APPEAL NO. 000035

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 December 13, 1999. The issues at the CCH were whether the appellant (claimant) sustained a compensable injury on _____; whether the claimant had disability; and whether the employer tendered a bona fide offer of employment to the claimant. The hearing officer determined that the claimant sustained a compensable injury on _____; that the claimant had disability from June 24, 1999, through July 24, 1999; and that the employer tendered a bona fide offer of employment to the claimant. The claimant appeals, urging that the hearing officer incorrectly applied the law in determining that the claimant's disability ended on July 24, 1999; that the employer did not make a bona fide offer of employment because it did not meet the "geographical accessibility" requirement; and that the hearing officer's decision should be reversed. The respondent (carrier) replies that the hearing officer's decision is supported by sufficient evidence and should be affirmed. The hearing officer's determination that the claimant sustained a compensable injury on _____, has not been appealed and has become final. Section 410.169.

DECISION

Reversed and rendered.

The claimant worked as a pump assembler for the employer and testified that she injured her back on _____, when she was carrying a pump and tripped on a box containing pumps. The claimant sought medical treatment with Dr. H on June 24, 1999. Dr. H issued an off-work slip on June 24, 1999, indicating that the claimant was unable to work until July 3, 1999, and another off-work slip on July 2, 1999, indicating that the claimant was unable to work until July 14, 1999. On July 15, 1999, Dr. H released the claimant to return to work on July 15, 1999, with restrictions of no lifting over 40 pounds. The claimant testified that at the appointment on July 15, 1999, Dr. H was mad because she had missed appointments and told her that he did not want to treat her anymore. The claimant said that her son signed for a certified letter from the employer addressed to her at her (City 1), Texas, address on July 24, 1999, but did not give her the letter until two or three weeks later. According to the claimant, she did not respond to the letter because it offered her the same job that she was performing when she was injured and she knew that she could not perform the job.

The claimant testified that she changed treating doctors and began to see Dr. M in (City 2), Texas. Dr. M examined the claimant on July 26, 1999, and took her off work. Dr. M's records indicate that he saw the claimant on July 27, 28, and 29, 1999, but that treatment was discontinued because the carrier disputed the treatment. The claimant testified that she has been unable to work as a result of her injury from June 24, 1999, through the date of the CCH, with the exception of a one-month period in which she worked

a contract job, earning $175.00 per week. The claimant said that her contract job required her to clean bathrooms, dust, and take out trash, and she had to quit the job because of back problems.

Dr. H's report of July 15, 1999, states "due to very poor patient compliance patient is not scheduled for future treatment and patient advised to seek treatment from another treating doctor if patient desires further treatment." Dr. M's records indicate that the claimant subsequently moved to City 2, Texas, and filed an Employee's Request to Change Treating Doctors (TWCC-53) on July 20, 1999, which was approved by the Texas Workers' Compensation Commission on July 22, 1999. On July 23, 1999, (Ms. W), the occupational health nurse with the employer, sent the claimant the following letter:

> You were seen by [Dr. H] on 7/15/99 and released to work light duty, no lifting over 40 pounds. We have light duty work available for you within your limitations 12 hrs/day, 3-4 days/week, on your shift rotation. The work assigned to you is pump assembly. This work is offered to you as of 7/15/99 and will be continued to be offered to you at [employer], [City 1], Texas.

The hearing officer determined that the employer tendered a bona fide offer of employment to the claimant and that the claimant had disability beginning on June 24, 1999, and continuing through July 24, 1999. In support thereof, the hearing officer made the following findings of fact:

FINDINGS OF FACT

4. As a result of her on the job injury, Claimant was unable to work from June 24, 1999, when her doctor, [Dr. H], put her on off work status to July 15, 1999, when [Dr. H] returned her to light duty.

5. The employer tendered a bona fide job offer on July 23, 1999, which met the requirements put forth by Rule 129.5 [Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 129.5].

6. Claimant had constructive notice of the bona fide job offer on July 24, 1999.

7. Claimant has not responded to the letter to this day.

* * * *

9. Due to the claimed injury Claimant was unable to obtain or retain employment at wages equivalent to claimant's pre-injury wage beginning on June 24, 1999 and continuing through July 24, 1999.

The claimant urges that the hearing officer has incorrectly applied the law in determining that the claimant's disability ended on July 24, 1999, based on the following statement contained in the hearing officer's Statement of the Evidence:

> Even though there is some evidence that shows that [Dr. M] put her on off work status on July 27, 1999, by this time, Claimant had now moved to [City 2], Texas area and was in no position to return to [City 1], Texas and her job with [employer].

