APPEAL NO. 000588

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 28, 2000. The single issue stated in the decision and order was: "Whether Employer extended a bona fide offer of employment to Claimant [respondent]."[1] The hearing officer determined that the appellant (self-insured) extended to the claimant a bona fide offer of light-duty employment for the time frame of June 11 through June 23, 1999, and that temporary income benefits (TIBs) for this period may be adjusted accordingly. The self-insured appeals the determination that the bona fide offer of employment was limited to the specified time period, expressing its disagreement and requesting clarification of the decision and order. The claimant replies that the decision is correct, supported by sufficient evidence, and should be affirmed.

DECISION

Affirmed.

The claimant sustained a compensable left knee injury in a fall on _____. Dr. F, D.C., became his treating doctor. By letter of June 10, 1999, received by the claimant on that day, the employer offered the claimant a position working a cutting machine. The claimant accepted this offer and began work in this position on June 11, 1999. The claimant worked this job through approximately June 18, 1999. He said that his condition worsened at work because, initially, there was nothing on which to elevate his leg as his doctor prescribed verbally to him and that one device, later fabricated, was attached to the machine and every time a cut was made it caused a jolt to his leg and knee. The second effort to elevate his leg, he said, consisted of resting it on a stool. The claimant said this put him in an awkward position and caused more pain in his leg. According to the claimant, he stopped working because his knee became more swollen and painful. It was not disputed that he was terminated from his employment on June 23, 1999. The self-insured asserts that the termination was because the claimant failed to call in over a number of days to say why he would not be at work. On June 25, 1999, Dr. F changed the claimant's status from "partially incapacitated" to "totally incapacitated." In a letter of July 16, 1999, Dr. F wrote that he "originally placed this patient on light duty because I felt light duty was indicated. Due to persistent swelling and inflammation along with restricted [range of motion], I took him off all work duties. I feel he was aggravating his condition with continued movement to the knee." On the other hand, Dr. T, a referral doctor from Dr. F, expressed the opinion on July 15, 1999, that the claimant could continue his sedentary job.

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[1]The benefit review conference report stated the issue as: "Did the employer make a bonafide offer of employment to the Claimant entitling the Carrier [sic] to adjust the post-injury weekly earnings and, if so, for what period?"

An employee is entitled to TIBs if the employee has disability and has not attained maximum medical improvement (MMI). Section 408.101. Disability is the inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage. Section 401.011(16). If an employee is offered a bona fide position of employment, the weekly earnings after the injury are equal to the weekly wage for the position offered for purposes of computing the amount of TIBs to be paid. Section 408.103(e). In the case we now consider, the hearing officer found that the employer made a bona fide offer of employment to the claimant from June 11, 1999, when the claimant began the duties contained in the offer and that the offer remained effective until June 23, 1999, when the employer terminated the claimant. This finding has not been appealed. The carrier appeals the finding that the bona fide offer ended when the claimant was terminated, contends that the termination was for cause, and asserts that a "termination for cause is not a withdrawal of the bona fide offer of employment." It further asserts that the finding that the claimant was terminated on June 23, 1999 (Finding of Fact No. 6) should be reformed to add the words "for cause."

Texas Workers' Compensation Commission Appeal No. 91027, decided October 24, 1991, on which the self-insured relies, addressed the similar situation where the claimant returned to light-duty employment pursuant to a bona fide offer of employment and then was terminated for cause (dishonesty). In that case, the issue was primarily defined in terms of disability and the claimant's entitlement to TIBs. The hearing officer found that the termination constituted, in effect, a withdrawal of the bona fide offer. On appeal, the carrier argued that the termination for cause constituted a refusal of the bona fide offer. After discussing the purpose behind the concept of a bona fide offer and the applicable rule (Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE ' 129.5), we observed that there was little guidance on how to treat a termination for cause and concluded that "[n]either extreme offers a reasonable remedy and is not mandated by the 1989 Act." The critical question was whether, after the termination, the claimant's unemployment was caused by the compensable injury or the termination. In that case, the evidence established that the claimant was, in fact, working in a light-duty position and there was no evidence (with a minor exception not here relevant) that she was unable to obtain and retain employment at her preinjury wage in that position. The Appeals Panel, under these circumstances, considered it of "no moment" whether the termination effectively withdrew the offer or constituted a rejection of the offer and did not hold that it was either. Rather, the Appeals Panel held that "the claimant's 'inability to obtain and retain' employment on the date of her termination for cause was because of her misconduct and not because of a compensable injury." The decision, therefore, reversed the finding that the claimant was entitled to TIBs from the date of her termination on May 21, 1991, until August 12, 1991, when the claimant went to an emergency room and was placed in a no-work status. Thereafter, the claimant was entitled to TIBs, absent reaching MMI or being released to full duty or otherwise employed.

The concept of a bona fide offer of employment has practical meaning only in the context of disability and the amount of TIBs owed a claimant. And, while the issue of TIBs was expressly present in Appeal No. 91027, *supra*, unfortunately, in the case we now consider, the

only express issue was the existence of a bona fide offer of employment. Nonetheless, the further issues of disability and entitlement to and amount of TIBs were inextricably intertwined with the bona fide offer issue. This is reflected in the fact that the hearing officer concluded in Conclusion of Law No. 3 that the self-insured "may adjust Claimant's [TIBs] rate accordingly for benefits payable during that time frame." In the Decision portion of the Decision and Order, the hearing officer further wrote that the "Claimant remains entitled to receive his unadjusted [TIBs] rate for other time frames relevant to this Decision provided that he sustained disability during those time frames and had not yet reached [MMI]. Self-insured is ordered to pay Claimant accrued and unpaid [TIBs], if any, together with interest accrued through the date payment is made." (Emphasis added.)

Regarding the assertion that the hearing officer should have expressly found that the termination was for cause, we observe, consistent with Appeal No. 91027, that such a finding in itself would not have resolved the underlying and implied issues of disability and TIBs. Also, given the holding in Appeal No. 91027, *supra*, that the nature of the termination on the bona fide offer of employment is largely beside the point on the much more practical questions of disability and amount of TIBs, we find any error in the failure to find the termination was for cause to be harmless.

Of much more importance than the nature of the termination was the evidence that Dr. F placed the claimant in an off-work status as of June 25, 1999, and the claimant's testimony that he could not continue to work in the position offered because it was making his knee condition worse. The hearing officer, at least impliedly, found this evidence credible and persuasive that the claimant could not return to work. Although there was other medical evidence suggesting that the claimant could have continued working in the offered employment, the testimony of the claimant and the opinions of Dr. F were sufficient to support the conclusion that the claimant could no longer work with restrictions. Under our standard of review, we affirm that determination. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986). Since the claimant was no longer able to work with restrictions, there could be no continuing bona fide offer of employment.

There remains the point on appeal that the self-insured is "[q]uite frankly . . . confused as to what the Hearing Officer is finding and ordering the Self-Insured to pay to this Claimant." We construe the hearing officer's decision as an order to pay TIBs, if any were due. If the self-insured believes the claimant was not entitled to further TIBs, it should act accordingly and consistent with the 1989 Act and rules.[2]

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[2]Because abandonment of medical treatment and recoupment were not issues at the CCH, we decline to address them on appeal or provide the relief requested by the claimant on these bases.

For the foregoing reasons, we affirm the decision and order of the hearing officer.

Alan C. Ernst
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Philip F. O=Neill
Appeals Judge