APPEAL NO. 92691

This appeal arises under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. (1989 Act), arts. 8308-1.01 *et seq.* (Vernon Supp. 1993). A contested case hearing was held on October 2, 1992 in (city), Texas, with (hearing officer) presiding. The issues in the case were the following: does the claimant currently have disability related to her compensable injury; if so, is the claimant entitled to temporary income benefits; has the employer tendered a bona fide offer of employment to the claimant such that the carrier is entitled to adjust the temporary income benefits to reflect the wages of the position; and may the carrier adjust the claimant's temporary income benefits to reflect the income the claimant is receiving from the employer's sickness and accident benefits program. The hearing officer made conclusions of law that the claimant's employer tendered a bona fide offer of employment that claimant did not accept, so that the carrier is entitled to adjust claimant's temporary income benefits (TIBs) to reflect the wages of the position after June 15, 1992, and further that the claimant no longer had disability after June 15th. Thus, the hearing officer ordered that claimant was not entitled to TIBs after June 15th. He also ordered that the carrier may adjust the claimant's TIBs to reflect the income the claimant received from employer's sickness and accident benefit program.

In her request for review appellant (hereinafter claimant) objected to portions of the statement of evidence contained in the hearing officer's decision and order, as well as to certain omissions from the findings of fact and conclusions of law. She also contends that certain findings and conclusions either are not supported by the evidence or misstate the applicable law. The response filed by the respondent (hereinafter carrier) basically supports the decision of the hearing officer.

DECISION

We reverse the decision of the hearing officer allowing the carrier to adjust TIBs to reflect the income the claimant has received from the employer's sickness and accident plan. We also reverse the hearing officer's decision that claimant no longer has disability after June 15, 1992 and that claimant accordingly was not entitled to TIBs after that date. We affirm the hearing officer's determination that a bona fide offer of employment was made to claimant on June 15, 1992, and render a decision that the claimant is entitled to that portion of TIBs in excess of that attributable to her wages pursuant to the bona fide offer.

The claimant testified that she began working for (employer) in 1977, and worked at various locations in an administrative capacity within the marketing division. She was transferred to (city) in May of 1990 to a job in the manufacturing division. All the work in these jobs required repetitive motions such as handling of circuit boards which claimant said weighed 1-2 pounds, and using lab tools to bracket the boards. Because of this, the claimant developed a problem with her hands, which she reported to her employer and for which she received medical treatment. The employer has accepted liability for this claim, and the carrier has paid claimant workers' compensation benefits under the 1989 Act.

On February 26, 1992, claimant saw a neurosurgeon, (Dr. N), two days after the onset of this particular injury (she had previously seen Dr. N for other problems). On that date Dr. N wrote, in part, "she has been placed back into an assembly job at [employer], that requires repetitive motion with approximately 600 repetitions per day. She has begun having pain in her right arm, thumb, and wrist since. I think that she is going to continue to have pain in her right arm with any type of repetitious assembly work. . . ." On the same date Dr. N took claimant off of work indefinitely, until released.

Dr. N referred claimant to (Dr. S), who in an April 14th letter to employer's medical department reviewed claimant's medical history including a 1969 whiplash injury and a cervical laminectomy fusion ten years later. He also wrote, "When she entered the manufacturing division and began repetitive movements I think that this triggered a myofascial problem. . .I think that there are two options: one to put her through extensive rehabilitation to the point that she is able to maintain a job in manufacturing, which might be successful, but runs a high risk for failure. The second option is to put her through a brief rehabilitation program and allow her to return to administrative or clerical type of work. She apparently is requesting this and I think that this appears to be a valid request. . . ." On May 19th Dr. S appears to have tentatively diagnosed claimant with carpal tunnel syndrome, and he ordered diagnostic tests.

On May 21st, (Ms. J), employer's senior associate nurse (Ms. J), wrote Dr. S in reply to his April 14th letter. Although Dr. S had not released claimant to return to work yet, Ms. J's letter asked that Dr. S review claimant's "current medical restrictions and your opinion as to their appropriateness at this time." These restrictions included no lifting over 10 pounds, no excessive walking or standing, job inspection prior to job change, avoid repetitive over the shoulder type work and avoid sustained neck posturing. The letter said employer could make reasonable accommodations for the claimant, but that a job site visit by Dr. S and/or a member of his rehabilitation staff would be beneficial.

