APPEAL NO. 991540

This appeal arises pursuant to the 1989 Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On June 14, 1999, a hearing was held. He (hearing officer) determined that respondent's (claimant) compensable right thumb injury of _____, extended to carpal tunnel syndrome (CTS) of the right wrist, that employer did not make a bona fide offer of limited-duty employment, and that claimant had disability. Appellant (carrier) asserts that the credible medical evidence does not support a determination that CTS was caused by an injured thumb, that claimant was not credible, that no disability existed, and that a bona fide offer "was present as a matter of law." In addition, carrier raises the point that requires this remand by pointing out that the hearing officer only found "sufficient" evidence, not that the claimant showed by a preponderance of the evidence that the injury caused CTS or that she had disability. The appeals file does not contain a reply by claimant.

DECISION

We reverse and remand.

Claimant worked on an assembly line that involved containers of cosmetics. She was apparently adjusting a receptacle in the machine to accept a different container, with the machine off, when the machine started on _____. She testified that her thumb was caught "up in the machine" and she "pulled my hand out." She went to Hospital that day. She was found to have a contusion and sprain of the right thumb, was told to keep the hand elevated, and was given restricted duty until December 10, 1998.

The parties agreed that claimant sustained a compensable thumb injury. There was no dispute that claimant returned to work the next day and worked either a full day or partial day through December 10, 1998. Claimant stated that she has not worked after December 10, 1998; she added that while she had been able to do some work that did not involve her right hand, she was in pain while doing so. The evidence thereafter varied between that of Dr. G, D.C., who first saw claimant on December 29, 1998, and said that claimant's CTS was caused by the trauma through an inflammatory reaction involving the median nerve and finger flexor tendons, and Dr. W, M.D., who said it did "not appear that claimant had an injury to her wrist that could explain [CTS] on the basis of her swelling." Dr. W saw claimant on referral from Dr. G. Dr. G had claimant off work into March 1999 and did not indicate at that time that she was released to return to work.

The evidence concerning a bona fide offer of work hinged on the fact that claimant returned to work through December 10, 1998; she testified that she was allowed to work with her left hand only, which she could do, but that her right upper extremity was still painful, so she quit working. She did not say how that pain in her right hand would be addressed for the better by ceasing to work with her left hand or why she had to quit work because of pain in her hand that she was not using. Section 408.103(e) provides that a bona fide position is one that a claimant "is reasonably capable of performing, given the physical condition of the employee." Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 129.5(b) (rule 129.5(b)) states that a written offer of limited work may be presumed to be bona fide when it meets certain conditions. There was no written offer in this case.

Regardless of whether the offer is written or verbal, Rule 129.5(b) provides that it must be based on physical limitations "under which the employee or his treating physician have authorized the employee to return to work." (Emphasis added.) There is only one doctor at any one time who can authorize limitations upon which a bona fide offer may be enforced, the treating doctor. The claimant's appearance for work and her work under certain limitations may also indicate her own authorization and thereby satisfy the requirements for a bona fide offer; if a bona fide offer is found under these conditions, another question would then arise as to whether the claimant could, just as a treating doctor could, amend or revoke the authorization based on a later determination that her "physical condition" as set forth in Section 408.103(e) would not allow work to continue.

The case must be remanded for reconsideration because the standard under which a claimant at a hearing must show that a compensable injury or disability has occurred is that of a preponderance of the evidence. While a hearing officer does not have to recite in each opinion that a preponderance of the evidence was shown, a question does arise when the hearing officer states, as here, in his Statement of Evidence that there is "sufficient" evidence that the claimant's compensable injury includes CTS, or that there is "sufficient" evidence that the claimant sustained disability, or that there is "insufficient" evidence of a bona fide offer. We do not know whether a standard of "sufficiency" has been applied such as that applied on review. On appeal, a decision may be affirmed when there is sufficient evidence to support the determination or if the determination is not against the great weight and preponderance of the evidence; these standards do not equate to a preponderance of the evidence which must be the standard for a determination by the hearing officer, absent a requirement such as the imposition of "clear and convincing" evidence found in Rule 129.5. A hearing on remand is not necessary; the hearing officer should weigh the evidence and make findings of fact and conclusions of law, relative to the issues presented, based on his determination as to where the preponderance of the evidence lies; credibility of the evidence is a matter for the hearing officer. *See* Section 410.165. Reasonable inferences may be made from the evidence.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Texas Workers' Compensation Commission's Division of Hearings, pursuant to Section 410.202. *See* Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

_____
Joe Sebesta
Appeals Judge

CONCUR:

_____
Stark O. Sanders, Jr.
Chief Appeals Judge

CONCURRING OPINION:

I concur in the remand only because carrier has specifically complained of the hearing officer's use of the word "sufficient." However, I would note that the Appeals Panel itself has used the term "sufficient" and "insufficient" when referring to a *hearing officer's* finding that there is sufficient evidence to make a certain finding. For instance, the Appeals Panel has noted that, "[t]he hearing officer determined that there was insufficient evidence to establish a causal relationship between claimant's admittedly heavy and repetitive work and the back injury." Texas Workers' Compensation Commission Appeal No. 971266, decided August 14, 1997 (Unpublished). *See also* Texas Workers' Compensation Commission Appeal No. 982000, decided October 5, 1998 (Unpublished); Texas Workers' Compensation Commission Appeal No. 972710, decided February 13, 1998 (Unpublished); Texas Workers' Compensation Commission Appeal No. 981690, decided September 8, 1998 (Unpublished); Texas Workers' Compensation Commission Appeal No. 971841, decided October 27, 1997 (Unpublished). This is apparently a common mistake, to the extent we can assume a mistake was made at all. The word "sufficient" also means "enough" and I am fairly certain that the hearing officer in this case meant there was enough evidence to satisfy the preponderance standard. I recognize that the word "sufficient" can also refer to the "sufficiency" appellate standard of review, but that is not the only available use for that word. I note that the hearing officer did not use the term in his actual fact findings, but only in the discussion portion of the decision and order. I am reluctant to assume that the hearing officer did not know what standard to apply when hearing this case. I reluctantly concur in the remand.

_____

Judy L. Stephens
Appeals Judge