APPEAL NO. 94086

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On December 10, 1993, a contested case hearing (CCH) was held in (city), Texas, with (hearing officer) presiding. The issues presented for resolution were:

1.Does the Claimant have disability as defined in Section 401.011(16)?
2.What is the Claimant's average weekly wage?

The hearing officer determined that the claimant had "disability" from July 24, 1993, through December 10, 1993, as a result of his injury on (date of injury), and that claimant's average weekly wage (AWW) is $566.44

Appellant, carrier herein, contends that the hearing officer erred in finding that claimant had disability from July 24, 1993 (all dates are 1993 unless otherwise noted) through December 10th, and that the employer had made a bona fide post-injury offer of employment to claimant and is entitled to adjust temporary income benefits (TIBS). Carrier does not appeal the hearing officer's determination regarding AWW and consequently that portion of the decision will not be discussed. Respondent, claimant herein, did not make a response.

DECISION

Determining that the claimant failed to establish he had disability, as defined by the 1989 Act, and that the hearing officer's decision is so against the great weight and preponderance of the evidence as to be clearly wrong, we reverse and render a new decision on claimant's disability.

The background facts are not undisputed. Claimant, who was 55 years old, was employed as a truck driver and drove a "long haul - cross-country" eighteen wheeler tanker truck. On (date of injury), claimant was lying in the sleeper portion of the truck while his partner was driving. The truck hit a bump and one corner of the spring that holds the mattress broke causing claimant to jerk his neck. It is undisputed claimant sustained a compensable neck injury. Claimant reported the injury to the company dispatcher the following day, (date), but continued driving. Claimant testified that in the following days he began "having stiffness in the neck and there was a little soreness and headaches . . . ." Finally claimant testified that he called the terminal manager and "told him . . . I needed to go to a doctor." Claimant was seen by (Dr. B) an occupational medicine specialist in (city) on April 21st. Dr. B took x-rays and diagnosed a cervical sprain and, according to claimant, told him he had arthritis. Claimant testified that he subsequently asked to be seen by a doctor "closer to home." Either Dr. B or the company then referred claimant to (Dr. PR) in (city). Dr. PR saw claimant on May 3rd, and sent claimant to therapy. Claimant saw Dr. PR six or seven times and when claimant did not get better referred claimant to a

neurologist, (Dr. SR) (who coincidentally is Dr. PR's wife).[1] Dr. PR gave notice to the trucking company that claimant should be on light duty, and claimant testified he was put on local short haul trips. Claimant was put on several different medications, at least one of which caused an allergic type of reaction. Claimant saw Dr. SR on July 2nd, and according to claimant, Dr. SR told him he had a "whiplash." Dr. SR referred claimant back to Dr. PR, who in turn sent claimant back to Dr. B in (city). Dr. B saw claimant on July 13th and then sent claimant to a (city) neurologist, (Dr. L) for a consult. Claimant saw Dr. L on July 18th. Claimant testified that because he was still having pain he went to (Dr. M) a general practitioner in A, Texas, on August 3rd. Dr. M took claimant off work as discussed later.

Claimant had continued to work to July 24th. Claimant testified he had worked regular long haul from (date of injury) to May 26th when Dr. PR suggested light duty short haul which claimant worked until June 21st when he went back to long haul until July 24th. Claimant testified that he has not worked since July 24th. Claimant concedes that around the end of July the trucking company had offered him a job doing "local driving" which he refused. The company terminal manager confirmed that position was still open at the time of the CCH.

Carrier offered into evidence a registered letter dated "7-30-92" the company had sent to claimant which said:

[Claimant]

Please contact the terminal for work.

Thanks
[Terminal manager]

Carrier contends that the above quoted letter constituted a bona fide offer of employment pursuant to Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 129.5 (Rule 129.5).

The documentary medical evidence included medical records of Dr. B including a comprehensive report dated April 21st, recounting the history of the injury, claimant's complaints of headaches ". . . exacerbated by activity or driving and decreases with rest." Claimant is noted as stating that "he is quite sensitive to analgesic medications and they may cause excessive drowsiness." Dr. B's assessment was "Probable neck sprain . . . aggravated by driving duties and manifesting as a headache and neck stiffness." Dr. B advised heat and rest. In a subsequent report dated July 14th, Dr. B acknowledged that claimant had seen Dr. PR and Dr. SR in the interim, that claimant continued to complain of a "dull aching pain in the neck area associated with stiffness." Dr. B reviewed various tests which were all normal (which the exception of an EMG showing mild carpal tunnel syndrome not at issue here) and gave an assessment of "Cervical sprain," released claimant to "work full duty without restrictions" and noted that claimant's current "symptomatologies may be

[1]The hearing officer made clear on the record that he is not related in any way to either of the Doctors Rountree.

the result of long-standing arthritis." Dr. B by note dated July 21st referred claimant to Dr. L "for a second neurological opinion." Dr. B in an affidavit of December 9th opined there are "no contraindications preventing him from working."