Dr. S responded to this letter on June 1st. He said he had reviewed the restrictions and they seemed "very appropriate"; however, his only concern was that claimant seemed to be bothered by repetitive work. He stated that he was "somewhat concerned that she is not going to respond to anything other than the opportunity to return back to the clerical work that she has done in the past. Maybe that is an impossibility but it certainly seems to be her major goal." He also reiterated his belief that an intensive rehabilitation program would not lead to a favorable outcome.

On June 10th Dr. S made a site visit and, according to carrier's witnesses, observed the tasks which the employer was proposing that claimant perform. In a June 10th letter to Ms. J, Dr. S said that one of the tasks, attaching brackets to trays, appeared to be a job that could be performed within the claimant's medical restrictions. He also approved of a packaging job, so long as she was not required to lift large boxes, and a water washing job so long as she were given a stool to rest on. He said he thought claimant could perform most of a job entailing testing of circuit boards, although he expressed concern about

excessive reaching required by that job. He concluded by suggesting claimant return to work on June 15th, starting with a four hour day and adding two hours each week until she was working an eight hour day.

The claimant stated that she was not sent the June 10th letter from Dr. S, but that she received a letter from her supervisor, (Mr. N), telling her to return to work on June 15th. She said she contacted Dr. S because she was concerned that he was releasing her to the same job that had injured her originally, and she believed he might be biased because he was getting paid by employer. For that reason, she contacted the Workers' Compensation Commission and requested permission to see another doctor.

Nevertheless, claimant reported back to work on June 15th and worked until June 19th. She stated that her first day back she was left with nothing to do because she was waiting for Mr. N to provide her with specifications she had to read before doing the work, and that she felt demeaned. She stated that, of the jobs employer had proposed, the bracketing was the same task as she had done previously, that she had done the packaging and water wash once, and that she had reported an injury after doing the latter job. She said, however, that during the period June 13-19 she never actually did any assembly work. After the week back on the job she was hospitalized for depression, and thereafter was told by the doctor treating her for that condition that she could not return to work for two or three weeks.

After she was released from the hospital the claimant saw (Dr. H), a hand surgeon, on July 8th. In his report of that visit Dr. H summarized her medical history and her description of what her job had entailed. Dr. H stated he did not believe she had carpal tunnel syndrome, although he ordered further testing. He also noted his agreement with Dr. N's assessment that she not be given a repetitive motion job, and said "The simplest thing would be to put her back into an administrative job since she seems to respond to that. . . ." On the same day, July 8th, he released claimant to light duty with the restrictions no repetitive motion of wrist, hands, elbows, or shoulders bilaterally. At a follow-up exam on August 3rd, Dr. H stated that claimant took his medical release to employer but that they had no job for her to do. (At the hearing, claimant maintained the truth of this statement, while carrier's witnesses stated that at that point claimant had not been released to return to work by the doctor treating her for her depression.)

Dr. H also made a site visit to employer and on August 14th summarized the visit in a memorandum. Dr. H apparently observed the bracketing, water wash, prepackaging and quality inspection jobs. He stated that the bracketing job entailed ergonomic changes from the task as previously performed by claimant, in that the screwdriver was activated by pressure rather than by trigger action. (Claimant contended that Dr. H had been misled by employer, and that this job as described was no different from the job she performed previously.) With regard to the other three jobs, Dr. S said the prepackaging required "a fair amount of motion" in putting on the labels, the water wash could entail some problems depending upon the height of the component, and the quality inspection, which involved

removing chips, "is really a pretty hard thing that does stress the hand. . .[and] would probably exert some force on her and create some problems for her." Although Dr. H indicated he had not seen Dr. S's assessment of the jobs, he said he had "a difference of opinion in terms of the quality assessment job and also the bracketing job because I do think that is repetitive. We are then into a conflict or difference of opinion as to what constitutes repetitive motion. . . ." In terms of claimant returning to work, Dr. H said she could return to "an administrative type job doing those same things that she was doing before which would involve reading, light use of the hands as spelled out basically in my restrictions of 8 July 1992. . . ."

