APPEAL NO. 93913

On April 23, 1992, a contested case hearing was held in (city), Texas, with (hearing officer) presiding as the hearing officer. The only issue to be decided at the hearing was whether the employer, (employer), had made a bona fide offer of employment to the claimant, MR, who is the respondent. There were two offers made to the claimant in writing; one was dated November 30, 1992, and the second was dated March 3, 1993. The record was held open until September 21, 1993.

The hearing officer determined, as to both offers, that neither offer complied with the requirements of the applicable rule of the Texas Workers' Compensation Commission (Commission), and that the employer failed to prove, by clear and convincing evidence, that a bona fide offer had been made.

The carrier has appealed this determination, pointing out that its March 3, 1993, offer contains all the elements of a presumptively bona fide job offer within the terms set out in the applicable rule, which is found at 28 TEX. ADMIN. CODE § 129.5 (Rule 129.5), and that it did not have to prove its case by clear and convincing evidence. No response has been filed. The hearing officer's determination as to the November 1992 job offer appears not to have been appealed.

DECISION

The decision of the hearing officer is reversed in part, and affirmed in part, and a decision rendered that a bona fide job offer was made to the claimant on March 3, 1993, in accordance with Rule 129.5 and Section 408.103(e). Based upon the evidence in the file, the Appeals Panel renders a decision that her temporary income benefits (TIBS) should be reduced from March 3, 1993 until April 26, 1993, the date she was taken off work by her second treating physician.

The claimant did not testify as to how she was injured, but this may be inferred from medical records in evidence. Succinctly, claimant was working on the line where she inspected and repaired parts when she got her thumb caught between two boxes. This occurred on (date of injury). Primarily, her immediate complaints had to do with pain and numbness in her right hand. Claimant testified that, as of the date of the hearing, she had numbness and coldness from three fingers to the wrist, and that she was unable to grip. She said she had pain nearly all the time. The carrier stipulated at the beginning of the hearing that she was unable to use her right hand. As of the hearing, the claimant testified that her left hand "sometimes" would hurt due to doing many things with it.

Claimant's treating doctor was (Dr. R), a neurologist. Dr. R's records from Fall 1992 indicated a "mild" carpal tunnel syndrome in the right hand as detected in nerve conduction studies. As of March 1, 1993, Dr. R noted that claimant's symptomatology was much greater than that which could be attributed to carpal tunnel and postulated a possible functional or emotional overlay to her pain. Both Dr. R and a consulting physician, (Dr. K), recommended against surgery. Dr. K's notes for a February 16, 1993, examination found

full range of motion in all joints, no swelling, and no sensory deficit. On March 3, 1993, Dr. R completed a release for claimant to return to work, under restrictions "per (Dr. T)." An initial medical report from (Dr. T), who was identified as the company doctor, is dated November 18, 1992, and indicated that the restriction was that claimant should not use her right hand.

The record indicates that claimant had, by April 8, 1993, changed her treating doctor to (Dr. A) with Commission approval. His report of an examination conducted April 26, 1993, was received into the record after the contested case hearing but prior to the closing of the record. Dr. A took claimant off work for two weeks, pending a recheck. Records from any re-examination by Dr. A are not in evidence. She was observed to be in no severe distress that time. He found claimant's symptoms consistent with right handed carpal tunnel, and did injections.

Employer offered claimant light duty on November 30, 1992 and March 3, 1993. The claimant stated that she tried to do the light duty job that was offered to her, in March 1993. When shown the written job offer of that date, claimant admitted it was her signature but denied she had seen the document in question. She stated that she did not recall knowing what she would be paid. She worked for, and was paid for, an entire day. Claimant stated that before the injury she worked ten hour days.

The offer of March 3, 1993, is on a form which has been signed by the claimant. The job title of production operator is listed. The location within the plant is described.
The specific duties are cited as follows: "Fill (approx) 3" x 5" metal tray with 50 lead cups (approximately the size of a pencil eraser.) Shake tray to seat lead cups. Visually inspect both top and bottom of tray of lead cups. Empty lead cups into "ice cream" carton."
Under maximum physical requirements is listed "repeat procedure. No use of Right hand."
The wage rate is clearly listed as "$9.25." On the form are the following statements: "[Employer] is aware of and will abide by the physical limitations under which the employee or his/her treating physician have authorized the employee to return to work. I have read and understand this job offer. I further acknowledge that this is a bona fide offer of employment."

The claimant stated that she went back to the job but was unable to perform the job. Her reason for her inability to perform primarily was that she could not lift and turn over a tray with one hand without some parts sliding off. She acknowledged that she was told that day by supervisors to do the best she could, and that no one complained about her performance. Although she testified that on her original job, when she had performed such services, she would have to lift and turn in excess of four thousand trays in a ten hour day, there was no testimony as to the number she had to do that day, other than performing the best she was able.

Also in the record is a report from (Dr. MC) in (L), dated May 26, 1993, described as a second opinion. His impression was a possible reflex sympathetic dystrophy, noting that claimant had "[a] great deal of subjective complaints and no real objective findings. There

are some aspects of her findings that are not totally consistent." The doctor noted that he did not find her injury to be a simple carpal tunnel syndrome, and he recommended functional capacity testing as well as symptom magnification testing. The record shows that claimant's change of treating doctor to Dr. MC was approved July 22, 1993.

