APPEAL NO. 93777

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On July 28, 1993, a contested case hearing (CCH) was held in (city), Texas, with (hearing officer) presiding as hearing officer. The issues to be determined at the CCH were: (a) whether claimant has reached maximum medical improvement; (b) if claimant has reached maximum medical improvement, what is claimant's impairment rating; and (c) whether claimant has disability from (date of injury), to present. The hearing officer determined that the appellant, claimant herein, had not reached maximum medical improvement (MMI), consequently an impairment rating would be premature and that claimant had disability from (date of injury) (the date of the injury) through May 20, 1992 (the day before being offered employment); from July 6, 1992, through August 18, 1992 (while claimant was in work hardening) and from May 20, 1993 (date of subsequent back surgery) to the date of the CCH. Claimant contends that the hearing officer erred in finding that there was a bona fide offer of employment, and requests that we reverse the hearing officer's decision and render a decision in his favor. Respondent, carrier herein, did not file a response.

DECISION

The decision of the hearing officer is affirmed.

Claimant testified he was employed by (employer), employer, initially as a janitor and subsequently on the assembly line. He testified on (date of injury), he injured his low back lifting a power mower. Claimant had a history of back problems including prior back surgery in 1976. Following his injury of (date of injury), claimant saw (Dr. C), apparently a company doctor. Dr. C referred claimant to (Dr. S) who was the first treating doctor. Dr. S referred claimant to (Dr. A) who was in the same medical group as Dr. S. Claimant saw Dr. A for a month or month and a half when he was referred back to Dr. S. Dr. S certified MMI on April 1, 1992, with 10% impairment. By a report dated May 21, 1992, Dr. S states: "I have asked him to return to some type of gainful employment. He needs to actively try to do a job and that way we can find out what in that job is affecting him." Subsequently claimant requested a change of treating doctors and began seeing (Dr. P). Dr. P, in a report dated June 25, 1992, stated that claimant may have a "degenerative disc, symptomatic at L3-4" and that claimant was not ready to consider surgical intervention. Dr. P recommended a "work hardening program, i.e. functional restorative therapy." Claimant next saw (Dr. B) at the Center for Functional Evaluation and Rehabilitation (Center). Dr. B in an interim evaluation dated August 5, 1992, states:

> The patient's job is one of heavy work only and it would not appear realistic for him to try to return to this type of work. He has been in contact with Job Source and is planning on attending classes to obtain his GED and then go into job retraining. (He) initiated this on his own and it appears that he will follow through on this endeavor.

Dr. P in a letter dated August 6, 1992, states:

> . . . he is going to have to get a lot worse clinically before we can consider surgical intervention. My plans at the moment are to have him finish the program and if light duty is available from his employer send him back to light duty. If not, I believe he is going to need vocational retraining."

Claimant was unable to complete the work hardening and Dr. B, by letter dated August 14, 1992, states:

> We regret that this patient was unable to complete the two week period of job simulation. It was determined that the job simulation activities were aggravating this patient's overall pain symptomatology and we felt that it would be in his best interest to discharge him at this time.

The record appears to reflect that (Dr. W) was a Texas Workers' Compensation Commission (Commission) selected designated doctor and the record reflects discussion of the effect of a designated doctor subsequently becoming a treating doctor. However, the record does not contain an appointing order or letter and Dr. W's narrative report is entitled "Second Opinion Evaluation" and his Report of Medical Evaluation (TWCC-69) states "Seen Second Opinion Evaluation 9/11/92." In any event Dr. W does not certify MMI but appears to give an impairment rating of 10%. Subsequently claimant files an Employee's Request for Third or Subsequent Treating Doctor (TWCC-50) and Dr. W becomes claimant's third treating doctor. Dr. W in subsequent TWCC-69's prospectively estimates claimant's MMI as (date) and 9-11-93. Sometime in latter 1992, claimant filed for unemployment with the Texas Employment Commission (TEC). His claim was denied and claimant appealed. On March 16, 1993, the decision denying claimant unemployment benefits because he failed to report for work was affirmed. On May 20, 1993, Dr. W performed spinal surgery on claimant.