Claimant was on approved vacation from August 13-29. On September 1st she met with Ms. J about returning to work in an assembly work position. At that meeting they were in disagreement about the opinion expressed in Dr. H's August 14th letter, with claimant maintaining the doctor had said she could not do this type of work. Claimant left at that point and later received a letter from employer stating their presumption that she had voluntarily resigned.

Claimant's supervisor, Mr. N, said that employer's medical department interpreted the claimant's medical restrictions and came up with the proposed jobs. While there was nothing in the record to indicate that a written offer of employment had been made (save for a June 12th letter from Mr. N telling claimant to report to work on June 15th, the day she had been released from Dr. S), Mr. N testified that he had made the offer to claimant in person, had described the duties of the position, and had stated the employer would abide by the limits set by claimant's doctor. He also told her that the job was in the same location as before and at the same salary, as supplemented by the sickness and accident plan. Mr. N stated that the offer was never withdrawn after claimant left work on June 19th. An August 5th letter to claimant from Mr. N stated that claimant had been released to light duty work on July 9th, but that she had not yet been released by the physician who was treating her depression. The letter said, "[h]ad you been released to return to work by both physicians on July 9th. . .we would have had work in. . .manufacturing available for you within your restrictions. Please be advised that as soon as you are released to return to work [by the second doctor], a job in. . .manufacturing is available within your restrictions and accommodations can be made as necessary." On August 10th claimant wrote Mr. N, verifying she had discussed the details of the job with him and stating that she had to discuss the matter with her attorney. On August 13th, Mr. N again wrote claimant, stating that she was released by both physicians (including Dr. H) to return to work on August 10th, but that she had not returned and was thus on unauthorized absence. The letter requested claimant to report to the medical department on August 31st, after claimant returned from her vacation, and that the failure to do so would cause employer to consider that she had voluntarily resigned.

Ms. J, employer's nurse, acknowledged that the jobs offered claimant were in fact the same jobs she had been doing before, but with accommodations such as a four-hour work day and rotation of tasks. She also said the job as offered in June stayed the same,

although she said the medical department had considered Dr. H's later restrictions; she specifically mentioned Dr. H's concern that the bracketing not be done more than 30 minutes at a time. She said that if claimant had tried the job and was unable to perform it, they would have continually reviewed the job and tried to accommodate her. A videotaped demonstration of the tasks was made part of the record, and Ms. J said the tasks as represented in the film were the same as demonstrated to Drs. S and H. When asked by the hearing officer what "repetitive use" meant to her, Ms. J stated it was a broad restriction subject to interpretation, and that the medical department had reviewed the opinions of Drs. S, H and N and believed that the three described jobs were within those restrictions.

Evidence regarding employer's sickness and accident plan was also made part of the record. A form detailing company procedures and signed as acknowledged by claimant stated that the plan pays the difference between workers' compensation insurance payments and an employee's full salary, and says, "[h]owever, in order to provide continuity of income, your full salary will be paid under the plan. Therefore, when workers' compensation payments are received for lost wages, payment equal to that amount must immediately be reimbursed to [employer]." Claimant stated her understanding that an employee who received these payments would endorse their workers' compensation checks over to employer, and said she had done so. Irene Phillips, employer's personnel advisor, testified that employer withheld federal income tax, but not social security, from these payments, which were part of the employer's benefits package. She also said claimant had received her full salary under this program, for the period (date of injury)-September 2. The carrier's position at the hearing was that the payments of claimant's full salary under this plan were wages under the 1989 Act, and that it should be allowed to credit such payments against TIBs.

The claimant raises several points on appeal, each of which will be addressed below. Claimant first objects to the omission from, or the mischaracterization within, the hearing officer's statement of evidence regarding evidence supporting claimant's position. We have reviewed this portion of the decision and order and find nothing therein to constitute error. The statement of evidence is of necessity a truncated version of the evidence presented at the hearing; in a hearing as lengthy as this one, certain facts will inevitably be omitted. We do not believe this indicates that they were not duly considered by the hearing officer, who is only required by the 1989 Act to include in a written decision findings of fact and conclusions of law, a determination of whether benefits are due, and an award of such benefits. Article 8308-6.34(g).

