APPEAL NO. 93567

This appeal arises under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art 8308-1.01 *et seq*. (Vernon Supp. 1993) (1989 Act). On May 5, 1993, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. The sole issue to be determined was: Is the Claimant entitled to temporary income benefits for the period beginning June 11, 1992 and ending (date of injury). The hearing officer determined that when claimant was released by his doctor for duty "claimant was offered the job of route man" by the employer, that "claimant was not capable of performing the physical requirements of the job offered," that the offer of a job was not a bona fide offer of employment because it "did not state the duration of the posistion (sic) nor the length of time the offer would be kept open" and that claimant had disability from June 11, 1992 through (date of injury).

Appellant, carrier herein, contends that the hearing officer erred in finding claimant's release to return to work was a limited release to return to work as an assistant manager, that the hearing officer erred in finding the claimant was not capable of performing the physical requirements of the job offered, that the hearing officer erred in concluding that the job offer made to claimant was not a bona fide offer of employment and requests that we reverse the hearing officer's decision and render a decision in its favor. Respondent, claimant herein, did not file a response.

DECISION

The decision of the hearing officer is affirmed as modified.

Claimant testified that he was injured on (date of injury), while helping unload a living room set off a truck while working as an assistant manager for (employer)., employer herein, out of employer's M Street store. Claimant testified he was earning $6.37 an hour. The injury is not disputed and the only issue is entitlement to temporary income benefits (TIBS) for the period announced in the issue. It is undisputed that in January 1992 claimant was "Released to Return to work: (with) Normal Activity" by claimant's treating doctor, (Dr. P) by a Specific and Subsequent Medical Report (TWCC-64) dated January 13, 1992. Block 23 of that report also indicated "a. Return to Limited Type of Work Jan. 20, 1992. . . c. Return to Full-time Work Jan. 20, 1992." Claimant testified, and it is not disputed, that claimant spoke with (Mr. G), employer's district manager, around the middle of January 1992. Claimant stated he gave Mr. G a copy of Dr. P's report and that Mr. G asked him if he was ready to go back to work. Claimant testified that he said he was. Mr. G then told claimant that his previous position as assistant manager was not available but that he could have a job as a route man at the rate of $5.00 an hour.

Claimant testified that employer had three types of positions which were: the route man who delivers furniture to the customer; an assistant manager who sometimes helps the route man and who moves furniture in the store; and the manager who remains in the store and sometimes helps move furniture in the store. It was Mr. G's testimony that the employer had to have an assistant manager at the M Street store during the two and one

half months claimant was out. Mr. G stated that typically a route man begins at the minimum wage but claimant was offered $5.00 an hour, an amount above the minimum, but $1.37 an hour less than he had been making. The position offered to claimant as a route man was at employer's store, which claimant said was 15 or 20 minutes farther from claimant's house than the (M Street) location. Mr. G stated he told claimant that claimant would be considered when an assistant manager position came open. Claimant testified, and the hearing officer apparently believed, that claimant was told that claimant would have to prove himself when an assistant manager job came open. Claimant testified that the duties of a route man were more physically demanding than those of an assistant manager and that claimant, at the time in January 1992, was not capable of performing the job of route man.

Exactly what happened next is not entirely clear from claimant's testimony. Claimant states he showed up for work at the store (apparently on January 20th). Claimant states he had been given (apparently by Mr. G at the meeting with claimant) a "new employee packet" (which was dated "1-20-92"), which contained an "Acknowledgement Sheet." The acknowledgement sheet recites that an employee agrees to abide with employer's policy manual, personnel policies are not a contract of employment and that employees are "employees at will" who may be terminated at any time for any or no reason. Claimant states he took the packet home, filled out all the information but did not sign the acknowledgement form. The next day (apparently January 20th) claimant states he came to work but was not allowed to clock in until he signed the acknowledgement sheet. Claimant stated "I am ready to work." Claimant states he refused to sign the acknowledgement sheet because he believed it would allow employer to fire him more easily. On examination by the employer, claimant stated he understood the form did not change his legal rights. Mr. G testified, and claimant acknowledged, that all of the employer's other employees had signed the form.

Mr. G testified at the CCH, and stated he was contacted by claimant on January 15, 1992. According to Mr. G, claimant was to resume employment as soon as he was released by the doctor. At some point between January 15th and January 20th, claimant brought in Dr. P's release. Mr. G testified that he then told claimant about the route man position at the store, that the pay was $5.00 an hour, and that the position was a full-time, permanent position to begin immediately (apparently on January 20th). Mr. G testified the offer was never revoked and the position was only filled some 10 days after the offer was made to claimant when it became clear that claimant was not going to sign the acknowledgement form. Another employee, JM, testified that claimant had said he was ready to work and never said that "wouldn't work because he couldn't work." There was testimony, from Mr. G, that claimant never told anyone of any work or job restrictions.

