APPEAL NUMBER 94956
FILED SEPTEMBER 1, 1994

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing was held on June 14, 1994, in (City), Texas, to determine the following issues: has the claimant reached maximum medical improvement (MMI) and, if so, on what date; what is the impairment rating (IR); is claimant's _____, compensable injury a producing cause of her left arm and hand problems; did the carrier contest compensability on or before the 60th day after being notified of claimant's left hand and arm problems and, if not, is carrier's contest based on newly discovered evidence that could not have reasonably been discovered at an earlier date; and did the employer tender a bona fide offer of light duty employment entitling carrier to adjust the amount of temporary income benefits (TIBS). The hearing officer, determined that the designated doctor found claimant had not reached MMI as of the date of his examination, and did not render an IR, and his determination has not been overcome by the great weight of the contrary medical evidence; that claimant on _____, suffered an injury which included both arms; that carrier knew or should have known that claimant's injury was not limited to her right arm by March 29, 1992, but that it contested compensability on December 14, 1993, more than 60 days after the carrier knew or should have known that the claimant's injury was not limited to her right arm; that the carrier's contest of compensability was not based on newly discovered evidence that could not reasonably have been discovered at an earlier date; and that the employer did not tender to the claimant a bona fide offer of light duty employment.

The carrier has appealed only the hearing officer's determination with regard to the issue of bona fide offer of employment; therefore, the hearing officer's other determinations as to the other issues stand as final. The carrier cites the appropriate statute and contends that the hearing officer's determination was against the great weight of the evidence. The claimant, citing evidence from the record, contends that the hearing officer's decision is correct.

DECISION

We affirm.

The claimant had been employed by (employer), since 1978. She suffered a job-related injury that included her wrists, hands, arms, and neck and shoulders, on _____. She saw a variety of health care providers over the next two years; however, due to the limited nature of this appeal those medical reports will not be summarized except as necessary.

On October 12, 1993, Dr. W wrote that he was releasing claimant to return to work on October 14th, and that she could do secretarial work but would have a ten pound lifting restriction, could type for 30 minutes out of every hour, and could do filing with "short spans of rest." It was claimant's testimony that despite this release, she could not return to work

because the medications she was taking caused her to be dizzy and incoherent and made it impossible for her to drive the approximately 100 mile round trip. Claimant said that on October 12th the doctor's office called employer's nurse to explain claimant's restrictions; she said she also spoke to the nurse, who did not discuss the particulars of the job but just said "something could be worked out." She also told the nurse about the problems with her medication, but said she was told she had to report to work. She said the day before she was supposed to report for work she went in with her husband to try to speak further with someone, but that no one was available to talk to her. She said she then had no choice but to resign.

Ms. M, employer's manager of health resources, testified that in July or August of 1993 the employer learned that Dr. W was thinking of releasing claimant to work, and there were several discussions between claimant, the director of human resources, employer's employee representative, and employer's benefits coordinator; none of these individuals testified at the hearing. She said it was the employer's usual practice under these circumstances to return employees to their same area of employment unless that area could not accommodate their restrictions; in that event, the employer would assign the employee to a different area. She said the hours and pay would remain the same, and the duration would be for as long as needed, including on a permanent basis if necessary. Ms. M said she was "certain" claimant understood the conditions of employer's program, but acknowledged that employer had provided nothing in writing to the claimant. Ms. M was not present when the position was discussed with the claimant on August 12th.

The claimant said that when she was contacted by telephone about returning to work, it was not specified what job she would have, where it would be located, or how long the offer would be kept open; she said she assumed the employer would comply with her doctor's restrictions.

Section 408.103(e) provides that for purposes of determining the amount of an employee's temporary income benefits (TIBS), 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 to the employee. Implementing this provision is Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 129.5 (Rule 129.5), which provides as follows:

Rule 129.5: Bona Fide Offers of Employment

(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 employer;

(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.

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

The hearing officer found that the employer's telephone call on October 12 or 13, 1993, regarding employment did not describe the duration of the offered position, the length of time the offer would be left open, the physical requirements and accommodations of the position, or the distance of the position from claimant's residence. He also found that the claimant knew or should have known the physical requirements and accommodations of the position and the distance of the position from her residence but did not know or have reason to know of the duration of the offered position or the length of time the offer would be left open; he further found that employer's contacts with the claimant regarding light duty employment were "contradictory and vague." He concluded that the employer did not tender a bona fide offer of light duty employment entitling carrier to adjust the amount of TIBS.

Where, as here, the offer was not in writing, the carrier has the burden of proof to establish by clear and convincing evidence that the offer was bona fide pursuant to the statute and rule. Texas Workers' Compensation Commission Appeal No. 92691, decided February 8, 1993. We have held that the statute requires more than a sympathetic motive by an employer, but rather consideration of whether the elements of the statute and Rule

129.5 were met. Texas Workers' Compensation Commission Appeal No. 93777, decided October 13, 1993.

The evidence in this case presented a fact determination for the hearing officer. Upon our review of the evidence, we cannot say that his determination of the issue does not find factual support in the record or that it was against the great weight of the evidence. According to claimant's testimony, following her doctor's release to light duty work, employer's nurse did not provide any specifics about the work claimant would be doing, the length of time the offer would be left open, or the expected duration of the position. In her testimony, Ms. M described what appeared to be a meritorious program to accommodate injured workers, although she did not have first hand knowledge of what information had been conveyed to claimant. (*See* Texas Workers' Compensation Commission Appeal No. 92004, decided February 20, 1992, which stated that the evidence in that case did not "describe a position that could then be compared to the employer's physical capabilities.") Given this evidence, the hearing officer could conclude that insufficient information had been conveyed to the claimant to constitute a bona fide offer of employment that the claimant was "reasonably capable of performing." The hearing officer is the sole judge of the relevance and materiality of the evidence, and of its weight and credibility. Section 410.165(a). Where, as here, the evidence was conflicting, he was entitled to resolve such conflict and believe all, part or none of the testimony of any witness. Taylor v. Lewis, 553 S.W.2d 153 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.). We do not find that the hearing officer's decision in this case was so against the great weight and preponderance of the evidence as to be manifestly unfair and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

The decision and order of the hearing officer are affirmed.

Lynda H. Nesenholtz
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Tommy W. Lueders
Appeals Judge