APPEAL NO. 93904

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq* (1989 Act) (formerly V.A.C.S., Article 8308-1.01 *et seq.*). A contested case hearing (CCH) was held in this case on August 27, 1993, in (city), Texas, with (hearing officer) presiding as hearing officer. The issues at the CCH were: 1. whether or not an injury occurred in the course and scope of employment on (date of injury); 2. whether or not the employer made a bona fide offer of light duty, and, if not, is the respondent's (claimant herein) disability a result of his injury; and 3. what was the claimant's average weekly wage (AWW) prior to the date of injury. The hearing officer concluded that the claimant was injured in the course and scope of his employment, that the claimant was not made a bona fide offer of employment and that the claimant's AWW prior to the date of injury was $190.00. The appellant (carrier herein) files a request for review contending that the determinations of the hearing officer as to injury in the course and scope of employment and bona fide offer of employment are not supported by sufficient evidence, as well as pointing to a typographical error in the decision. The claimant files no response to the carrier's request for review.

DECISION

We reform the sentence in the section of the hearing officer's Decision and Order entitled "Decision" where it reads, "Temporary Income Benefits should be paid when disability ends or Maximum Medical Improvement is reached." We reform this sentence to read, "Temporary Income Benefits should be paid until disability ends or Maximum Medical Improvement is reached." Finding no reversible error in the record, and sufficient evidence to support the decision of the hearing officer, we affirm the Decision and Order of the hearing officer as reformed.

The evidence is accurately summarized in the Decision and Order of the hearing officer and we adopt his "Statement of the Evidence" for our decision. Briefly, the claimant began working with the employer, an apartment complex, in February 1993 as a janitor. The claimant testified that on (date), while putting trash in a dumpster, the lid to the dumpster slipped and fell on his left hand. The claimant testified that he went to the hospital the next day and a fracture was discovered. The carrier sent the claimant to its doctor on March 11, 1993, who diagnosed two fractures. The claimant then saw (Dr. O), who is a specialist, who diagnosed a "unicordal fracture" and a contusion. All three of the foregoing doctors gave the claimant work release slips to return to work with restrictions.

Under cross-examination, the claimant admitted that he had been previously reprimanded for several infractions of company rules since he had been hired by the employer. The claimant also confessed, prior to the accident, that he had requested the weekend after the accident off, and his request had been denied. After the accident the claimant left town for the entire weekend.

The apartment manager (Ms. G) testified that the claimant was not supposed to be at the dumpster at the time when he claimed to have been injured. Ms. G also testified that a coworker had seen the claimant's hand the evening of this injury and the coworker could

see nothing wrong with it. Ms. G stated that when she received the light duty release, she made up a list of duties which she thought claimant could do. According to Ms. G, the claimant and Ms. G met on March 17th to talk about the injury and agreed to get together the next day. Ms. G further testifed that the next morning the claimant's girlfriend called in to say that claimant was too sick to report. Ms. G said that in the meantime she corresponded with the treating doctor in an effort to get medical approval of the limited duty tasks. On March 22, 1993, Ms. G received a response from the doctor. The claimant testified that he did not come in for work or call the employer between March 19th and 23rd because he understood that his supervisor and physician were in contact. The claimant did report on the morning of March 23, 1993, and was terminated. Ms. G said that she had to replace him because it had been so long since he had contacted the employer. Ms. G testified that she did not discuss the bona fide offer of employment with the claimant on March 23rd.

In its request for review the carrier first challenges the following Finding of Fact and Conclusion of Law of the hearing officer as not being supported by the evidence:

FINDING OF FACT

5.Claimant was about the task of dumping trash into a dumpster, in the furtherance of his employers' business, when the lid of the dumpster fell onto his hand. The hand was fractured.

CONCLUSION OF LAW

3.Claimant was injured in the course and scope of his employment on (date of injury).

The carrier recognizes that the question of whether an employee was in the course and scope of employment when injured is a question of fact to be determined by the hearing officer. The carrier cites Texas Workers' Compensation Commission Appeal No. 92276, decided August 5, 1992, for the proposition that the claimant bears the burden of proving, by a preponderance of the evidence, that an injury occurred while in the course and scope of employment. The carrier argued that the claimant failed to meet this burden. The carrier argued that it presented evidence that the claimant could not have been disposing of the trash at the time he claimed because the carrier presented evidence that at the time the claimant's alleged the injury took place the trash had already been dumped. The carrier also points to evidence that at other times the claimant had rummaged through the dumpster to obtain items for himself. The carrier then argues that if the claimant was injured at the dumpster at the alleged time of the accident it was because he was in the trash dumpster on a personal rummaging expedition which in no way furthered the business of the employer.