The hearing officer made the following pertinent determinations:

FINDINGS OF FACT

4.Prior to his injury on (date of injury), CLAIMANT was an assistant manager at the store

located at 1401 (city), Texas.

5.CLAIMANT was released to return to work as an assistant manager, a job requiring little heavy lifting, on January 13, 1992.

6.CLAIMANT was offered the job of route man, a job requiring much heavy lifting, at the store located at (address) location 15 or 20 minutes farther from his home than his previous job.

8. (sic)(Should be Finding of Fact No. 7 or Finding of Fact No. 7 was left out). Although CLAIMANT's doctor had released him to return to work on a full time basis as an assistant manager, CLAIMANT was not capable of performing the physical requirements of the job offered, that of a route man.

9.The offer of the job did not state the duration of the posistion (sic) nor the length of time the offer would be kept open.

10.CLAIMANT has been unable to obtain and retain employment due to his compensable injury at wages equivalent to his pre-injury wage from June 11, 992, through (date of injury).

CONCLUSIONS OF LAW

2.The offer of a job made by CLAIMANT'S EMPLOYER was not a bona fide offer of employment.

3.CLAIMANT had disability from June 11, 1992, through (date of injury).

Carrier apparently contests Findings of Fact Nos. 5, 6, 8, 9, and 10 and Conclusions of Law Nos. 2 and 3.

Disability is defined as "the inability to obtain and retain employment at wages equivalent to the pre-injury wage because of a compensable injury." Article 8308-1.03(16). If disability is necessary for continued payment of TIBS, it would follow that where disability ceases, TIBS stop. We noted in Texas Workers' Compensation Commission Appeal No. 91045, decided November 21, 1991, determining the end of disability within the meaning of the 1989 Act can be a very difficult and imprecise matter. Where there is a question as to the continuance of disability, it would be reasonable and consistent to require showing of the employee's inability to obtain and retain employment at the preinjury wage because of the compensable injury. An unconditional medical release to return to full duty does not in and of itself, end disability. Appeal No. 91045, *supra*, and Article 8308-4.16(e). If an employee cannot obtain and retain employment because of a compensable injury, disability continues. Where the evidence sufficiently establishes an unconditional medical release to return to full duty status of the employee, the employee has the burden to show that disability

is continuing. Evidence such as reasonable efforts made to secure employment, suitable to a person in his circumstances, the availability or unavailability of such employment, and the acceptance or rejection of any employment offer or opportunity, may be probative evidence in proving a case for continued temporary income benefits. *See generally* Larson, Workmen's Compensation Law, Vol. 2, § 57.61(d), pp. 10-208 through 10.247 (Matthew Bender, NY, 1989). (We note that, in this case, had claimant returned to work as a route man, he would arguably have had "disability" because his wage would have been less.)

In the instant case, claimant on more than one occasion announced he was ready to return to work. The treating doctor also indicated that claimant was released to return to return to full time work with normal activities (and/or limited activities) on January 20th. It was after claimant was told that the position being offered him was as a route man, rather than to his previous position as assistant manager, that claimant expressed reservations that he could perform the duties of a route man because that position, arguably, involved more strenuous physical activities and lifting than the position of assistant manager. Claimant's activities would further indicate that he actually showed up to begin working as a route man on January 20th, but refused to sign the acknowledgement form which, according to the testimony, was the only reason claimant did go back to work as scheduled.

The key issue in this case is whether claimant was physically capable of performing the requirements of the offered job as a route man or was able to obtain or retain employment. The doctor did not place any limitations on claimant's duties, releasing him to "normal activities" in his report dated January 13, 1992. Subsequent reports from Dr. P do indicate some limitations of claimant's physical capabilities. Claimant testified that Dr. P knew he was an assistant manager and that the doctor was releasing him to the normal activities of an assistant manager. Claimant also testified, on one occasion, he did not believe he was physically capable of performing the duties of a route man. The hearing officer accepted claimant's testimony and in Finding of Fact No. 5 states, "CLAIMANT was released to return to work as an assistant manager, a job requiring little heavy lifting. . . ." The hearing officer, in so finding, makes some inferences beyond the actual work release and the testimony. Claimant's testimony that he was not physically capable of performing the requirements of a route man are somewhat belied by the fact he apparently had agreed to the job and had actually showed up for work as a route man but was not allowed to clock in because he refused to sign the acknowledgement sheet. There is certainly abundant evidence that claimant had been released for normal activities and had started to work as a route man. When reviewing a case based on factual sufficiency of the evidence, the challenged findings will be upheld unless the Appeals Panel determines that the evidence is so weak or that the findings of the hearing officer were so against the great weight and preponderance of the evidence as to be manifestly erroneous or unjust. In re King's Estate, 244 S.W.2d 660 (Tex. 1951); INA of Texas v. Howeth, 755 S.W.2d 534 (Tex. App.-Houston [1st Dist.] 1988, no writ). The hearing officer found, based solely on claimant's testimony, that claimant was not physically capable of performing the duties of a route man. The hearing officer is the sole judge of the weight and credibility to be given the evidence. Article 8308-6.34(e). In reviewing a case, the Appeals Panel should not set aside the decision of the hearing officer because the hearing officer may have drawn inferences and