In addition to these doctors, the claimant indicated she had also been to (city) to see other doctors. The medical records in evidence from Dr. MC state that she voiced dissatisfaction with Dr. K and Dr. A on the basis that they felt her problems were in her head.

Mr. (Mr. E), the benefits coordinator for the employer, testified that he recalled specifically discussing the March 3, 1993, job offer with claimant in his office. He stated that she did not appear not to understand this offer. He said that it was stressed to claimant that she should do the best she could. He stated that the tray that claimant would be required to lift and turn over weighed, even with parts on it, approximately one to two ounces, and was the size of the cassette tape used by the hearing officer. The tray would be turned after covering it with another device. Mr. E stated that even if some parts rolled off the tray, they were not sensitive and it would not hurt them to fall on the table top. Mr. E testified that other employees have been brought back to do this task as light duty work, and that the job is capable of performance with one hand. Mr. E agreed that the person who performed the inspection job with one hand would not be as proficient, but he indicated that the a standard of performance would be the best that person was capable of doing. He stated that the company doctor, Dr. T, was the doctor who recommended the restriction that claimant not be put on a job where she would use her right hand, after reviewing her medical records.

An employee who has sustained a compensable injury and who has disability and has not attained maximum medical improvement is entitled to TIBS in accordance with applicable provisions of the 1989 Act. *See* Sections 408.101 through 408.103. TIBS are payable at the rates which are based upon the difference between the employee's average weekly wage and the employee's weekly earnings after the injury. However, under Section 408.103(e) (previously Article 8308-4.23(f)), 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 deemed equivalent to the weekly wage for the position offered to the employee. Rule 129.5(b) provides that 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. *See* Texas Workers' Compensation Commission Appeal No. 91023, decided October 16, 1991, for discussion of clear and convincing evidence standard.

Of course, the job offer in this case of March 3, 1993 was in writing. In our opinion, it fairly and reasonably meets the criteria set forth in Rule 129.5(b), and should have been accorded presumptive weight. The claimant's treating doctor at the time, Dr. R, released claimant to work per the restrictions of Dr. T. Dr. T, as of November 1992, had restricted claimant from work with her right hand. Mr. E's testimony indicated that they honored Dr.

T's restriction in the March 1993 job offer (as well as the earlier undisputed November 1992 offer). To the extent that the claimant's testimony could be taken by the hearing officer as setting some physical restrictions, claimant's testimony for the time period covered by the offer was basically that she could not use her right hand, and that she actually used her left hand. Moreover, claimant signed the March 3, 1993 offer at the time it was made acknowledging that it was consistent with limitations imposed either by her or her treating doctor. Thus, the offer made was consistent with her own self-imposed limitations, as well as those imposed by her treating doctor. Claimant agreed that her supervisor on the line that day did not criticize the quality of her work, but told her to do the work to the best of her ability. Claimant's assertion that she "could not do" the job appears to be based mainly on her unilateral determination that two hands were needed to render a certain quality of work apparently not demanded by the employer.

We have stated that a job offer must be analyzed with reference to an employee's physical capabilities at the time it is made. Texas Workers' Compensation Commission Appeal No. 92293, decided August 17, 1992. While subsequent events may be used by a trier of fact to determine whether the Rule 129.5 presumption has been rebutted, claimant's testimony that she could not perform a job she had actually undertaken cannot be used to retroactively read non-compliance with Rule 129.5 into a written offer that on its face complies with the rule. The hearing officer was thus in error in applying a "clear and convincing" proof standard to the March 3, 1993, offer.

According presumptive weight to this offer, it appears that the great weight and preponderance of the evidence in this case refutes claimant's position that she was "unable" to do the job. The evidence indicated that the position offered March 3, 1993, was one which the claimant was reasonably capable of performing, given her physical condition at the time. The major reason given by claimant as to why she could not do the job related to not being able to invert the trays in question without dropping parts, but this was coupled with her testimony that she was encouraged to do "the best you can," and Mr. E's testimony that it was known to the employer that the task could not be performed as proficiently with one hand as with two, and that the task was one that had been performed with one hand by other workers. The evidence also indicated that effective April 26, 1993, claimant was taken off work by her new treating doctor.

Therefore, for the period from March 3, 1993 until April 26, 1993, we reverse the hearing officer's determination that a bona fide job offer was not made to the claimant. The hearing officer's application of a higher legal standard (clear and convincing, rather than rebuttal of presumption) for analyzing the evidence was clearly erroneous. The amount of TIBS for that period should be reduced by using the offered wage. However, after April 26, 1993, there is sufficient evidence (given Dr. A's "off work" statement) to support the hearing officer's determination that claimant's TIBS should not be reduced. In accordance with this determination, and the record, we render a decision that the claimant's TIBS may be reduced for the period from March 3, 1993 through April 26, 1993.

In other respects, we affirm the decision of the hearing officer

Susan M. Kelley
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Robert W. Potts
Appeals Judge