Dr. L's neurological consult dated July 20th, recounts claimant's history, and notes "[t]he patient consistently states that he will not take medication while driving on the road. He requests that he be taken off driving duty and undergo medical therapy." Dr. L's impression is "1. Post-traumatic headache 2. Cervical pain 3. Paresthesias." Dr. L states that claimant's "symptoms are consistent with a post-traumatic concussive syndrome. Neurologic examination is normal . . . . Neurologic clearance is given for full return to work."

Dr. PR in a report dated May 3rd, gives a history, finds the examination essentially normal and opines claimant ". . . has sustained cervical strain with some underlying degenerative osteoarthritis." Claimant was advised to stop smoking. Claimant was seen by Dr. PR on May 6th, May 11th, May 18th (which noted claimant's allergy to certain medications) and May 25th. In the May 25th report Dr. PR notes "I am surprised that the patient's symptoms have persisted to this period." Dr. PR noted that claimant was prescribed different medications and "I have removed the patient from restricted work and allowed him to participate in regular duties." A June 21st note states it is Dr. PR's impression that claimant "has degenerative osteoarthritis." A radiologist report dated June 21st shows cervical spine "normal" with an opinion of "mild degenerative changes of the cervical spine." A July 6th report by Dr. PR notes that claimant ". . . has symptoms of neck pain with no significant loss of ROM and no radicular symptoms."

An affidavit from Dr. SR made on December 6th, stated Dr. SR's impression as "a probable cervical strain due to degenerative osteoarthritis." Dr. SR notes claimant ". . . told me that aspirin and similar medications make him lethargic and unable to drive a truck while taking medication. I do not know whether this is a true statement or not, as I am unable to determine whether a patient is made drowsy by medication." Dr. SR in a July 6th report stated "no significant abnormality found for the ulnar motor and ulnar sensory and radial sensory study."

Dr. M, claimant's current treating doctor, in an August 17th report noted he saw claimant for the first time on August 3rd, and noted claimant "continues to have pain in the neck area which has limited his ability to do <u>any</u> physical activity." (Emphasis added.) Dr. M's examination showed "the neck with full range of motion but with crepitance or crackling sensation." Dr. M examined the x-rays claimant had furnished and recommended "range of motion exercises as well as home traction units. I also suggested he stay off work for approximately 2 weeks." Dr. M commented "most injuries of this nature are well by this time." In a subsequent report dated October 4th, Dr. M noted that "the Ibuprofen which has been prescribed for him is helping, but he still has significant pain." Dr. M notes the home traction unit has improved claimant's situation but at the same time claimant's ". . . neck is essentially status quo without significant improvement nor worsening." Dr. M notes that claimant's prognosis for "becoming symptom free are, I would consider to be very poor." Dr. M, in the October 4th report concluded that claimant had "a permanent injury although

he may be able to function on a lower level of activity.

Dr. PR was called and testified as a live witness. He stated that he is board certified in occupational medicine, as is Dr. B. Dr. PR testified claimant "may have gotten a cervical sprain" in the (date of injury) incident and that claimant has "degenerative arthritis." Dr. PR confirmed he released claimant to "regular duty" on May 25th. Dr. PR confirmed that on July 6th all claimant's "tests are normal. Symptoms of pain in the neck without objective abnormalities, restrict to local runs." Dr. PR testified that "I don't think [claimant] has ever been, in my experience, incapable of working. I never told [claimant] not to work." Dr. PR explained the only reason he suggested claimant be restricted to local runs was "not because of the degree of pain he was having . . . but rather because of his concern . . . of drowsiness . . . ." Dr. PR said claimant could use medication in the evening when he did sleep and he could work during the day. Dr. PR testified that claimant's case is "a little bit unique" because:

> he has an inordinate sensitivity to medication. I have to say that I have not met people before who became drowsy from aspirin. And the incidence of drowsiness as a result of the use of nonsteroidal anti-inflammatory drugs is less than 1 percent.
>
> All of the medicine that [claimant] has been prescribed that I'm aware of are either salicylates in the aspirin family or the nonsteroidal anti-inflammatory drugs. In fact, Ibuprofen is a generic name for Advil. Feldene and Daypro, which were also prescribed for him, are first cousins of Advil, and they all have a similar spectrum of side effects.
>
> So that aspect, his unique sensitivity, which is certainly uncommon, makes his situation more difficult. Degenerative arthritis is a very common condition. It's estimated that probably at his age almost 100 percent of people will have degenerative changes in their spine. And it's likely not to improve over a course of time.

