

APPEAL NO. 991374

This appeal is considered in accordance with the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On June 2, 1999, a contested case hearing (CCH) was held. The issues concerned whether the respondent, who is the claimant, had disability as a result of her compensable injury, and whether the appellant (referred to as self-insured or employer) made a bona fide offer of employment which would entitle the self-insured to apply the offered wages against the post-injury wages for purposes of temporary income benefits (TIBS) computation.

The hearing officer determined that the claimant had disability beginning on January 20, 1999, through the date of the CCH, and that the employer had not made a bona fide offer of employment such that TIBS could be reduced.

The self-insured appeals and argues that, although a witness for the employer was able to attend the CCH, it was improper of the hearing officer not to transfer venue. It argues that the statute does not require the convenience of the employee to be considered over the convenience of the employer. The self-insured also argues that the evidence was greatly against the finding that a bona fide job offer was not made. The determination that the claimant had disability has not been appealed. The claimant responds that the decision should be affirmed.

DECISION

Affirmed.

All dates listed herein are in 1999 unless otherwise stated. The claimant was a cashier for (employer), who is self-insured. She said that she hurt her right wrist on _____ when she attempted to lift a case of Dr. Pepper soft drink that she estimated would weigh 15 to 20 pounds. She felt a pop in her wrist. The claimant sought medical treatment on January 18th from her family doctor, Dr. MR. Dr. MR told her she probably had a strained arm and could return to work on light duty. At the time of the accident, the claimant lived and worked outside of (City 1), Texas.

The claimant said she took "the papers" from Dr. MR to her employer that day, and the employer put her back to work "doing demos," which entailed handing out food samples for promotional purposes. Dr. MR had told her not to use her right hand. However, the claimant said she was demonstrating pizza and used her right hand to cut it. She worked part time (four hours a day) on the 20th, but was unable to work after the 22nd. Her ordinary work schedule at the time of her injury was an eight-hour day or more.

The claimant contended that the employer knew she could not use her right hand because that was what the doctor wrote on the paper she had given the employer. One of

her coworkers offered to assist, but the claimant felt "bad" about asking for help once her coworker became busy. The claimant contended that she could not use the pizza cutter with her left hand at all because she was not left-handed and the roller was not good. She contended that she asked for a sharper cutter but was not given one. The claimant said she complained to "D" (Mr. D) but agreed she did not talk to "B" P (Mr. P), the store manager, about this.

A February 19th medical report from Dr. M stated that the claimant had a "subluxing distal radial ulnar joint at the right wrist and a positive piano key sign." He recommended that the claimant be casted for six weeks. The claimant had x-rays, and a February 22nd report found no subluxation, but did find an irregularity that could be secondary to a cyst, but also could be due to an impaction injury. On March 8th, Dr. M wrote that the claimant could return to limited duty in three weeks and full duty in six months. If she required surgery, he said, recovery would be extended to six months after surgery. Surgery was performed on May 25th.

The claimant moved to (City 2) on February 11th and obtained a referral to Dr. M from the self-insured. There are back-to-work certificates from Dr. M in April and May which state that the claimant can return to work but may not lift at all with her right hand. She said that she contacted an area store for the employer after being told by people at her original store that they would help her get a job, but that the (City 2) store had no jobs for her. She then took a slip from Dr. M to the store but this did not help her obtain a job. The claimant did not deny that she told her employer that she was going to be moving to (City 2) and that she did so to take care of her ill mother, but she denied that this conversation occurred before her injury.

Mr. P testified by telephone. He understood that after her injury the claimant had been released to light duty and could not use her right arm. He said that, accordingly, she was re-employed as a demo clerk, which was the employer's light-duty program. Mr. P understood that the claimant worked only one or two days at the most, four hours a day. He said he did not personally discuss the job with the claimant when she returned, and could testify only as to what he believed she would have been told about the terms of the job. He said the normal rate of pay was \$6.00 per hour, unless the regular job paid less, in which case they would be paid the same hourly rate.

Mr. P said that after the first or second day, the claimant told his front line manager that she did not like doing the demo job and would not be willing to drive back and forth to do this job anymore. Mr. P said that it was not relayed to him that the claimant reported that she was physically unable to do the job. He said it would have been possible for the claimant to have demonstrated another product if she had difficulty with pizza or to get a better cutter if she asked. Mr. P said that the claimant put in a request for transfer to (City 2) and gave two weeks notice before her injury.

The record included a motion by the self-insured to change venue to a location within 75 miles of the claimant's residence at the time of her injury. The hearing officer had overruled this motion. It was not re-urged at the CCH, nor was any objection made to proceeding with the hearing.

First of all, we cannot agree that there was error in venue being found where the claimant resided at the time of the CCH. There was no showing that holding the CCH in (City 2) was any less convenient for the self-insured than it would have been to hold it in a (City 1)-area field office. In any case, as the matter was not urged at the CCH and the parties proceeded to litigate the matters in controversy, there was no reversible error that occurred.

The amount of TIBS paid during a period of disability may be reduced if it is determined that an injured worker receives a bona fide offer of employment that the employee "is reasonably capable of performing, given the physical condition of the employee and the geographic accessibility of the position. . . ." Whether or not the position is accepted, the offered wage will be imputed to the employee. Section 408.103(e). The ability of the employee to perform the job must be analyzed with reference to physical condition of the employee at the time that the offer is made. The elements that the Texas Workers' Compensation Commission will consider to determine if an offer is a bona fide offer are described in Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE §129.5(a) (Rule 129.5(a)). We would initially observe that after the claimant moved on February 11th in accordance with plans formulated prior to her injury, any job that might have been offered at the (City 1)-area location would have ceased to be "geographically accessible" and this fact alone would have curtailed the duration of any credit against TIBS that was arguably due. There was no evidence that a job was offered by the employer at an (City 2)-area store.

Second, during January 21st to 23rd, when the claimant said she complained that she could not do the work (which the hearing officer apparently believed), the employer was thus put on notice at this time that its job offer may not have been in the nature of that described in Section 408.103(e), one that the employee "is reasonably capable of performing, given the physical condition of the employee. . . ." There is no evidence of any follow-up at this time on the part of the employer to determine what modifications could be made with the objective of returning the claimant to the work place. Rather, the self-insured's argument appears based upon the premise that it is the employee that must seek out the continued existence of an offer and its possible modifications, once it is made. This is not what the statute says; rather, it is the offer that must be proven to meet the standards of Section 408.103(e) before the TIBS payment can be reduced. It was the self-insured's burden to establish that a verbal job offer is bona fide under a "clear and convincing" standard of proof. Rule 129.5(b); Texas Workers' Compensation Commission Appeal No. 91023, decided October 16, 1991. A "standing offer" in the form of a light-duty program generally available to all employees does not bind the trier of fact to equate this with a

"bona fide offer" under applicable statutes and rules. See Texas Workers' Compensation Commission Appeal No. 92293, decided August 17, 1992.

The hearing officer is the sole judge of the relevance, materiality, weight, and credibility of the evidence presented at the hearing. Section 410.165(a). The decision should not be set aside because different inferences and conclusions may be drawn upon review, even when the record contains evidence that would lend itself to different inferences. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). While we acknowledge that different inferences could have been drawn from the evidence, at least with regard to the time period when the light duty was "geographically accessible," we will not reverse the fact determinations of a hearing officer unless they are against the great weight and preponderance of the evidence so as to be manifestly unfair or unjust. Atlantic Mutual Insurance Company v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.). We cannot agree that this is the case here and the hearing officer's decision and order are supported sufficiently in the record.

Susan M. Kelley
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Alan C. Ernst
Appeals Judge