APPEAL NO. 990706

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 March 10, 1999. He (hearing officer) determined that: (1) employer made a bona fide offer of employment to appellant (claimant); (2) claimant's average weekly wage (AWW) is $688.20; and (3) claimant did not have disability from the date of the _____, injury to the date of the CCH. Claimant appeals these determinations on sufficiency grounds. Respondent (carrier) responds that the Appeals Panel should affirm the hearing officer's decision and order.

DECISION

We affirm.

Claimant contends the hearing officer erred in determining that (employer) made a bona fide offer of light-duty employment. Claimant contends that employer made an offer of light-duty employment with specific terms, but that employer did not comply with the offer. Claimant contends that employer was to provide claimant with transportation to and from work because he cannot drive, and that the light-duty offer was for Rig 97, only.

Section 408.103(e) provides that if an employee is offered a bona fide position 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 post injury weekly wages are considered equal to the weekly wages of the position offered. The carrier has the burden to show that a bona fide offer of employment was made and pursuant to Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 129.5 (Rule 129.5).

Claimant testified that he sustained a compensable leg fracture on _____, while working as a floor hand for employer, and that he had surgery on his leg. Claimant said that (Mr. H) approached his treating doctor, Dr. D, and obtained a light-duty release for claimant while he was still in the hospital. Claimant said employer presented a light-duty offer on October 5, 1998, and that he returned to Rig 97 for work about four days after he got out of the hospital. Claimant said he was to sign "the book" at the rig and then sit there, with no job duties to do. Claimant said he was never asked to do work that was beyond his work restrictions. Claimant said Rig 97 was about 50 miles from his home and that he had friends or his girlfriend drive him there each day. Claimant said the rig eventually moved to another location, also about 50 miles from his home. Claimant did not indicate that be believed he was no longer required to report to work at that point. He said he asked Mr. H if he could work at another site closer to his home but he was told to stay with his rig. Claimant said that one day, around October 17, 1998, he showed up at the rig around 12:00 noon but the tool pusher told him he could not sign in. Claimant testified that the tool pusher said that he was required to show up at the same time his crew worked, which was from 5:00 p.m. to 5:00 a.m. Claimant said he quit showing up for work after that time. Claimant said that shortly after this, he called Mr. H and told him that he did not have transportation to the rig and that he was told he had been terminated.

The hearing officer determined that claimant stopped showing up for his light-duty job with employer because he was "dissatisfied" with the light-duty job. The hearing officer apparently did not credit claimant's contention that employer failed to comply with the light-duty offer by failing to provide transportation, but found that claimant did not intend to return to the light-duty job. From the evidence, the hearing officer could and did find that employer made a bona fide offer of light-duty employment to claimant. Claimant asserts that when employer stopped working Rig 97, the light-duty offer ended or was withdrawn by its own terms. Claimant asserts that carrier may adjust claimant's temporary income benefits (TIBS) only for the period from October 5, 1998, the date of the light-duty offer, to the date in October 1998 when Rig 97 stopped being worked. The copy of the job offer contained in the record does not limit the work to that on Rig 97.

The hearing officer could find from the evidence that the bona fide offer was for claimant to be at work with his regular crew and that claimant was informed when the rig moved to another location. Claimant contends that the light-duty offer was not made in good faith because he did not have any job duties and because, he asserted, employer had a policy to fire employees who filed workers' compensation claims. Claimant did not introduce evidence regarding employer's alleged firing policy and the hearing officer made his determinations regarding bona fide offer based on the evidence before him. We have reviewed claimant's contentions on appeal, and we conclude that the hearing officer's determinations in this regard are not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

Claimant contends the hearing officer erred in determining that his AWW is $688.20. Claimant asserts that the AWW should have been computer-based on the wages of a same or similar employee. It was undisputed that claimant did not work for employer for the 13 weeks immediately preceding the injury. *See* Section 408.041. Carrier asserted at the CCH that employer informed it that there was no "same or similar employee." Employer's wage statement for claimant stated that there was no same or similar employee. The hearing officer determined that the claimant's AWW should be determined under a fair, just, and reasonable method and that the claimant's AWW is $688.20 based on dividing claimant's earnings over a four-week period by four. The claimant states in his appeal that employer should have based his AWW on the "same or similar employee" he testified about at the CCH. However, claimant did not offer any evidence regarding the wages of a same or similar employee and the hearing officer determined that there was no same or similar employee. Therefore, we conclude that the hearing officer's AWW determination is supported by sufficient evidence and is not against the great weight and preponderance of the evidence.

Claimant contends the hearing officer erred in determining that he did not have disability. Claimant contends that the reason why he was no longer able to obtain and retain his preinjury wage is because Rig 97 was "stacked down" and no longer working. Claimant asserts that the hearing officer erred in determining that the sole reason for claimant's inability to obtain and retain his preinjury wage was because claimant refused to comply with the light-duty offer. The hearing officer also determined that claimant was terminated for not showing up for his light-duty job.

Claimant testified that Rig 97 was stacked down at some point in October 1998 and that the rig was moved to another county. Claimant said the rig was stacked down every time a hole was drilled. He also said that, at the time of the CCH, the rig was running. There is evidence in the record from Dr. D that claimant had not been released to return to full-duty work as of January 4, 1999. Claimant said he is still walking with a cane and undergoing physical therapy and that he is unable to do his former job. A record from employer indicates that claimant's employment was terminated on November 17, 1998, for "no show."

We note that the existence of a bona fide offer does not mean that the claimant did not then have disability. Section 408.103(e) refers to Section 408.103(a) and defines criteria for a bona fide offer and states how the amount of the wage offered will be considered. Section 408.102(a) describes the amount of TIBS. Section 408.101(a) states that an employee is entitled to TIBS "if the employee has a disability . . . ." These sections, plus Rule 129.5, show that a bona fide offer of employment affects TIBS, which will only be due if there is disability. There is no "implicit finding" of no disability in a determination that a bona fide offer of employment was made. *See also* Texas Workers' Compensation Commission Appeal No. 94905, decided August 26, 1994, which said that a question of a bona fide offer is a different issue from that of disability.

Whether disability exists is a question of fact for the hearing officer to decide. Texas Workers' Compensation Commission Appeal No. 93560, decided August 19, 1993. We have reviewed the record and this determination and we conclude that the hearing officer's disability determination is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain, *supra.* We note that claimant will not receive TIBS in any case.

Claimant contends the hearing officer abused his discretion in denying claimant's request for depositions on written questions of carrier and employer (requests) regarding any bona fide offers, certain wage records, and the records regarding the operation of Rig 97. Claimant contended that he was unable to prove his contentions regarding AWW, disability, and bona fide offer because the hearing officer denied his requests. However, at the CCH, when claimant raised this issue, the hearing officer asked claimant whether claimant wanted the hearing officer to hold the hearing record open, apparently so that claimant could obtain this requested discovery. Claimant declined the hearing officer's offer and said the evidence was not needed. Therefore, we perceive no abuse of discretion in the denial of the requests. *See generally* Texas Workers' Compensation Commission Appeal No. 951067, decided August 10, 1995.

We affirm the hearing officer's decision and order.

_____
Judy Stephens
Appeals Judge

CONCUR:

_____
Tommy W. Lueders
Appeals Judge

_____
Elaine M. Chaney
Appeals Judge