APPEAL NO. 93961

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 on September 28, 1993, in (city), Texas, before hearing officer (hearing officer). The sole issue was whether the claimant, CS, had disability and if so, for what periods. The parties stipulated that the claimant's disability as a result of his compensable injury began on (date), and continued through March 7, 1993. The carrier seeks our review of the hearing officer's determination that the claimant had disability from (date), to the date of her decision on October 11, 1993. The claimant responds that the hearing officer's decision should be affirmed.

DECISION

We affirm the hearing officer's decision and order.

It was not in dispute that the claimant, who worked as a body work technician for (employer), suffered a compensable injury to his left hand on (date of injury). He was treated by (Dr. A), who referred him to (Dr. E), a hand specialist. Dr. E performed surgery on claimant (scapholunate reconstruction) on November 19, 1992. On March 8, 1993, Dr. E released the claimant to unrestricted work effective that date, although he did not discharge the claimant and said he would see him again in eight weeks. The claimant stated that he did not feel his hand was better because he continued to have pain in his wrist upon movement. He said he contacted his employer and the carrier, and received permission to return to Dr. A.

On March 11, 1993, the claimant was seen by Dr. A, who reviewed claimant's x-rays and questioned whether the claimant either had retorn the scapholunate structures or was having "chronic instability." He recommended that claimant undergo another MRI "to see whether his repair is intact." (An MRI of the left wrist, performed on May 27, showed post-surgical changes to the left wrist, specifically the scaphoid, and partial tear of the triangular fibrocartilage ligament.)

The next day, March 12th, claimant met with (Mr. H), employer's Director of Fixed Operations, concerning a job with employer as body shop estimator. While a written job description was introduced into evidence, claimant denied that he had seen it and Mr. H said he could not recall whether he showed it to claimant on March 12th. However, both claimant and Mr. H testified that claimant was offered the position that day. The claimant said he did not want to make a decision about the job until he knew more about his medical condition. Mr. H remembered that claimant mentioned his concern that Dr. E's medical release was not justified, but he said claimant also was reluctant to do this job, which involved dealing with customers. Claimant acknowledged that he talked to Mr. H about his concerns in this area. Mr. H said claimant told him he would get back in contact with him, but that he never did so.

Both claimant and Mr. H said the duties of an estimator were discussed in general at

their meeting, and that claimant, who had worked for employer for several years, had an idea of what the job entailed. Mr. H stated that the estimator was required basically to greet customers, write up estimates, and take cars in to be repaired. He said he believed that someone like claimant, who is right handed, could perform the job even with an impaired left hand. He also said the estimator job paid less than claimant's job as a repairman, but he did not remember by how much; however, he said he discussed the pay with claimant on March 12th.

The claimant said that following his visit with Dr. A he wrote Dr. E a letter expressing his concerns about his condition and his ability to work. On March 18th Dr. E wrote claimant that it was possible that his repair "could stretch out causing the . . . appearance that is noted on your xray . . . . As far as what effect continuing your occupation as an auto body repairman would have on your particular condition is concerned this would depend entirely upon what type of symptomatology you are having."

At Dr. E's invitation, the claimant returned for an appointment on March 29th. On March 31st, Dr. E wrote, "[i]t is obvious to me that the ligamentous reconstruction of his scapho lunate (sic) separation has not worked out. He is still very symptomatic. In my opinion he is not capable of doing a regular laboring job of work at this time. Nor, would I feel he was capable of doing it when I thought he could and when I released him on 03-08-93." Dr. E recommended further surgery and said the claimant could not return to his job as a body repairman. He concluded, "[a]gain, I am not releasing him to work."

The claimant stated under cross-examination that he had not discussed the estimator job with Dr. E when he saw him. On April 12th the claimant called Mr. H to ask about the job, even though he said he was not considering returning to work at that time, and was told the position had been filled on March 26th. Mr. H said the position again became available around July 1st, but that this information was not conveyed to the claimant.

