

APPEAL NO. 990109

This appeal arises 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 13, 1998. The record closed on December 21, 1998. He (hearing officer) determined that the employer made a bona fide offer of employment to the appellant (claimant) and that the claimant had disability as a result of a compensable injury of _____, from _____ to August 3, 1998. The claimant appeals these determinations, contending that they are against the great weight and preponderance of the evidence. The respondent (carrier) replies that the decision is correct, supported by sufficient evidence, and should be affirmed.

DECISION

Affirmed in part and reversed and rendered in part.

The claimant sustained a compensable low back injury on _____. He received medical care that day on referral from the employer and was placed on light duty. The claimant then saw Dr. M, who on July 6, 1998, continued the light duty. The claimant said he understood the light duty to be essentially clerical or office work, which he did for two to three weeks and was then told to cut the grass, wash trucks, sweep the floor, and clean windows, tasks that he did not consider light duty. An MRI on July 9, 1998, showed minor degenerative change at L3-4 and L4-5 without herniation, bulging or significant spondylosis. On July 20, 1998, Dr. M released the claimant to regular duty effective August 3, 1998, with the caution "if unable - return for recheck visit."

The claimant said he worked more or less 40 hours per week after his injury for the same rate of pay as before the injury, but that before the injury he worked many more hours. He also said that on some afternoons the pain increased to the point he had to take medication and fell asleep. He admitted that on a couple occasions, he failed to tell his supervisor that he could not return to work and missed work on at least one other day. He was terminated on August 10, 1998. On July 28, 1998, he requested to change treating doctors to Dr. S, D.C., which request was approved on August 10, 1998. Dr. S first saw the claimant on August 11, 1998, diagnosed low back and leg pain, lumbar discopathy, and facet joint syndrome and excused the claimant from work until further notice. The claimant had not been released to return to work as of the CCH. The claimant testified that he could not work after August 10, 1998, the date of his termination, because of his compensable injury.

Mr. V, the safety manager, testified that he understood Dr. M's light-duty release to include clerical and office work and admitted that he had the claimant also do the other things the claimant stated in his testimony. He said that he never told Dr. M about these other tasks. According to Mr. V, the claimant was terminated for attendance problems.

Disability is defined as the "inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage." Section 401.011(16). An employee who has disability and has not reached maximum medical improvement is entitled to temporary income benefits (TIBS). Section 408.101. In calculating 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." Section 408.103(e). Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 129.5 (Rule 129.5) further defines what is to be considered in determining whether a bona fide offer of employment has been made and provides that if the offer was not in writing, the carrier "shall provide clear and convincing evidence that a bona fide offer was made." Rule 129.5(b).

In the case now before us, the hearing officer stated that the parties stipulated that the claimant "continued working from _____, through August 10, 1998, on light duty." The claimant appeals this determination presumably because he disputes whether the work offered was "light duty" as defined by Dr. M. Our review of the record indicates that this stipulation was agreed to by the parties as stated by the hearing officer in the decision and order. What was not disputed was that the claimant did return to work on _____, until August 10, 1998, at the same hourly wage, but for fewer hours than before the injury. The question of a bona fide offer becomes of much less significance in determining disability and entitlement to TIBS under these circumstances. Where, as here, the claimant actually returns to work for some period of time, it matters little whether or not this was pursuant to a bona fide offer of employment. The effect on TIBS remains the same. Nonetheless, the hearing officer found a bona fide offer of employment "through mutual consent." It is not clear what is meant by this phrase. Because the offer in this case was oral and Mr. V testified that he did not explain to Dr. M that he required the claimant to do more than office work, we cannot agree that the carrier established through clear and convincing evidence that the offer of employment was for work which the claimant was reasonably capable of performing. Rather, we find that the determination of a bona fide offer of employment was contrary to the great weight and preponderance of the evidence. For this reason, we reverse that determination and render a decision that the employer did not make a bona fide offer of employment.¹ The hearing officer's finding of disability for the period from _____ to August 3, 1998, was not appealed by the carrier. The amount of TIBS owed the claimant is reduced by his actual wages during this period.

As the claimant's attorney pointed out at the CCH, the real issue was whether the claimant had disability after he was terminated on August 10, 1998. We have noted that termination for cause does not necessarily preclude a finding of disability. Texas Workers' Compensation Commission Appeal No. 92282, decided August 12, 1992. Whether disability exists is a question of fact for the hearing officer to decide and can be established by the testimony of the claimant alone if deemed credible. Texas Workers' Compensation Commission Appeal No. 93560, decided August 19, 1993. In this case, the claimant

¹Of course, any such offer would have been effectively withdrawn by the termination.

testified that he could no longer work after August 10, 1998, because of the pain from his injury. Dr. S placed the claimant in an off-duty status effective August 11, 1998. Dr. M, however, was of the opinion, based on his examinations of the claimant and the results of the MRI that the claimant could return to work August 3, 1998. The hearing officer found Dr. M more credible on the issue of disability than either the claimant or Dr. S. In his appeal, the claimant argues that Dr. M was not worthy of belief because he was selected by the employer, that he ignored the claimant's testimony, and that Dr. M's return to normal duty was tentative at best because Dr. M wrote that if the claimant were unable to work, he should return for further examination.

Section 410.165(a) provides that the hearing officer is the sole judge of the weight and credibility of the evidence. While the questions raised by the claimant clearly have a bearing on the credibility of the evidence presented, it was the responsibility of the hearing officer to determine what facts have been established. He was simply not persuaded by the evidence, including the nature of the injury, that the claimant had disability or that Dr. M was doing anything less than giving a return to normal duty. We will reverse a factual determination of a hearing officer only if that determination is so against the great weight and preponderance 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, 635 (Tex. 1986). Applying this standard of review to the record of this case, we find the evidence sufficient to support the determination of disability only from _____, the date of the injury, to August 3, 1998, when Dr. M returned the claimant to regular duty.

For the foregoing reasons, we affirm the determination of disability. We reverse the finding of a bona fide offer of employment and render a decision that the employer did not make a bona fide offer of employment.

Alan C. Ernst
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Susan M. Kelley
Appeals Judge