

APPEAL NO. 950027  
FILED FEBRUARY 21, 1995

This appeal is brought pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on November 14, 1994. The issues at the hearing were whether the employer tendered a bona fide offer of employment to the appellant (claimant herein) and whether the claimant had disability as a result of his compensable injury of \_\_\_\_\_. The hearing officer determined that the employer did make a bona fide offer of employment to the claimant and that the claimant did not have disability as a result of his compensable injury. The claimant appeals arguing that the decision and order of the hearing officer are against the great weight and preponderance of the evidence. No response to this appeal has been received. All dates are in 1994.

DECISION

We affirm.

It was not disputed that the claimant sustained a compensable injury on \_\_\_\_\_, when he cut the little finger of his left hand with a saw, almost severing the finger between the first and second joints. The accident happened at about 10:00 a.m. By approximately 6:30 p.m., microsurgery had been performed which reattached the finger. The claimant was prescribed medication for swelling, to prevent an infection and for the pain. He said he also wore a splint on the finger until August. (Dr. S), the claimant's initial treating doctor, advised the claimant on May 10th that he could immediately return to light duty with the limitation that he not use his left hand for four to six weeks. The claimant testified he has not worked since the injury because he is unable to as a result of the injury. He said he had not been "officially" released to return to work until about two weeks prior to the CCH when his current treating doctor, (Dr. SH), told him he could "try" to return. He said he made no attempt to find work since his injury, but admitted he did work around the house including the cleaning of a house trailer that burned on September 17th.

(Mr. B), the claimant's supervisor, testified that he took the claimant for medical treatment on \_\_\_\_\_. He said that while still at the hospital, a doctor (not further identified) told him that the claimant could go back to light duty the next day, but could not use his left hand. He said he next spoke to the claimant on May 13th, a Friday, when the claimant came to pick up his check. Mr. B said he then told the claimant he had light duty available that involved being a painter's helper and included turning slats for painting. He said the proposed light duty did not involve any painting and that he would not be required to use his left hand. According to Mr. B, the claimant said he was not ready to return to work and Mr. B did not press the issue. Mr. B said he called the claimant again the following Monday (May 16th) to tell him he had to come back to work or he would be terminated. The claimant said he was not yet ready and would have to be terminated.

Mr. B said he again told the claimant he would not have to use his left hand and that two hands were not needed to turn the slats. Mr. B admitted that any job involving actual painting would have required use of both hands. He said he told the claimant on May 16th that he was terminated effective that day. When the claimant returned to pick up his final paycheck on May 23rd, he was asked, but refused, to sign a termination statement. The statement read, in part:

This letter is to serve as written acceptance of termination by [claimant], in lieu of light duty work as offered by both [Mr. B] and (Mr. P). It is understood that [claimant] was released by the attending physician to do light duty work for a period of four (4) weeks beginning \_\_\_\_\_, and [claimant] has chosen not to return to work at this time.

The accompanying exit interview report explained that the claimant was discharged because he "did not feel ready to return to work after hand injury although doctor had released employee to return to light duty work for a period of four weeks."

Mr. P, the production manager, testified that he called the claimant at home on May 12th to explain the light duty that was available and to tell the claimant that he was needed because of the work that had to be done. He said the claimant never argued with him about the nature of the light duties, but only that, in the claimant's opinion, turning the slats required two hands.

(Ms. V), the payroll manager and workers' compensation administrator for the employer, testified that she presented the claimant with the termination papers on May 23rd and told him about the offer of light duty. When the claimant said he could not turn the slats with one hand, she said she told him that even she could turn them with one hand and there was no need to use his left hand. She also testified that she told him that the employer needed him for whatever he could do because they were shorthanded. Ms. V said the claimant was officially terminated on May 16th, but was again offered light duty on May 23rd, and was paid his regular pay through May 10th and was then given "workers' compensation time" through May 13th. This "workers' compensation time" was not further explained. She also said that the claimant was to be paid his full wages for whatever time he worked light duty.

The claimant testified that he did not feel he could return to work the day after surgery, and went back to the employer the following Friday with Dr. S's duty excuse. He said he was not aware until the following Monday that light duty was available after conversations with Mr. B and Mr. P. The claimant said he believed the light duty offered involved only spray painting which was what he was hired for and which he did not consider light duty because it required use of both hands to spray, pull the air hose and manipulate the slats on the paint table. He also said his medicine, which he took for about three months after the surgery, made him unable to work. He said he was able to drive after the "initial period." He said that on May 11th, his hand was still throbbing; on May

13th, he talked to Mr. B, but not about light duty; and on May 16th had talked about light duty which included getting help spray painting. In his opinion, there was no other duty, but spray painting. He said the subject of turning slats did not come up until May 23rd, when he considered himself already terminated.

On June 8th, the claimant began treating with Dr. SH. On June 10th, Dr. SH certified that the claimant "will be unable to return to work until further notice." He renewed this duty excuse on August 8th and in his last treatment entry of September 13th.

