APPEAL NO. 931096

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (formerly V.A.C.S., Article 8308-1.01 *et seq.*) (1989 Act). A contested case hearing was held in (city), Texas, on October 29, 1993, to determine the issue of whether the claimant had disability related to his injury of (date of injury), and, if so, for what period(s). The carrier, who is the appellant in this action, appeals the determination of hearing officer (hearing officer) that the claimant had disability beginning on (date of injury), ending on September 1, 1993, and that he continued to have disability beginning on September 15, 1993, and continuing through the present. The carrier contends in its appeal that the employer made two offers of light duty to the claimant, which he failed to accept, and that the evidence shows the claimant voluntarily quit his job with employer; the hearing officer's decision to the contrary, the carrier argues, is against the great weight and preponderance of the evidence. There was no response filed by the claimant.

DECISION

The decision of the hearing officer is affirmed in part and reversed in part.

The claimant was employed as a pipe layer with a construction company, (employer). On (date of injury), as claimant was lifting a manhole cover with a pick, the pick broke and the cover hit his left hand. He was seen by (Dr. G) on that date; x-rays of the hand revealed soft tissue swelling but no fracture. Dr. G took the claimant, who is right-handed, off work for two to three days. On (date) claimant saw (Dr. H), who noted complaints of pain and swelling. Dr. H recommended physical therapy and ice and prescribed medication; he also took claimant off work until August 23, 1993, when he released him to light duty.

The claimant testified that he sent Dr. H's release to employer and that he contacted (Ms. F), employer's office manager, who told him a light duty security job would be opening up, but that she did not know when. Claimant said he called her every day thereafter but that she was either out of town or out of the office and did not return his calls. On September 1st claimant said he received a letter from Ms. F. The letter, which was dated August 31st, stated as follows:

> Dr. A (sic) has released you for light duty work. (EMPLOYER) has a job starting in the City area that has a light duty position available. The position is that of a night watchman. You will be working nights, (5:00 pm to 12:00 pm) and some weekends, and your duties will involve being on site to watch the equipment and materials, to watch against vandalism and theft. There will be no lifting involved in the work, you only need to be on site, and you will be able to sit or stand at your discretion. Your hourly wage will be the same as when you were injured.
>
> Please contact us within ten days so we may arrange your work days and hours.

Claimant testified that he called Ms. F twice a day for one week, and every other day

afterwards, but that he was never able to reach her. He also said he went into the office and talked to a man there, but was told he had to speak with Ms. F.

A benefit review conference (BRC) was held on September 9, 1993. The claimant said that at the BRC he talked to Ms. F about the light duty position; he contended that he accepted it but was told by Ms. F that she would send him a letter telling him when to report. He said he again tried to contact Ms. F and when he finally reached her he was told that the job was filled. Claimant's position was that he accepted the job, but was never called to come to work.

Ms. F testified that she told claimant on August 23rd, when he brought in his light duty release, that there was a job available and that she would check with the superintendent regarding the job site and call him back. She said the claimant did not accept the verbal offer because he wanted to be paid $10.75 per hour, while the light duty jobs paid $5.00 an hour. She also said she tried to contact the claimant after talking to the superintendent about the job site, but one of the telephone numbers claimant gave her had been disconnected and she left messages at the other number (which apparently belonged to a relative of claimant's) but she did not hear from claimant. At that point, she sent the August 31st letter. She denied that she had gotten telephone messages from the claimant, said she had not been out of town in the past year, and that her usual working hours are from 7:30 a.m. to about 7:00 p.m.; she said it was possible she could have been out of the office in the afternoons for about one to one and one-half hours, but that she never leaves the office before noon.

Ms. F said at the September 9th BRC she re-offered the job that was described in her August 31st letter, telling the claimant to come in the next day to arrange his schedule. She considers that he did not accept this job because he never came in or contacted her. She said the position was held open for a while, but ultimately was filled on September 13th or 14th. Ms. F said she so informed claimant on September 17th; however, she said she had again tried to reach the claimant about two weeks before the October 29th contested case hearing to tell him about another light duty job. She said she had done this despite the fact that claimant had told her on July 27th that he was quitting his job and going back to work at his previous job at a refinery, where he could earn more money. Notarized statements from four other employees basically say the same thing. The claimant denied that he had quit his job, although he said he told Ms. F that he would not return to employer when he was released to regular duty work because of the work hazards.

Ms. F stated at the hearing that she has no light duty positions available and that light duty for the claimant ceased to exist on September 13th or 14th (despite her testimony that she had tried to contact claimant two weeks before). The claimant testified as to his physical condition, saying that he still has pain and numbness in his hand, which causes him to drop things.

The carrier in its appeal argues that the claimant is not entitled to temporary income benefits (TIBS) for two reasons: he quit his job voluntarily following the injury, and

the employer extended bona fide offers of employment which the claimant refused to accept. The Appeals Panel has previously affirmed the decision of a hearing officer who held that a claimant's disability was due to her voluntary resignation rather than to her work-related injury. *See* Texas Workers' Compensation Commission Appeal No. 93614, decided September 3, 1993. However, as that decision indicated, the cause for the claimant's failure to obtain or retain employment was a fact determination for the hearing officer. In this case, despite evidence in the form of Ms. F's testimony and statements from other of employer's employees, there was evidence indicating that claimant had not resigned; in addition to his own testimony, which the hearing officer could choose to credit, it was uncontroverted that he discussed the light duty position with Ms. F on at least two occasions following his purported resignation on July 27th. Thus the hearing officer was not in error in failing to determine that claimant's disability was foreclosed by his voluntary resignation.