The claimant also objects to the omission of certain facts from the findings of fact. These facts, which basically concern the compensability of claimant's injury, the timeliness of her notifying her employer, and the Commission's jurisdiction over the matter, are not necessary to this decision as they are not within the issues to be decided in the case, *see* Article 8308-6.31(a). For the same reason, it was not error for the hearing officer not to specify in his findings the cause, nature, and possible diagnosis of claimant's injury. We note in this regard that Finding of Fact No. 4 states that claimant "reported an injury in the

form of pain in her arm and neck," which generally describes the nature of claimant's injury.

Claimant further objects to as unsupported by the evidence Findings of Fact Nos. 6, 9, 10, 12, 13, and 15, which are as follows:

FINDINGS OF FACT

6.[Dr. S] was the claimant's treating physician.

9.[Dr. S], of Physical Medicine & Rehabilitation Associates, released the claimant to return to work as of June 15, 1992.

10.The job offered by the employer was a bona fide job offer which met the claimant's physical needs, at the same salary the claimant had been receiving.

12.The claimant did not accept the offered job because she did not like that type of job, not because of any compensable injury.

13.While the claimant was off work, the employer had paid her full pay and allowances as part of its employees' benefits program. The payments made by the employer to claimant when she was not working were earnings within the meaning of Article 8308-4.23(c).

15. There is no provision in the Act or Rules of the Commission that prohibits the carrier from taking such a credit.

The claimant also objects to certain Conclusions of Law, as follows:

CONCLUSIONS OF LAW

2.The employer tendered a bona fide offer of employment to the claimant such that the carrier is entitled to adjust the temporary income benefits to reflect the wages of the position after June 15, 1992.

3.The claimant did not have disability related to her injury of (date of injury), after June 15, 1992.

4.The claimant is not entitled to receive temporary income benefits after June 15, 1992.

Article 8308-4.23(f) provides that, for the purposes of payment of TIBs, if an 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 by the employee. The applicable Commission rule on bona fide offers of employment, Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 129.5 (Rule 129.5), basically provides as follows:

> (b) 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 of 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. 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.

The rule further provides that in determining whether an offer of employment is bona fide, the Commission shall consider the following:

1.the expected duration of the offered position;

2.the length of time the offer was kept open;

3.the manner in which the offer was communicated to the employee;

4.the physical requirements and accommodations of the position compared to the employee's physical capabilities; and

5.the distance of the position from the employee's residence.

Rule 129.5(a).

Because the offer of employment in this case was not written, the carrier had the burden to prove by clear and convincing evidence that the offer was indeed bona fide. That being the case, the hearing officer could consider all evidence submitted, not merely that by the treating doctor, in assessing whether the offer made was within the physical capabilities of the claimant. Texas Workers' Compensation Commission Appeal No. 92087, decided April 22, 1992. Because of this, it does not matter for purposes of the decision below that the hearing officer found that Dr. S was claimant's treating doctor. Texas Workers' Compensation Commission Appeal No. 91024, decided October 23, 1991. The hearing officer was entitled to review all the evidence, both the medical evidence and claimant's own testimony, in considering the "physical requirements and accommodations of the position compared to the employee's physical capabilities," Texas Workers' Compensation Commission Appeal No. 91023, decided October 16, 1991. Upon review of the record in this case, we cannot say that the hearing officer's determination was not based on sufficient

probative evidence. The evidence shows that both Drs. S and H visited the work site to view the proposed jobs, and that the offer by employer attempted to accommodate the concerns of Dr. S, which constituted the existing medical opinion at the time the offer was tendered. While Dr. H's August 14th letter expressed reservations about the repetitive nature of particular tasks, there was testimony that the employer was attempting to accommodate this by limiting the amount of time claimant would perform the bracketing, by rotating jobs, and by setting no production requirements. The Act provides that the hearing officer is the sole judge of the relevance and materiality of the evidence in a case, and of its weight and credibility. Article 8308-6.34(e). We will not set his decision aside where, as here, it is supported by sufficient evidence. This is true even where there is evidence supporting different inferences by the fact finder. *See* Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993; Texas Workers' Compensation Commission Appeal No. 92675, decided February 4, 1993.