The evidence to which the carrier points clearly created a conflict in the evidence. Section 410.165(a) provides that the contested case hearing officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence as well as of the weight and

credibility that is to be given the evidence. It was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701, 702 (Tex. Civ. App.-Amarillo 1974, no writ). The trier of fact may believe all, part, or none of the testimony of any witness. Taylor v. Lewis, 553 S.W.2d 153, 161 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.); Aetna Insurance Co. v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ). An appeals level body is not a fact finder, and does not normally pass upon the credibility of witnesses or substitute its own judgment for that of the trier of fact, even if the evidence would support a different result. National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied). When reviewing a hearing officer's decision for factual sufficiency of the evidence we should reverse such decision only if it is so contrary to the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex 1986); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986).

The carrier in its request for review recognizes the above described standard as the proper standard of appellant review. It argues that applying this standard to the evidence that we should reverse the decision of the hearing officer. We cannot agree. A claimant's testimony alone may establish that a compensable injury occurred. Gee v. Liberty Mutual Insurance Co., 765 S.W. 2d 394 (Tex. 1989); Texas Workers' Compensation Commission Appeal No. 92187, decided June 29, 1992. We believe that while carrier certainly produced substantial contrary evidence, we cannot say that the carrier's evidence constituted the great weight and preponderance of the evidence.

The carrier's second point of error revolves around a challenge of the hearing officer's following Finding of Fact and Conclusion of Law:

FINDING OF FACT

9.Claimant was terminated on March 23, 1993. Claimant had not been made a bona fide offer of employment either in writing or verbally before he was terminated.

CONCLUSION OF LAW

2.Claimant was not made a bona fide offer of employment.

The carrier argues that it made a bona fide offer of employment to the claimant on March 17, 1993. The carrier contends that this offer met the requirements of Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 129.5 (Rule 129.5). The carrier states that the hearing officer himself recognized as much in his "Discussion." The carrier argues that the claimant was aware of this offer, yet he failed to come in on March 18th as agreed. The carrier then argues that the claimant failed to contact the employer until March 23, 1993, when he was terminated for good cause, due to his failure to check in and his many violations of company policy and rules.

Rule 129.5 provides in relevant part:

(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 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 hearing officer stated in his "Discussion" as follows:

Carrier has presented what would probably be minimum compliance with rule 129.5, Rules Of the Texas Workers' Compensation Commission (Carrier's Exhibit "C".) Carrier has also presented clear and convincing evidence that the elements of a verbal offer had been crafted should one determine that the written offer did not satisfy the requirements of the rule. However, the Claimant was terminated before the offer in any acceptable form was transmitted to him.

Carrier's Exhibit "C" is a letter date March 19, 1993, from the employer to the claimant's treating doctor, Dr. O, listing light duties the employer felt that the claimant could perform and requesting that she advise the employer whether or not Dr. O felt that the claimant was physically capable of performing these tasks. The date of this letter, as well as testimony for Ms. G and the claimant, is evidence that the carrier was still in the process of formulating a bona fide offer to the claimant after the March 17, 1993, meeting between the claimant and Ms. G. This precludes us, under the standard of review discussed *supra*,

from holding that there is insufficient evidence to support the finding of the hearing officer that the claimant had not been made a bona fide offer of employment before he was terminated.

While not directly in issue, but implicit in the carrier's prayer for relief, requesting that we find that the claimant is not entitled to benefits due to the bona fide offer, is the question of whether termination for good cause would necessarily preclude the claimant from temporary income benefits. We addressed this question in Texas Workers' Compensation Commission Appeal No. 91027, decided October 24, 1991, where we stated:

> It is our opinion that a broadly stated rule forever denying workers' compensation benefits to an employee returned to light duty and subsequently discharged for cause, (citation omitted) 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.
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> The decision of the hearing officer, as reformed, is affirmed.

Gary L. Kilgore
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Susan M. Kelley
Appeals Judge