APPEAL NO. 000454

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 February 2, 2000. The issues at the CCH were whether the employer made a bona fide offer of employment to the appellant (claimant) and, if so, for what period were the offered earnings available; and whether the claimant had disability resulting from the injury sustained on _____. The hearing officer determined that the employer made a bona fide offer of employment to the claimant with the offered earnings available from June 2 through July 28, 1999; and that the claimant had disability from May 26 through June 1, 1999, and from July 29, 1999, through the date of the hearing. The claimant appealed; contended that the hearing officer erred in applying the law concerning bona fide offer and disability; urged that the determinations that the employer made a bona fide offer and that the claimant did not have disability from June 2 through July 28, 1999, are so contrary to the overwhelming great weight and preponderance of the evidence as to be manifestly unjust; argued that the hearing officer erred in siding with and coaching the respondent's (carrier) witness; and requested that the Appeals Panel reverse the decision of the hearing officer and render a decision in his favor. The carrier replied, contended that the hearing officer properly applied the law, urged that the evidence is sufficient to support the determinations of the hearing officer, and requested that his decision be affirmed.

DECISION

We reverse the decision of the hearing officer and render a decision that the employer did not make a bona fide offer of employment to the claimant in May or June 1999 and that the claimant did have disability beginning on May 26, 1999, and continuing through the date of the hearing.

Some of the facts in this case are undisputed. The claimant worked for a company that provided employees to other companies and had been assigned to a company for about a year when on _____, he struck the back of his left hand and his left elbow in the course and scope of his employment. He continued to work and his pain became worse. On May 19, 1999, he told Mr. A, a branch manager for the employer, about the injury and that he needed to see a doctor. Mr. A sent him to (C Clinic) where he was seen by Dr. FS. Dr. FS released him to return to work on that day with the use of a splint, no repetitive lifting over 10 pounds, no pushing or pulling over 15 pounds of force, limited use of the left hand, and no use of an impact tool or power tool with the left arm or hand. The next day the claimant and Mr. A met. The claimant told Mr. A that he was not happy with Dr. FS. The claimant did not see Dr. FS again. On May 21, 1999, Mr. A sent the claimant to (T Clinic) where he was seen by Dr. G. The claimant testified that Dr. G put him in a splint and returned him to work with modified duty. A report from Dr. G dated May 21, 1999, states that the claimant must wear a splint at work and may not be able to use fingers on the left hand. The claimant testified that on May 21, 1999, Mr. A told him that they were going to find something for him at the company where he had been working, but did not mention a specific position. A report from Dr. G dated June 3, 1999, states that the

claimant may return to modified duty on that day, that he must wear a splint while at work, and that he may not use the left hand. The claimant said that he thinks he saw Dr. G twice. Dr. G referred the claimant to Dr. C. Dr. C first saw the claimant on June 7, 1999. A report from Dr. JS dated July 29, 1999, states that starting on that day the claimant should be excused from work until further notice. Dr. JS referred the claimant to Dr. B, who saw the claimant on August 30, 1999. Dr. B referred the claimant to a neurologist and those doctors agreed that the claimant had developed a pattern of reflex sympathetic dystrophy.

Mr. A testified that at about 10:00 p.m. on May 26, 1999, he typed a letter to the claimant, placed a stamp on the envelope, and placed the envelope in the mailbox. The letter states:

> Please accept this correspondence as official notification of "light/modified duty" work which awaits you at our office located at [address], here in [City A].
>
> As I mentioned to you the day after your initial treatment, a few special projects were devised especially for you, in order for you to continue earning wages while keeping within the parameters of the restrictions set forth by your physician during your recovery.
>
> We have been expecting your arrival for several days now and as long as you are still requiring treatment and are unable to perform your regular duties, we want to provide these accommodations for you. However, please make note: that from this moment, you will have up to 5 calendar days from the time you receive this notice, to begin the work we have assigned for you. Your schedule will be based on a flexible routine that will be between 8:00 a.m. to 5:00 p.m., Monday through Friday, so that you can continue with your therapy and or treatment. In addition, your wages will remain at $7.70 per hour.
>
> We have been and continue to look forward to having you join us here until you are released for regular duty work upon which time, you will be reassigned into a job more of your choosing.
>
> We do anticipate a speedy recovery for you and until then, we want to do all we can to help you through this period.

Mr. A said that the letter is a form letter that is used in similar cases, that he had several projects in mind at the employer's office, that it was possible that the claimant could perform a job using a machine at one of the companies it provided employees for, that the letter does not mention physical requirements of a job offered, and that he would do the best that he could for an employee to earn wages while he recuperated from an injury. Mr. A said that he last spoke with the claimant on May 20, 1999; that he had left a message for the claimant on an answering machine; that Ms. D, an office employee, left a telephone message on Call Notes for the claimant on May 27, 1999; and that the calls had not been

returned. The claimant testified that soon after he stopped working his telephone was disconnected because he did not pay his bill; that that had happened before; and that when that happened, any messages that were in Call Notes were lost when the telephone service was disconnected. He said that on other occasions the employer had contacted his wife about jobs where she worked or on her cellular telephone. The claimant's wife's testimony concerning telephones is consistent with that of the claimant. The claimant testified that he had not received a letter from the employer dated May 26, 1999, offering him employment; that he had difficulty receiving some mail; and that he had received a check so late that he had only about two weeks to cash the check before the expiration date.

