APPEAL NO. 92722

On October 20, 1992, a contested case hearing was held in (city), Texas, with (hearing officer) presiding as the hearing officer. This case concerned a work-related injury which occurred on (date of injury 1). The issues at the hearing were whether the appellant (claimant herein) has disability and whether the employer made a bona fide offer of employment to the claimant. The hearing officer determined that the claimant had no disability after June 10, 1992, and that the employer made a bona fide offer of employment to the claimant at the same wage she was making before her injury. He decided that the claimant was not entitled to temporary income benefits for her injury of (date of injury 1), after June 10, 1992, unless the claimant can show at a later date that she has disability. The claimant disagrees with the hearing officers' decision. The respondent (carrier herein) responds that the claimant's request for review was not timely filed; that the hearing officer's findings of fact, conclusions of law, and decision are supported by the evidence; and requests that we affirm the decision.

DECISION

The decision of the hearing officer is affirmed.

The claimant's request for review was timely filed. Article 8308-6.41(a) provides that a party that desires to appeal the decision of the hearing officer shall file a written appeal with the Appeals Panel not later than the 15th day after the date on which the decision of the hearing officer is received from the division of hearings. The hearing officer's decision was mailed to the parties on December 8, 1992. The claimant does not state the date she received the decision. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 102.5(h) provides that the deemed date of receipt is five days after the date mailed. Therefore, the claimant is deemed to have received the decision on December 13, 1992. Under Rule 143.3(c), a request for review is presumed to be timely filed if it is mailed on or before the 15th day after the date of receipt of the hearing officer's decision, and is received by the Commission not later than the 20th day after the date of receipt of the decision. The claimant's request for review was mailed on December 28, 1992, which was the 15th day after the date of receipt of the decision, and was received by the Commission on December 30, 1992, which was not later than the 20th day after the date the claimant received the decision.

The employer, (employer), makes computer products. The claimant began working for the employer in July 1989, and sustained a work-related injury to her knee in December 1989 when she fell out of a chair. She had two operations on her knee and was returned to restricted work in February 1992. The claimant said that her work restrictions included no prolonged sitting, standing, or bending. The employer provided the claimant a light duty job consisting of putting software diskettes into envelopes and bought her a special chair which the claimant requested. The claimant worked for the employer from February 1992 to (date of injury 1), the date she claimed she injured her back at work. At the hearing, the carrier did not dispute the occurrence of a work-related injury on (date of injury 1), but did dispute that the claimant had disability after she was released to restricted work on June 10,

1992.

The claimant testified that on (date of injury 1), she was asked by her supervisor to work on a "lug machine." The claimant said that when she ran out of work stuffing envelopes she would be asked to help out with other work. This work involved using a machine to place a small piece of metal around small wire segments in order to attach the wires to a circuit board. The claimant said that when she was bending over the machine to put wires onto the lug, she heard a "pop" in her back, and then immediately informed her supervisor that her back had just "popped out." The claimant said that she went to (Dr. B), M.D., the day of her injury, that she then saw (Dr. R) who "popped" her back into place, that she next chose to go to (Dr. M), D.C., a chiropractor who had treated her during the time she was off work for her 1989 injury, and that (Dr. B) referred her to (Dr. S), M.D. She said that (Dr. M) treated her on a daily basis for about a month and released her to restricted work on June 10, 1992. She said that (Dr. M) released her to return to work because he was angry at her for wanting to see a medical doctor. She did not return to work. She testified that she "assumed" that her light duty job was still available to her, but that no one had talked to her and told her it was available. The claimant testified about having back pain, but did not say she was unable to do the light duty job that she was assigned in February 1992, which she assumed was available to her after she was released to return to work by (Dr. M). She also did not testify that the physical requirements of her envelope stuffing job or the physical requirements of her occasional work on the lug machine were not within the work restrictions set by (Dr. M). The following exchange took place on cross-examination:

Question by carrier's attorney: [Claimant] its not your position, is it, that you were not aware that you could go back out there to the job that you were doing prior to your injury, after you were released by (Dr. M), is it?

Claimant's answer: No, sir.