With regard to the second prong of the carrier's argument, whether or not the employer had made a bona fide offer of employment to the claimant was not expressly an issue in the case, despite the fact that an unappealed finding of fact states that the letter received on September 1st contained a bona fide offer of employment. Section 408.103(e) provides that for purposes 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, the employee's weekly earnings after the injury shall be deemed to be equal to the weekly wage for the position offered. The statutory provision on bona fide offers thus presupposes that an employee has already demonstrated disability and is entitled to TIBS. The issue in this case was whether, and for what period of time, claimant had disability. As we have previously held, disability and bona fide offer of employment are related, but disti(employer), issues. *See* Texas Workers' Compensation Commission Appeal No. 92293, decided August 17, 1992.

The fact that the claimant received an offer of employment from his employer, however, is certainly probative evidence of whether disability exists. Texas Workers' Compensation Commission Appeal No. 92087, decided April 22, 1992. The hearing officer's determination that claimant did not have disability during the period September 1-14, 1993, apparently represented her belief that during that period claimant could obtain or retain employment at pre-injury wages. *See* Section 401.011(16). She also determined that this period ended, and a new period of disability began, after the job was filled on September 14th.

This panel has observed many times that injured employees can move in and out of disability. Texas Workers' Compensation Commission Appeal No. 92299, decided August 10, 1992. Under such circumstances, the claimant has the burden of proving when each period of recurring disability is re-established. Texas Workers' Compensation Commission Appeal No. 91122, decided February 6, 1992. In a recent case, Texas Workers' Compensation Commission Appeal No. 931062, decided December 31, 1993, we disagreed with a carrier that a subsequent hearing officer's determination that disability had recurred was precluded by *res judicata* due to an earlier hearing officer's determination that

no disability existed through the date of the first contested case hearing. In that case we stated that, ". . . the fact that a condition remains unchanged does not foreclose a finding that disability has recurred. . . . The hearing officer is correct in noting that the difference in the time period fundamentally changed the issue of disability. . . . The reason this is true, however, is that there was additional evidence developed bearing on the time period in question," such additional evidence including additional hospitalizations. That opinion essentially holds that passage of time alone is an insufficient basis upon which to determine that disability has recurred.

Somewhat similar to the situation in this case are those cases involving the termination of an injured employee after his return to work. In Texas Workers' Compensation Commission Appeal No. 91027, decided October 24, 1991, we held that a "broadly stated rule forever denying workers' compensation benefits to an employee returned to light duty and subsequently discharged for cause . . . has the potential to undermine a very basic purpose of workers' compensation programs: to compensate injured workers for loss of earnings attributable to a work-related injury." However, this panel also held that there was no evidence to establish that her compensable injury resulted in disability, up until the time she was seen in an emergency room and taken off work.

The evidence in this case showed that claimant was originally taken off work completely, then released to light duty employment. As we have previously observed, a conditional medical release (light duty) does not end disability unless the employee was thereafter able to obtain and retain employment at a wage equal to the pre-injury wage. Texas Workers' Compensation Commission Appeal No. 93449, decided July 21, 1993, *citing* Texas Workers' Compensation Commission Appeal No. 92282, decided August 12, 1992. It is apparent that the hearing officer found that the claimant thereafter (after the initial period of disability) could obtain and retain employment at his pre-injury wage. That being the case, it was error for the hearing officer to determine that disability had recurred in the absence of any evidence of changed circumstances, as well as the lack of any evidence showing why claimant could perform the offered job, but could not obtain or retain any other employment. The evidence of claimant's purported disability, after the period of nondisability, is the same as it was for the earlier period of disability; he continued to have a light duty release with physical symptoms of pain and numbness. Of significance, the claimant did not testify that he could not perform the job employer offered him; indeed, it was his testimony that he <u>had</u> accepted it but was not told when to begin work. This case is thus distinguishable from those in which questions of fact are raised as to whether a claimant can physically perform either a job offered by his employer or other jobs in the workplace at large. Nor did he seek to rebut the employer's offer by raising any of the other considerations contained in the statute or rule, such as geographic accessibility.

As this panel said in Texas Workers' Compensation Commission Appeal No. 91045, decided November 21, 1991:

> We do not perceive the intent and purpose of the 1989 Act to impose on the 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 as 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.

For all the foregoing reasons, we find that the hearing officer's determination that the claimant had recurring disability beginning on September 15, 1993, and continuing thereafter, is so against the great weight and preponderance of the evidence as to be manifestly unfair and unjust. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986). We accordingly reverse that portion of the decision and render a decision that the claimant's disability ceased on September 1, 1993. However, we affirm the hearing officer's determination that the claimant had disability from (date of injury) to September 1, 1993.

____
Lynda H. Nesenholtz
Appeals Judge

CONCUR:

____
Stark O. Sanders, Jr.
Chief Appeals Judge

____
Susan M. Kelley
Appeals Judge