumption set out in Rule 129.5. Rule 129.5 states that a written offer meeting certain standards will be taken ("presumed") as a bona fide offer. Of course, a claimant may

respond by presenting evidence that he or she was physically unable to do the offered job, but the burden is on the claimant to do just that.

Of possible concern also to the hearing officer may have been the term of the offer holding it open for acceptance until November 16, 1992. Because the claimant testified that she had not decided yet what her decision on the offer would be, the issue was not fully ripe for decision even if there had been an explicit agreement between the parties to broaden the bona fide employment issue to include the October 16, 1992 letter.

We affirm the hearing officer's findings and conclusions.

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Susan M. Kelley
Appeals Judge

CONCUR:

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Joe Sebesta
Appeals Judge

CONCURRING OPINION:

I concur both in the reasoning and the result of this opinion. I wish to emphasize, however, that it was the particular facts surrounding this hearing and the remand which require our affirmance and the determination that the written offer of October 16th constituted a new issue. Conceivably there could be other cases involving the issue of bona fide offer of employment where written offers of employment made during the pendency of a contested case hearing, or pending resolution of a case on remand, could provide relevant evidence. Admissibility of such evidence, of course, would be subject to the Commission's rules concerning discovery, which are designed in part to protect due process and prevent surprise.

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Lynda H. Nesenholtz
Appeals Judge