We address first the issue of disability which is defined in Section 401.011(16) as the "inability to obtain and retain employment at wages equivalent to the preinjury wage." The claimant has the burden of proving disability. Texas Workers' Compensation Commission Appeal No. 93959, decided November 30, 1993. Whether disability exists as claimed is a question of fact for the hearing officer to decide and may be based on the testimony of the claimant alone if found credible. Texas Workers' Compensation Commission Appeal No. 93854, decided November 9, 1993. It was undisputed in this case that Dr. S had always considered the claimant capable of work which did not involve the use of his left hand. The claimant disagreed with this opinion and believed he could not work not only because of his hand injury, but also due to the effects of medication. Dr. SH, without additional clarifying information about the claimant's condition, concluded that the claimant could not work at all. The claimant testified that it was not until about two weeks before the hearing that Dr. SH said he could try to go back to work. During this time, the claimant admitted to doing work around the house, including cleaning up a house trailer.

The hearing officer was the sole judge of the relevance and materiality of this evidence and of its weight and credibility. Section 410.165. It was his responsibility to resolve conflicts and inconsistencies in the medical evidence and judge the weight to be given to expert medical testimony. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). To this end, the hearing officer as fact finder could believe all, part or none of the testimony of any witness. The testimony of a claimant as an interested party raises only an issue of fact for the hearing officer to resolve. Campos, supra; Burelsmith v. Liberty Mutual Insurance Company, 568 S.W.2d 695 (Tex. Civ. App.-Amarillo 1978, no writ). Obviously, the hearing officer considered the nature of claimant's injury and found the claimant's contention that he could not work since his injury unpersuasive and gave less weight to Dr. SH's conclusory opinion that the claimant was unable to work at all than to Dr. S's view that the claimant could do limited work. 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 we will reverse such decision only if it is so contrary to the overwhelming weight 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 Company, 715

S.W.2d 629 (Tex. 1986). Based on our standard of review, we find the evidence sufficient to support the decision and order of the hearing officer on the disputed issue of disability and decline to reverse it on appeal.

Although the determination of the hearing officer that the claimant did not have disability, which we affirm, is dispositive of the issue of the claimant's entitlement to temporary income benefits (TIBS), we nonetheless address the remaining issue of whether the employer extended a bona fide offer of employment to the claimant after his injury. Section 408.103(e) provides that, for purposes of determining the amount of 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:

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;
- (2) the manner in which the offer was communicated to the employee;
- (3) the physical requirements and accommodations of the position compared to the employee's physical capabilities; and
- (4) the distance of the position from the employee's residence.

(b) . . . 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 employer had the burden of proving a bona fide offer of employment was made which, because the offer in this case was not in writing, had to be established by clear and convincing evidence. Texas Workers' Compensation Commission Appeal No. 92691, decided February 8, 1993. The Appeals Panel has also held that whether a communication amounts to clear and convincing evidence is "largely a factual determination." Texas Workers' Compensation Commission Appeal No. 94086, decided March 4, 1994. In reaching the conclusion that the employer extended a bona fide offer of

employment to the claimant, the hearing officer found as a fact that the offer of light duty "fully complied" with the claimant's restrictions (Finding of Fact No. 7) and "fully complied with the criteria set out in Rule 129.5." (Finding of Fact No. 8).

As might be expected where there was no written offer of employment, the terms of the purported offer in this case were hotly contested. In his appeal, the claimant contends that "there was no communication as to the nature of the offer of employment made . . . ." The dispute centers on the contention of the claimant that he was offered his old position of spray painter, which both parties agree required use of both hands, and that, in any case, the job of turning slats required use of both hands. The carrier countered at the hearing that the offer of employment never included spray painting and that slat turning required only one hand. Carrier's witnesses also stated they were aware that the claimant was not to use his left hand and believed that the duties offered respected this limitation. Texas Workers' Compensation Commission Appeal No. 93777, decided October 13, 1993, involved a dispute over the terms of a verbal offer of employment. There the offer was to return to "similar . . . only lighter" duties and that the employer would accommodate the claimant's physical limitations. The claimant in that case contended that his limited language abilities and the fact that he was not explained the new duties in detail by someone who had familiarity with his medical condition rendered the offer ineffective. The hearing officer evaluated the evidence against the standards of Rule 129.5 and held that the employer did make a bona fide offer of employment. The Appeals Panel affirmed and noted that whether the evidence established a bona fide job offer was a question for the hearing officer to decide. In the case now appealed, as in Appeal No. 93777, the hearing officer was able to observe the demeanor of the claimant as well as of the two supervisors who offered the claimant employment after his injury. Obviously, the hearing officer found the testimony of the supervisory personnel about the nature of the employment offered persuasive. Having reviewed the record, we are unwilling to conclude that this determination is so against the great weight and preponderance of the evidence as to be manifestly wrong or unjust or that the carrier failed to prove by clear and convincing evidence that a bona fide offer of employment had been made.

The decision and order of the hearing officer are affirmed.

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Alan C. Ernst  
Appeals Judge

CONCUR:

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Stark O. Sanders, Jr.  
Chief Appeals Judge

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Philip F. O'Neill  
Appeals Judge