In a medical report dated May 21, 1992, (Dr. B) reported that he saw the claimant on (date of injury 2), that she had a long history of reoccurring neck and back pain, and that the claimant told him she reinjured her back on (date of injury 2). (Dr. B) found that the claimant had mild lumbar pain and referred her to a chronic pain clinic. A CAT scan of the claimant's neck was negative, as were x-rays of her lumbar spine. In a medical report dated May 29, 1992, (Dr. M) reported that he saw the claimant on (date), that she told him she was using a lugging machine when her back made a popping sound and "went out," and that she had a significant history of back injury in 1989. (Dr. M) issued a "Disability Certificate" for the claimant on May 20, 1992, in which he indicated that the claimant would be off work until further notice. In another certificate dated June 10, 1992, (Dr. M) released the claimant for light duty work with no lifting over 15 pounds and no prolonged/repetitive bending, twisting, or standing. (Dr. M) stated in a letter to the carrier dated June 15, 1992 that "[a]s with [the claimant's] previous case I find it difficult to clearly objectify her complaints of low thoracic and upper thoracic pain. I feel that she does indeed experience pain but objective test

results do not correlate with her reported symptoms." He further stated that "I recommended [claimant] to return to work on June 8, 1992, which she declined. I recommended a psychological test on June 10, 1992 which she also declined and furthermore refused to continue under scheduled treatment."

In a report dated June 5, 1992, (Dr. S), M.D., reported that the claimant was significantly overweight, that she told him that all of her pains had been worsening for the past five months, that she cannot live "to the demands of her job," and that the claimant told him that "I could not be functional for my family if I worked." (Dr. S) noted the 1989 injury and a motor vehicle accident the claimant had in November 1991, but no mention is made of a (date of injury 1) injury. (Dr. S's) assessment of the claimant's condition included a report of a work-related injury with chronic myofascial pain and SI pain, status post left knee injury and surgery with persistent pain, chronic headaches with muscle contraction and migraine characteristics, and sleep disorder and depression consistent with a chronic pain syndrome. On July 28, 1992, (Dr. S) issued a "Disability Status" note for the claimant in which he wrote "no work." He indicated that the claimant was to attend daily therapy sessions. (Dr. S) next saw the claimant on September 2, 1992, at which time the claimant complained of headaches and low back pain. On September 22, 1992, (Dr. S) wrote a letter to the carrier for the purpose of clarifying inaccuracies in his June 5th report. He said that he and the claimant had miscommunicated about her injury in (month year) and that the claimant reported that she had no neck or back pains prior to her (month year) injury. On October 1, 1992, (Dr. S) diagnosed the claimant's condition as "chronic myofascial pain syndrome."

The employer's director of manufacturing operations, (LC), testified that from the standpoint of physical requirements, the work the claimant was doing on the lug machine on (date of injury 1) was equal to if not more of a light duty job than the envelope stuffing job. He said that when the claimant returned to work in February 1992 he bought her a special chair she wanted and that he explained to her that she could stand or sit whenever she was uncomfortable. He testified that the claimant's envelope stuffing job was available to her after her injury of (date of injury 1), that the claimant was never terminated from employment, and that she was still considered an employee.

(PB), the employer's human resources specialist, testified that the employer sent the claimant a certified letter on September 3, 1992, in which the employer reassured the claimant that her job was still available. This witness said that the letter came back to the employer unclaimed. The address to which this witness said the letter was sent was the same address the claimant gave as her address in response to a question by the hearing officer. This witness said that shortly after the letter was returned unclaimed, the claimant called her about health insurance premium payments, and that during that conversation, this witness reassured the claimant that her job was still available. The following exchange between the carrier's attorney and the witness then took place:

Question by carrier's attorney: Did she [the claimant] give you any indication that she

was aware that her job was available?

Answer of witness: She told me that she had no doubts of it, that it existed.

Sally Johnson, the employer's director of human resources, testified that on some unspecified date after the (date of injury 1) injury, she received a call from a doctor's office concerning a claim number, and that at that time she talked to the claimant on the telephone and reassured the claimant that the employer would work with her and do anything reasonable as far as holding her job for her. She added that the employer has been paying the claimant's and the employer's portion of health insurance premiums for the claimant since the claimant's injury of (date of injury 1).