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). Section 408.103(e) provides:

> For purposes of Subsection (a), 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.

Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 129.5 (Rule 129.5), effective February 1, 1991, provides in part:

> **Rule 129.5. Bona Fide Offers of Employment.**
>
> (a) In determining whether an offer of employment is bona fide, the commission [Texas Workers' Compensation Commission] shall consider the following:
>
> (1) the expected duration of the offered position;
>
> (2) the length of time the offer was kept open;
>
> (3) the manner in which the offer was communicated to the employee;
>
> (4) the physical requirements and accommodations of the position compared to the employee's physical capabilities; and
>
> (5) the distance of the position from the employee's residence.
>
> (b) A written offer of employment which was delivered to the employee during the period for which benefits are payable 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. If the offer of employment was not made in writing, the insurance carrier shall be required to provide clear and convincing evidence that a bona fide offer was made. [Emphasis added.]

Rule 126.9 is entitled Choice of Treating Doctor and Liability for Payment. Subsection (c) provides:

> (c) The first doctor who provides health care to an injured employee shall be known as the injured employee's initial choice of treating doctor. The following do not constitute an initial choice of treating doctor:
>
> (1) a doctor salaried by the employer;
>
> (2) a doctor recommended by the carrier or employer, unless the injured employee continues, without good cause as determined by the commission, to receive treatment from the doctor for a period of more than 60 days; or
>
> (3) any doctor providing emergency care unless the injured employee receives treatment from the doctor for other than follow-up care related to the emergency treatment.

The claimant had been seen by Dr. FS And Dr. G when the letter dated May 26, 1999, was written. The claimant did not receive treatment from either of them for more than 60 days. Nor does the record indicate that the claimant authorized his return to work with certain restrictions as stated in Rule 129.5(b). The letter to the claimant does not specify a job and does not state the physical requirements and accommodations of the position compared to the employee's physical capabilities. The record does not indicate that Mr. A communicated those matters to the claimant when he spoke with him. The determination that the employer made a bona fide offer of employment to the claimant is so against the great weight and preponderance of the evidence as to be clearly wrong and unjust and is reversed. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986). We render a decision that the employer did not make a bona fide offer of employment to the claimant in May or June 1999.

The carrier cited Texas Workers' Compensation Commission Appeal No. 961272, decided August 14, 1996, and an unpublished Appeals Panel decision concerning the mailbox rule and the rules of civil procedure and argued that the hearing officer was correct in determining that the May 26, 1999, letter was deemed to have been received five days after it was mailed. The carrier did not argue that Rule 102.5(h) applied to things mailed by it. In those cases cited by the carrier, the Appeals Panel stated that whether a party actually received a letter is a factual determination for the hearing officer and that depositing the item in the mail and other evidence may be considered in determining

whether the item was received. The hearing officer made a finding of fact that the letter was deemed to have been mailed on May 27, 1999, because of the late mailing and was deemed to have been received by the claimant on June 1, 1999. There is no indication that the hearing officer considered the testimony of the claimant in making that finding of fact. Because we have reversed the determination that the employer made a bona fide offer based on the letter and the oral representations of Mr. A, we need not remand for the hearing officer to make findings of fact concerning receipt of the letter in addition to the finding of fact that the letter was deemed to have been received on June 1, 1999.

The Appeals Panel has on numerous occasions stated that the issues of a bona fide offer and disability are separate. Disability concerns whether because of a compensable injury a claimant is unable to obtain and retain employment at wages equivalent to the preinjury wage. The 1989 Act contains bona fide offer provisions concerning temporary income benefits (TIBS) and supplemental income benefits. The provision concerning TIBS is in Section 408.103, AMOUNT OF [TIBS] and provides that a bona fide offer results in the employee's weekly earnings being equal to the weekly wage for the position offered to the employee. The bona fide offer is used to determine the amount of TIBS, if any, due. The bona fide offer does not result in disability ceasing. Even without considering the reversal of the determination that the employer made a bona fide offer of employment, we reverse the determination that the claimant did not have disability from June 2 through July 28, 1999, and render a decision that he did have disability beginning May 26, 1999, and continuing through the date of the hearing.

During the cross-examination of Mr. A, the hearing officer reminded Mr. A of his previous answers and advised him that he did not have to answer questions if he did not know the answers. That action of the hearing officer was not appropriate. In view of our reversal of the appealed determinations on other grounds, we need not determine whether that inappropriate activity resulted in reversible error.

We reverse the decision of the hearing officer and render a decision that the employer did not make a bona fide offer of employment to the claimant in May or June 1999 and that the claimant had disability beginning on May 26, 1999, and continuing through the date of the hearing.

Tommy W. Lueders
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Gary L. Kilgore
Appeals Judge