Claimant's position, as we understand it from his testimony, is that the pain medication he is taking (Ibuprofen), and which claimant maintains makes him drowsy, is the cause of his disability, namely, "the inability because of a compensable injury to obtain and retain employment at . . . the preinjury wage." Section 401.011(16). Claimant testified:

> •I'm not able to continue the job that I was doing at the time of the injury because of the medication that I have to take.
>
> * * * * *
>
> •Even aspirin has made me sleepy.
>
> * * * * *

•[Dr. M] says that I'll be taking it [medication such as Ibuprofen] for the rest of my life.

In specific response, on two occasions, to the hearing officer's questions claimant said:

Hearing officerQ.Okay. And there is no other physical symptom that is keeping you from working in your opinion?

Claimant A.No, sir.

and

Hearing officer:Okay. If you had a job, just you worked eight hours and that was it? Do you feel that you can do that type of a job?

Claimant: Yes, sir.

Hearing officer:Okay.

Claimant:That was the recommendation that I do work to where I could go home at night and take my medication.

Hearing officer:And yet you haven't looked for any jobs trying -- just to have an eight hour truck driving job?

Both the terminal manager and the district manager testified on behalf of the carrier, that both in July 1993, and at the date of the CCH, there was a position open where claimant could do short haul or local driving, or other work at the terminal. Claimant testified he has not been back at work since July 24th, has not sought or "applied for any other type job" and that he can drive a private vehicle, just not a commercial vehicle. Claimant even indirectly testified he drove to (city), presumably in his private vehicle, after his "disability" started but yet he was too drowsy to drive long distances.

The hearing officer determined in pertinent part:

FINDINGS OF FACT

FINDING NO. 4:The Claimant continues to experience lingering effects from his neck injury on (date of injury).

FINDING NO. 5:The Claimant has been unable to obtain employment since July 24, 1993 as a direct result of his injury on (date of injury).

FINDING NO. 7:The Carrier did not timely raise an issue concerning "bona fide offer of post-injury employment".

If it is found that the Carrier timely raised an issue concerning bona fide offer of post-injury to light duty or full duty employment the following findings are applicable.

FINDING NO. 9:The Employer's written offer of post-injury employment dated July 30, 1993 did not contain all the requirements of Rule 129.5 and there is no presumption that this was a bona fide offer of post-injury employment.

FINDING NO. 10:The physical requirements of the post-injury job offered to the Claimant exceeded the Claimant's current physical capabilities.

CONCLUSIONS OF LAW

CONCLUSION NO. 2:The Claimant proved, by a preponderance of the evidence, that he had "disability", from July 24, 1993 through December 10, 1993, as a result of his injury on (date of injury).

CONCLUSION NO. 3:The Carrier failed to prove, by a clear and convincing evidence, that the Employer made a bona fide post injury offer of employment to the Claimant.

Turning first to carrier's contention that "a bona fide post-injury offer of employment" had been made to claimant, Rule 129.5 provides that a written offer of employment, to be bona fide, must clearly state the position offered, the duties of the position, that the employer is aware of and will abide by the physical limitations of the employee, the maximum physical requirements of the job, the wage, and the location of the employment. Clearly a one line note "Please contact the terminal for work" does not comply with the requirements for a written offer of employment. The hearing officer's determination and comments that the note does not "as a matter of law" meet the requirement of a written offer of employment is correct and we affirm that ruling. If a written offer is not made then the carrier is required to provide clear and convincing evidence that a bona fide offer was made. Certainly the July 30th note does not contain such evidence. Whether the terminal manager's testimony regarding what was conveyed to claimant and whether that amounts to clear and convincing evidence is largely a factual determination within the province of the hearing officer, as the sole judge of the weight and credibility of the evidence to determine. Section 410.165.(a). The hearing officer's determination that the carrier failed to prove by clear and convincing evidence that the employer made a bona fide post injury offer of employment is supported by the record. Even the terminal manager's testimony is vague as to the exact nature of the work, the hours, whether overnight stays were required, the wage, and how the employer was going to take into consideration claimant's alleged drowsiness due to medication.