The hearing officer determined that the claimant had no disability relating to the injury of (date of injury 1), after June 10, 1992. "Disability" means the inability to obtain and retain employment at wages equivalent to the preinjury wage because of a compensable injury. Article 8308-1.03(16). In Texas Workers' Compensation Commission Appeal No. 91045, decided November 21, 1991, the Appeals Panel stated the following concerning disability under the 1989 Act:

> 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 wages. Evidence to establish this must show there is employment at preinjury wage levels reasonably available to the employee meeting the conditions of the medical release, taking into consideration reasonable limitations on the type of work suitable within the frame work of the employee's abilities, training, experience and qualifications, and that the employee has not availed himself of such employment opportunities.

The Appeals Panel went on to state in Appeal No. 91045 that:

> We do not perceive the intent and purpose of the 1989 Act to impose on an injured employee the requirement to engage in new employment while still suffering some lingering effects of his injury unless such employment is reasonably available and fully compatible with his physical condition and generally within the parameters of his training, experience, and qualifications. On the other hand, we do not believe the 1989 Act is intended to be a shield for an employee to continue receiving temporary income benefits where, taking into account all the effects of his injury, he is capable of employment but chooses not to avail himself of reasonable opportunities or, where necessary, a bona fide offer.

In reviewing the hearing officer's decision we are mindful that under Article 8308-6.34(e) the hearing officer is the sole judge of the relevance and materiality of the

evidence offered and of the weight and credibility to be given the evidence. We do not substitute our opinion for that of the hearing officer where the hearing officer's determination is supported by sufficient evidence and is not so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust. Texas Workers' Compensation Commission Appeal No. 92447, decided October 5, 1992. Having reviewed the record, we believe that the hearing officer could reasonably conclude from the evidence that as of June 10, 1992, the claimant was released to light duty work, that the claimant was capable of performing light duty work, that light duty work at preinjury wages and within the restrictions set by (Dr. M) was reasonably available to the claimant, that the claimant was aware that the light duty work was available to her, and that the claimant chose not to avail herself of such employment opportunity. Consequently, we conclude that there was sufficient evidence to support the hearing officer's determination of no disability after June 10, 1992, and that the determination is not so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust.

As to (Dr. S's) "no work" note of July 28, 1992, it is clear to us from the hearing officer's evidence summary that the hearing officer did not assign much weight to that note for a number of reasons, including the fact that (Dr. S's) clarification letter of September 1992, which indicated that the claimant had told him she had no neck or back pain before (date of injury 1), was contrary to the medical records in evidence which showed that the claimant had reported to other health care providers that she had chronic neck and back pain since 1989. Also, the hearing officer pointed out that (Dr. S's) initial report made no mention of a (date of injury 1) injury, that he treated the claimant for her long term physical and emotional problems, and that he did not relate any of the claimant's numerous medical and emotional problems to the injury of (date of injury 1) until several months after the claimant's initial visit. The credibility and weight to be given the expert medical evidence was for the hearing officer's determination. *See* Texas Employers' Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist] 1984, no writ).

The hearing officer also determined that the employer made a bona fide offer of employment to the claimant. For purposes of computing temporary income benefits under Article 8308-4.23, 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. Rule 129.5 sets out the requirements of a bona fide offer of employment. In our opinion, the question of whether the employer made a bona fide offer of employment to the claimant was not pivotal to a determination of whether the claimant had disability after June 10, 1992, for the reason that the claimant assumed that her light duty job was available to her and she told the employer's human resources specialist after the (date of injury 1) injury that she had no doubts that her job was available to her. The question really became whether the light duty job that the claimant knew was available to her was within her physical capabilities as shown by (Dr. M's) work restrictions. Considering that the claimant's light duty job was tailored to her work restrictions for her 1989 injury and the similarity of those

work restrictions to the work restrictions under which (Dr. M) released the claimant to return to work, it would be reasonable for the hearing officer to conclude that the physical requirements of the light duty job compared favorably to the work restrictions for her (month year) injury. Consequently, we conclude that error, if any, in the determination of a bona fide offer of employment would not amount to reversible error.

The decision of the hearing officer is affirmed.

Robert W. Potts
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Lynda H. Nesenholtz
Appeals Judge