We accordingly find that Findings of Fact Nos. 6, 9, and 10 are supported by the evidence in the case. While Finding of Fact No. 12 may be somewhat inartfully stated, claimant testified that during her week back on the job she felt "demeaned," and that she continued to have concerns that the job she was offered was the same job on which she had been injured. The hearing officer may have been attempting to distinguish the claimant's concerns that the job was beyond her physical capabilities, from an actual inability to perform the job--both of which would have been probative evidence bearing on the issue of bona fide offer.

As noted earlier, however, Article 8308-4.23(f) essentially provides that where there is a bona fide offer of employment, the employee's weekly earnings after the injury are deemed to be the weekly wage for the offered position. *See also* Rule 129.4. The effect of this provision is that the wages the position would have paid are imputed to the employee. For this reason, while the hearing officer correctly concluded, in Conclusion of Law No. 2, that TIBs may be adjusted to reflect the wages of the position after June 15th, his conclusion that the claimant did not have disability beginning June 15th effectively eclipsed his determination on the bona fide offer of employment and relieved the carrier of liability for TIBs from that date. It appears that the hearing officer's decision was premised on the determination that the income claimant was receiving from employer's sickness and accident plan constituted "earnings" (Finding of Fact No. 13), and thus because claimant continued to receive the equivalent of her full salary under this program she was not unable "to obtain and retain employment at wages equivalent to the preinjury wage because of a compensable injury", Article 8308-1.03(16). This is the only basis in the record for such a ruling, since the claimant as of June 15th had only been released to work with restrictions. As this panel has previously held, "Where the medical release is conditional and not a return to full duty status because of the compensable injury, disability, by definition, has not ended unless the employee is able to obtain and retain employment at wages equivalent to his preinjury wage." Texas Workers' Compensation Commission Appeal No. 91045, decided November 21, 1991.

The carrier in this case contended that payments made under employer's sickness and accident plan constituted "wages" under the Act's definition, which includes "every form of remuneration payable. . .for personal services." Article 8308-1.03(47). We disagree. The evidence showed that the plan was intended only to replace the employee's salary (or a portion of the salary in the case where workers' compensation benefits were being paid) when the employee was off work due to illness. By its very nature, it paid benefits only when the employee was not working. Contrary to carrier's assertion that these payments represented wages, the evidence shows employer's intent only to cover the "gap" between claimant's salary and TIBs payments for the compensable injury. This is true despite the fact that the employer paid claimant, up front, her entire salary pending reimbursement for the TIBs portion. Under these circumstances, the employer's plan was more in the nature of a disability insurance policy and not a wage, and as such it does not affect the carrier's liability for TIBs under the 1989 Act.

For this reason, we reverse the hearing officer's decision and order, which would have effectively relieved the carrier from any liability for TIBs (since employer's personnel advisor stated that the employer had made payments under this plan from the date of claimant's injury until her separation from employment). Applying the same reasoning, claimant's disability also did not end on June 15th. Rather, under Article 8308-4.23(f), the amount of salary the claimant would have earned had she taken the position, exclusive of her sickness and accident benefits, is imputed to her. TIBS owed by the carrier would then equal 70 percent of the difference between the employee's average weekly wage and her imputed earnings (or, for the week in which she worked, her actual earnings), Article 8308-4.23(c). We therefore reverse the hearing officer's decision and order and render a decision that the claimant, beginning June 15, 1992, is entitled to receive from the carrier TIBs as provided for by this decision.

In sum, we reverse the hearing officer's decision and order allowing the carrier to adjust TIBs to reflect the payments the claimant has received from the employer's sickness and accident plan, due to our determination that such amounts are not "wages" within the meaning of the 1989 Act. We reverse the hearing officer's decision and order that claimant was not entitled to receive TIBs after June 15, 1992, because of our determination that claimant still had disability on that date. We render a new decision and order that the claimant is entitled to receive from the carrier TIBs in the amount of 70 percent of the difference between the claimant's average weekly wage and the imputed amount of her earnings pursuant to the bona fide offer of employment of June 15, 1992.

Lynda H. Nesenholtz
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Thomas A. Knapp
Appeals Judge