Even though the issue of bona fide offer of post-injury employment was not

specifically identified as an issue at the CCH, the hearing officer could, and perhaps did, consider testimony of what employment was available in determining whether claimant had disability (i.e. had the ability to obtain and retain employment at the pre-injury wage). The hearing officer apparently considered whether a bona fide offer of post-injury employment had been made in considering whether claimant had disability, and then determined no such offer had been made. We agree in part with one of the carrier's contentions that the issue of bona fide offer of employment was subsumed in the disability issue. Carrier extensively urges evidence which would indicate that the post-injury offer, as articulated by the terminal manager, contained the elements of a bona fide offer and met what few physical limitations Dr. M had placed on claimant's future employment, particularly that Dr. M said claimant could perform work at a lower level of activity. Carrier urges doing short local runs and other work around the terminal amounted to a lower level of activity, and claimant's refusal of this post-injury offer "was unreasonable and unwarranted." In Texas Workers' Compensation Commission Appeal No. 92110, decided May 11, 1992, the hearing officer's determination that the employer's post-injury offer of employment was found to be inconsistent with work limitations attributable to the compensable injury. In that case the hearing officer concluded that the post-injury employment duties did not meet the limitations imposed by the doctor. In the instant case the hearing officer found that the physical requirements of the post-injury job exceeded claimant's current physical abilities. While we may not agree with that finding we will not substitute our judgment for that of the hearing officer when, as here, the challenged findings are supported by some evidence of probative value. Texas Employers' Insurance Association v. Alcantara 764 S.W.2d 865, 868 (Tex. App.-Texarkana 1989, no writ).

As to the issue of whether claimant ever had disability, as defined in Section 401.011(16), previously quoted, or if claimant did at one time have disability, whether that disability is continuing, the hearing officer in his statement of evidence stated:

The issue of 'disability' is a subjective concept and reasonable people can differ. It has been held that disability can be established by the Claimant's testimony alone, even if contradicted by medical evidence, an unconditional medical release does not, in and of itself end disability and objective medical findings are not a prerequisite to a finding of disability. [*See* Texas Workers' Compensation Commission Appeal No. 92299 decided August 10, 1992.]

We agree and affirm the hearing officer's statement as a general proposition of law. In an even more recent court decision in American Motorists Insurance Co. v. Volentine, 867 S.W.2d 170, 174, (Tex. App.-Beaumont 1993, no writ history), the court held that the fact finder " . . . is free to find total and permanent incapacity [disability] from the testimony of lay witnesses, even though such evidence is contradicted by the testimony of medical experts and medical specialists in recognized fields of medicine." In the instant case it is a given that claimant was examined by Drs. B and PR, who are board certified specialists and who essentially found claimant had a cervical strain with no loss of motion or other objective signs of injury. In addition Drs. SR and L, both neurologists found no neurological reason to keep claimant from working. However, in spite of this evidence the hearing officer found, that

claimant was experiencing lingering effects of his neck injury and was unable to obtain employment since July 24th.

The basis of our reversal is that not only are the hearing officer's determinations against the great weight and preponderance of the evidence, but also that the claimant by his own testimony, even if completely believed, failed to establish that he was unable to obtain and retain employment because of his compensable neck injury. The claimant's cited testimony clearly indicates it is not because of pain that he is unable to work, but because the medication he is taking makes him drowsy and that precludes him from obtaining and retaining employment as a long distance truck driver. As incredulous and unlikely as claimant's testimony that aspirin and Ibuprofen cause drowsiness may be, the hearing officer apparently accepted that as fact, and we will not substitute our findings for that of the fact finder, even though we surely would have reached a different conclusion. However claimant concedes that he has not looked for other employment and had apparently refused the trucking company's offer of short haul local driving or other work around the terminal for unknown reasons, perhaps believing the inability to obtain and retain employment applied only to his previous employment of long distance cross-country trucking. In Texas Workers' Compensation Commission Appeal No. 92083, decided April 16, 1992, the Appeals Panel held that the definition of disability " . . . is not premised on the inability to obtain and retain employment in the type of work the employee was doing when injured, but it is the inability to obtain and retain 'employment' at wages equivalent to the pre-injury wage because of a compensable injury." Conceding claimant may not be able to do long haul cross-country driving because aspirin makes him sleepy, there is no evidence that claimant could not do other work around the terminal, or for other employers, which does not involve cross-country trucking. In fact claimant concedes that he could do work "where I could go home at night and take my medication." Claimant, concedes he has not looked for other work and has refused the truck company's offer of local short time hauling or "other work around the terminal." Even Dr. M concedes that claimant "may be able to function on a lower level of activity." Carrier argues, and we agree, that short term local hauling or other work around the terminal would meet Dr. M's requirement of work "on a lower level of activity." Consequently using claimant's own testimony as gospel fact, claimant has failed to prove he is unable to obtain and retain any kind of "employment" due to his compensable neck injury.

In that Dr. M, in his August 17th report recommended that claimant "stay off work for approximately 2 weeks" to perform range of motion exercises "as well as home traction" we find and render the claimant had disability from July 24, 1993, to August 31, 1993.

For the above reasons, the decision of the hearing officer, on the issue of disability, is reversed as being so against the great weight and preponderance of the evidence as to be manifestly unjust. In re King's Estate, 244 S.W.2d 660 (Tex. 1951); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986). A new decision is rendered that no disability was established by claimant after August 31, 1993.

_____
Thomas A. Knapp
Appeals Judge

CONCUR:

_____
Susan M. Kelley
Appeals Judge

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Alan C. Ernst
Appeals Judge