The carrier's position is that based on Dr. S's report of May 21, 1992, claimant was released for light duty, that the employer made claimant a verbal bona fide offer of employment that met the requirements of Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE §129.5 (Rule 129.5). According to the carrier, claimant refused the offer stating he wanted special schooling and was not interested in any type work. Carrier's case is advanced by the testimony of (Mr. G) who testified he offered claimant a light duty position on several occasions and spoke with claimant in his native Spanish. (Mr. B), the "employer representative," who is apparently employer's President, testified that a specific offer of light duty at the pre-injury wage had been made to claimant at a meeting in Mr. B's office in May 1992. (Ms. N), employer's bookkeeper/secretary testified that she had typed a letter to the TEC verifying an offer of employment to claimant.

The hearing officer determined that claimant had not reached MMI as of the date of the hearing and therefore claimant's impairment rating is not ripe for adjudication. These determinations were not appealed and consequently we need not further comment on them.

The hearing officer also made the following pertinent findings:

FINDINGS OF FACT

8.On May 21, 1992, (employer), Inc. made an offer of employment to Claimant (injured employer) which clearly stated the position offered, the duties of the position, that the Employer was aware of and would abide by physical limitation, the maximum physical requirements of the job, the wage, and the location of employment.

9.On May 21, 1992, the (employer), Inc. made an offer of employment to Claimant (injured employer) which stated the expected duration of the position, the length of time any offer was kept open, the physical requirements and accommodations of the position compared to Claimant (injured employer)' physical capabilities, and the distance of the position from Claimant (injured employer)'s residence.

10.Under the job offer found in Findings of Fact Nos. 8 and 9, Claimant (injured employer)'s weekly wages from May 21, 1992, to the date this Benefit Contested Case Hearing was held on July 28, 1993, were equivalent to the preinjury wages except for the hereinafter provided periods that Claimant (injured employer) was unable to perform under the job offer.

CONCLUSIONS OF LAW

4.On May 21, 9192, the (employer), Inc. made a bona fide offer of employment to Claimant (injured employer).

Claimant contests the quoted findings and conclusions and contends that ". . . the Workers' Compensation Act must be given liberal construction to carry out it's evident purpose." Citing Shelton v. Standard Ins. Co., 389 S.W.2d 290 (Tex. 1965). Claimant contends ". . . that the evidence must be viewed most favorably to the Claimant's version of the occurrence. Najera v. Great Atlantic & Pacific Tea Co., 207 S.W.2d 365 367 (Supreme Court of Texas 1948)." We have addressed the issue of liberal construction of the 1989 Act on a number of occasions and have held that the weight of case law authority under the pre-1989 Act does not extend a liberal construction to questions of fact as opposed to law. Texas Workers' Compensation Commission Appeal No. 93488, decided July 29, 1993, and Texas Workers' Compensation Commission Appeal No. 93057, decided February 25, 1993. In Appeal No. 93057 we observed that no sound basis has been found to apply a liberal construction doctrine, as requested by the claimant, to claimant's conversation with Mr. B, a factual matter. Appeal No. 93057, *supra*, cites Jackson v. U.S. Fidelity and Guaranty Co., 689 S.W.2d 408 (Tex. 1985) which stated:

[t]his case, however involves a determination of the facts, "rather than the law" and goes on to state "[t]herefore, the act itself offers nothing to resolve this case,

and the rule of liberal construction certainly does not authorize liberally construing ambiguous fact findings in favor of the claimant." The cases cited by claimant involve interpretations by the court of provisions of the statute to a given factual setting.

Claimant's contention that conversations with a supervisor or manager are to be liberally construed is not meritorious as this involves a question of fact within the purview of the hearing officer to resolve.

Basically claimant's contention goes to the question of fact whether a bona fide offer of employment was made to claimant based on Dr. S's report releasing claimant ". . . to return to some type of gainful employment." Claimant argues that because he has only a limited formal education, that there were some ambiguities in the offer of employment and that there was unobjected to hearsay, we should overturn the hearing officer's decision that there was a bona fide offer of employment.