The claimant appeals the hearing officer's determination that disability ended on July 24, 1999, and that the employer made a bona fide job offer. According to the claimant, the hearing officer incorrectly focused on the claimant's moving away from the job site and the bona fide offer in determining disability, instead of focusing on the claimant's inability to obtain and retain employment because of the compensable injury. The claimant also argues that the bona fide offer of employment does not meet the "geographic accessibility" requirement of Rule 129.5.

Section 408.103(e) provides that 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." Rule 129.5(b) states that a written offer of employment shall be presumed to be a bona fide offer "if the offer clearly states the position offered, the duties of the position, that the employer is aware of and will abide by the physical limitations under which the employee or his treating physician have authorized the employee to return to work, the maximum physical requirements of the job, the wage, and the location of employment."

In Texas Workers' Compensation Commission Appeal No. 983011, decided February 10, 1999, we stated that the "geographic accessibility" of a job for purposes of determining whether the offer was bona fide ultimately depends on the hearing officer's determination of the reasonableness of the commuting distance. We further stated that "[i]n the absence of supporting evidence and a hearing officer's finding that the employee moved from the vicinity where he lived at the time of the injury largely in order to defeat a job offer, reasonable geographic accessibility of the proffered job should be measured in the context of where the claimant resided at the time the offer was made." *See also* Texas Workers' Compensation Commission Appeal No. 961271, decided August 14, 1996.
In this case, there was no evidence indicating exactly when the claimant permanently changed her residence to City 2, Texas. However, the claimant testified that she "came up here [City 2, Texas] and saw [Dr. M]" and when asked whether she moved from her home in City 1 to City 2, Texas, she responded "[n]ot at that time." The claimant first saw Dr. M on July 26, 1999. Given the claimant's testimony, it appears that she was still residing in City 1, Texas, at the time she received the employer's letter on July 24, 1999.

Whether and when an employer makes a bona fide offer of employment as defined by the 1989 Act and rules are generally questions of fact for the hearing officer to decide. Texas Workers' Compensation Commission Appeal No. 962197, decided December 16,1996. The hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). 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, 635 (Tex. 1986). We find there was sufficient evidence to support the hearing officer's determination that the employer tendered a bona fide offer of employment to the claimant.

"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). The claimant has the burden of proving disability. Texas Workers' Compensation Commission Appeal No. 941566, decided January 4, 1995. Whether disability exists is a question of fact for the hearing officer to decide and can be proved by the testimony of the claimant alone, if found credible. Texas Workers' Compensation Commission Appeal No. 93560, decided August 19, 1993. In Texas Workers' Compensation Commission Appeal No. 91045, decided November 21, 1991, the Appeals Panel stated that "[w]here the medical release is conditional and not a return to full duty status because of the compensable injury, disability, by definition, has not ended unless the employee is able to obtain and retain employment at wages equivalent to his preinjury wages."

Section 408.103(e) essentially provides that a bona fide offer of employment can be used as an offset against a carrier's liability for temporary income benefits; however, we have held that a bona fide offer of employment and disability are distinct, albeit related, issues. Texas Workers' Compensation Commission Appeal No. 92293, decided August 17, 1992. We have held that a finding that disability has ended does not require proof of a bona fide offer; likewise, a bona fide offer of employment would not preclude a finding that disability continues. Texas Workers' Compensation Commission Appeal No. 92432, decided October 2, 1992. In this case, the hearing officer ended disability on the day he determined that the claimant received the bona fide job offer.

The carrier presented the testimony of Ms. W who testified that the claimant's light-duty rate of pay would have been $7.37 per hour and the claimant's normal hourly rate was $9.95. Thus, regardless of whether the claimant accepted or rejected the bona fide job offer, she would have earned, or was said to have earned, less than her preinjury wage after July 24, 1999. The claimant testified that for the month she worked after the injury, she earned $175.00 per week, which is less than her preinjury wage. The hearing officer incorrectly considered the claimant's move to City 2, Texas, as a factor in determining disability. Because the hearing officer applied the incorrect legal standard in his analysis of disability, and the evidence indicates that the claimant was released to light-duty work and was offered a job at wages less than her preinjury wage, we find the hearing officer's decision that the claimant's disability ended on July 24, 1999, to be against the great weight and preponderance of the evidence. We reverse the hearing officer's decision and order,

and render a decision that the claimant had disability from June 24, 1999, through December 13, 1999, the date of the CCH.

We affirm the hearing officer's decision that the employer tendered a bona fide offer of employment to the claimant. We reverse the hearing officer's determination that the claimant had disability beginning on June 24, 1999, and continuing through July 24, 1999, and render a new decision that the claimant had disability from June 24, 1999, through December 13, 1999, the date of the CCH.

Dorian E. Ramirez
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Thomas A. Knapp
Appeals Judge