On April 16th Dr. E replied to a letter to the carrier concerning the estimator position. He wrote, "you tell me that [claimant] was offered a position with [employer] not doing body repair work but writing up estimates for customers. You asked me if in my medical opinion he would have been able to do a job of writing. [Claimant] is right handed. I do think that it would be possible for him to do a job writing up of estimates." The claimant said he did not see this letter until a benefit review conference on June 14, 1993. After that conference, the Texas Workers' Compensation Commission (Commission) directed the claimant to be examined by (Dr. B). On June 30th Dr. B wrote that the claimant had disrupted his scapholunate ligament repair and would require further surgery. He also stated that "if all goes well, we can get him back to his normal work activities as an auto body repairman within three to four months." However, Dr. B also wrote that questions above claimant's job activities "are premature." The claimant said that Dr. B could not perform the surgery, and that Dr. A, who on July 30th took him off work until further notice, had referred him to another hand specialist, (Dr. R). (A Specific and Subsequent Medical Report signed by Dr. A indicated this referral had been made on September 1, 1993.) At the hearing the claimant said he had seen Dr. R twice but had no medical reports from him. He said he was not

currently scheduled for surgery.

On appeal the carrier challenges the hearing officer's determination that the claimant continued to have disability, stating that the claimant refused employer's bona fide offer of employment in a job which the evidence shows he could have performed, and that the claimant abandoned medical treatment. (To the extent that the carrier contends that the hearing officer omitted certain evidence, we note that we have held that when a hearing officer chooses to include a statement of the evidence in his or her decision, he or she is not required to mention every piece of evidence admitted. Texas Workers' Compensation Commission Appeal No. 93955, decided December 8, 1993. We are not able to conclude that the hearing officer did not consider every piece of evidence before her, although she was entitled to accord the evidence the appropriate weight. *See* Section 410.165).

We note at the outset that the 1989 Act provides that 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 to the employee, the employee's weekly earnings after the injury are equal to the weekly wage for the position offered. Section 408.103(e). The appropriate Commission rule, Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 129.5 (Rule 129.5) distinguishes between written and non-written offers; if the offer is not made in writing the carrier must provide "clear and convincing evidence" that a bona fide offer was made.

Neither the parties at the hearing, nor the hearing officer in her decision, addressed whether the offer in this case came within the parameters of Rule 129.5; rather, the carrier appears to have based its argument that claimant did not have disability on several factors, including his turning down the offer and refusing further medical treatment. However, our review of the evidence convinces us that the hearing officer's determination that claimant continued to have disability is supported by the evidence. Claimant's clear testimony, supported by documentation in the record, was that he immediately believed Dr. E's release to be premature, and he timely took action to seek further medical opinion with regard to his condition. Claimant's concerns were indeed borne out by reports of Drs. A, E, and B, as well as further testing, which indicated that further corrective action was necessary. Despite claimant's admission that he did not inform Dr. E about the estimator's job, by the time Dr. E opined that claimant could perform such work the position had been filled. We note that the facts show that the position was filled during the time the claimant was actively seeking Dr. E's opinion on Dr. A's report, prior to his appointment with Dr. E, and two weeks after he was offered the job. We also note that, after receiving Dr. E's letter concerning claimant's ability to perform the estimator's job, the employer did not inform the claimant when the job again became available. With regard to carrier's contention that the claimant has abandoned medical treatment, the evidence shows Dr. A referred claimant to another specialist on September 1st; claimant testified at the September 28th hearing that he had seen this doctor twice.

While a release to return to work is normally probative evidence that disability has ceased, Texas Workers' Compensation Commission Appeal No. 92088, decided April 12,

1992, this panel has held that under the 1989 Act all relevant evidence can be considered on this issue. Texas Workers' Compensation Commission Appeal No. 92202, decided July 13, 1992. The hearing officer was entitled to consider and weigh all the evidence in this case, including the claimant's testimony. We will not overturn the hearing officer's decision where, as here, it is supported by sufficient evidence and is not so against the great weight and preponderance of the evidence as to be manifestly unfair and unjust. In re King's Estate, 150 Tex. 662, 244, S.W.2d 660 (1951).

The decision of the hearing officer is affirmed.

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Lynda H. Nesenholtz
Appeals Judge

CONCUR:

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Joe Sebesta
Appeals Judge

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Gary L. Kilgore
Appeals Judge