The issue of bona fide offer of employment become pertinent in the instant case because the amount of temporary income benefits (TIBS) paid, or payable, during a period of disability may be reduced if it 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. Section 408.103(e). While a job offer may be a "bona fide" in the layman's sense that the employer is sincere, the statute plainly requires more than a sympathetic motive before the TIBS benefits can be reduced. The elements that the Commission will consider to determine if an offer of employment is "bona fide" for purposes of Section 408.103(e) are described in Rule 129.5. The provisions of Rule 129.5 state:

(a)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.

(b)A written offer of employment which was delivered to the employee during the period for which benefits are payable shall be presumed to 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.

(c)Employment is geographically accessible" to the injured employee if it is within a reasonable distance from the employee's residence unless the employee established through medical evidence that the employee's physical condition precludes travel of that distance.

Although there was a letter to the TEC in this case, that letter only appears to confirm the verbal offer previously made and there is no indication that the letter was sent to, or written for, the claimant. 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, decided October 5, 1992.

Both Mr. G, the supervisor, and Mr. B, employer's President, testified that claimant had been urged to return to work, on more than one occasion, and that claimant would not be required to do more than he felt he was capable of doing. Although the exact position was not identified, both Mr. G and Mr. B testified it would be duties similar to what claimant initially had as a janitor, only lighter, and that accommodations would be made for claimant's physical condition. Both Mr. G and Mr. B testified the wage would be claimant's pre-injury wage and the position would be at the same location where claimant had previously worked. The testimony was that the position was for an indefinite duration and that the offer was left open from May 1992 to April 1993. Mr. B specifically testified be told claimant "(claimant), you need to come back to work. The doctor (meaning Dr. S) says you need to go back to work. And he (claimant) said 'No'." Mr. B testified he said ". . . just go back there, we will find something for you to do," to which claimant responded "No . . . I'm going to go and get retrained." Claimant's argument on appeal is that claimant, with his limited education, did not understand what was being told him, that the position was not definite enough, that Mr. G did not know exactly what the doctor's restrictions were and that no one with the employer ". . . ever sat down with [claimant] . . . and explained to him in terms that he could understand exactly what his job duties would be, what the rate of pay would be . . . in a way to be understanding and compassionate." This argument is directly contradicted by the testimony of both Mr. G and Mr. B who both testified regarding claimant's return to his original job as modified for his condition. Claimant's appeal states claimant ". . . truly thought he did not have a job or a job offer . . . ." However, this is contradicted by claimant's testimony on cross-examination where he was asked:

Q:Okay. And you were offered a job at [employer], in fact, weren't you?

A:Right

Q:Okay. Do you remember who offered that job?

A:The first time that I went, I talked to [Mr. B].

Whether the conversations and testimony amounted to a bona fide offer of employment is a determination to be made by the hearing officer, who is the sole judge of the relevance and materiality of the evidence offered and of the weight and credibility to be given to the evidence. Section 410.165(a). The hearing officer determined that carrier's evidence complied with the requirements for a bona fide offer of employment pursuant to Rule 129.5. The hearing officer had the opportunity to hear the witnesses, including the claimant, and observe their demeanor. Obviously the hearing officer believed claimant understood he had been offered a position and this is supported by claimant's own testimony. Upon a careful review of the record we cannot say that as a matter of law that the determinations of the hearing officer were so against the great weight and preponderance of the evidence as to be manifestly wrong or unjust. In re King's Estate, 244 S.W.2d 660 (Tex. 1951); Pool v. Ford Motor Co., 751 S.W.2d 629 (Tex. 1986). Nor are we willing to say, as a matter of law, that the carrier failed to prove, by clear and convincing evidence, that a bona fide offer of employment had been made. Consequently, the hearing officer's decision is affirmed.

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Thomas A. Knapp
Appeals Judge

CONCUR:

_____
Stark O. Sanders, Jr.
Chief Appeals Judge

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Joe Sebesta
Appeals Judge