conclusions different than those the Appeals Panel deems most reasonable, even though the record contains evidence of or gives equal support to inconsistent inferences. Garza v. Commercial Insurance Co. of Newark, N.J., 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). Consequently we find there is sufficient evidence to support the hearing officer's determination on this point.

The carrier also contests the hearing officer's conclusion that a bona fide offer of employment was not made. In Texas Workers' Compensation Commission Appeal No. 92432, October 5, 1992, we held the amount of TIBS paid, or payable, during a period of disability may be reduced if it is determined that an injured worker receives a bona fide offer of employment that the employee "is reasonably capable of performing, given the physical condition of the employee and the geographical accessibility of the position. . . ." Whether or not such a position is accepted, the offered wage will be imputed to the employee. Article 8308-4.23(f). While a job offer may be "bona fide" in the layman's sense that the employer is sincere, the statute plainly requires more than a sympathetic motive before the TIBS benefit can be reduced. The elements that the Commission will consider to determine if an offer of employment is "bona fide" for purposes of Article 8308-4.23(f) are described in Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 129.5(a) (Rule 129.5). Because the offer made in this case was verbal, the carrier was required to prove by "clear and convincing" evidence that a bona fide job offer had been made. Rule 129.5(b); Texas Workers' Compensation Commission Appeal No. 91023, decided October 16, 1991; and Appeal No. 92432, *supra*.

At the outset we note that the dispute about the bona fide offer of employment revolved around a January 1992 time frame while the announced and agreed upon issue dealt with whether claimant was entitled to TIBS from June 11 to (date of injury). Nevertheless, it is undisputed that claimant was offered the position of route man (a position with which claimant was familiar), at $5.00 an hour, the position was available immediately or the next day, that it was a permanent, full-time position, and that the distance was approximately 15 or 20 minutes further away from claimant's home than his previous position. Mr. G testified that the offer was for a permanent full time position, that claimant would get some kind of consideration for the next assistant manager opening and the offer had never been revoked and that the position was only filled 10 days later when it became apparent that claimant would not sign the acknowledgement form and effectively refused the offer. The hearing officer, as noted above, found that this "offer of a job did not state the duration of the posistion (sic) nor the length of time the offer would be kept open." We find the hearing officer's determination on this point to be erroneous. The undisputed testimony was that the position was a full time permanent position and that it remained open indefinitely until claimant had rejected the offer by refusing to sign the acknowledgement form. This undisputed testimony establishes, by clear and convincing evidence, that the offer had complied with the duration and length of time considerations of Rule 129.5(a).

Rule 129.5(a)(4) also requires that the offered position consider "the physical requirements and accommodations of the position compared to the employee's physical capabilities. . . ." The hearing officer in Finding of Fact No. 8 states "CLAIMANT was not

capable of performing the physical requirements of the job offered, that of a route man." This finding is supported by claimant's testimony. Consequently, the hearing officer's Conclusion of Law that employer's job offer "was not a bona fide offer of employment" is supported by Finding of Fact No. 8, rather than No. 9.

Upon review of the record and the evidence, we find that the hearing officer's determinations are supported solely by the hearing officer's acceptance of claimant's testimony. There was some evidence inconsistent with claimant's testimony, however, when presented with conflicting evidence the hearing officer may believe one witness and disbelieve others and may resolve inconsistencies in the testimony. McGalliard v. Kuhlmann, 722 S.W.2d 694 (Tex. 1986). The hearing officer may accept some parts of a witness testimony and reject other parts of that testimony. Cobb v. Dunlap, 656 S.W.2d 550 (Tex. App.-Corpus Christi 1983, writ ref'd n.r.e.). Because we cannot conclude from all the evidence before her that the hearing officer's determinations are so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust, we affirm the decision andmodify Finding of Fact No. 9 to read "The offer of the job adequately stated the duration of the position and the length of time the offer would be kept open." Finding of Fact No. 8 still supports Conclusion of Law No. 2. The hearing officer's decision is affirmed as modified in Finding of Fact No. 9.

Thomas A. Knapp
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Susan M. Kelley
Appeals Judge