APPEAL NO. 001790

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 June 15, 2000. The record closed on July 5, 2000. He determined that the employer's bona fide offer of employment was "retracted" on September 20, 1999, when the respondent (claimant) was terminated from his employment and that the claimant had disability as of this date and continuing through the date of the CCH. The appellant (carrier) appeals these determinations, contending legal error and factual insufficiency. The claimant replies that the decision is correct, supported by sufficient evidence, and should be affirmed.

DECISION

Affirmed.

The claimant worked as an x-ray lab technician. On _____, he sustained a compensable injury when struck in the head by a piece of equipment. He complains of neck pain and radiating pain in his upper and lower extremities. He returned to light-duty, sedentary work entering data in a computer on September 8, 1999, pursuant to a verbal offer of employment, but was terminated from this position on September 20, 1999, according to the employer, for failure to comply with the employer's requirements for advance notice of when he would not be at work. The issues in this case as litigated by the parties were whether the claimant had disability on and after September 20, 1999, and whether the bona fide offer of employment in effect up to this time was rejected by the claimant or withdrawn by the employer.[1]

Section 401.011(16) defines "disability" as the "inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage." An employee who has disability and has not reached maximum medical improvement is entitled to temporary income benefits (TIBs). Section 408.101(a). For purposes of calculating the amount of TIBs owed, "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." Section 408.103(e). Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 129.5 (Rule 129.5) then in effect[2] further addresses bona fide offers of employment. We have held that the bottom line for determining whether an offer of employment is bona fide is whether it meets the physical restrictions of the injured employee. Texas Workers' Compensation Commission Appeal No. 000422, decided April 10, 2000.

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[1]Finding of Fact No. 10 that the "[e]mployer made a bona fide offer of employment on _____," has not been appealed.

[2]This rule was amended and renumbered as Rule 129.6 effective December 26, 1999.

The carrier conceded that the offer of employment in this case was verbal. The claimant's work history pursuant to the offer of employment was largely undisputed. The employment offered was conceded to be for eight hours per day. On September 8, 1999, the claimant worked 5.25 hours. According to a memo and testimony from Ms. B, who was in charge of the employer's light-duty program, the claimant left work early that first day without telling anyone. The next day he failed to come in or call, despite the employer's policy that notices of intended absences were to be given in advance. On this day, the claimant saw Dr. Z. On September 16, 1999, the claimant left early to obtain pain medication without personally informing any supervisor of this intention. On Friday, September 17, 1999, he again failed to call in to say he would not be at work. His termination notice effective Monday, September 20, 1999, reflected as reasons a preinjury history of poor performance and post-injury "job abandonment."

The claimant testified that he left work early on September 8, 1999, because his legs hurt and he had a "bout of incontinence." He said he was also on medication that required some getting used to and that he was experiencing numbness in his legs, severe low back pain, and a left hand tremor. On December 2, 1999, Dr. E examined the claimant at the request of the Texas Workers' Compensation Commission. His diagnoses included "neck pain of uncertain etiology" and "unusual neurologic symptoms including tremor and numbness." Dr. E also concluded that the claimant could only return to light-duty work. An MRI in August 1999 disclosed cervical herniation.

The carrier's position was that the claimant's only articulated physical restriction given by Dr. Z was a sedentary work position, that the claimant demonstrated an ability to perform this job, and that he was "legitimately terminated for not properly notifying his employer of his absence from work on several occasions." The claimant represented at the CCH that this was essentially a make-work job and the employer was setting up the claimant to fail at the job.

As noted above, critical to a determination of whether a job offer is or continues to be bona fide is whether it meets the physical restrictions of the claimant. Whether it does or does not is a question of fact for the hearing officer to decide. Texas Workers' Compensation Commission Appeal No. 970033, decided February 20, 1997; Texas Workers' Compensation Commission Appeal No. 931174, decided January 28, 1994. We have further held that a claimant's testimony can be probative evidence of whether the offered job is within the claimant's restrictions. Texas Workers' Compensation Commission Appeal No. 962100, decided December 4, 1996. In this case, Dr. Z's only restriction was to a sedentary position. The claimant testified about the pain and numbness he felt while trying to do this job.

In Finding of Fact No. 4, the hearing officer found that the claimant's treating doctor "took him off work on September 17, 1999." We agree with the carrier that there was no evidence to support this. However, the hearing officer made further findings that the claimant's "problems from his compensable injury affected his ability to perform the light duty offered" (Finding of Fact No. 6) and that the claimant's "work attendance" problems

"were related to his injury." Finding of Fact No. 9. These latter two findings reflect that the hearing officer considered the claimant credible and persuasive in testifying that he could not perform the light-duty, sedentary work offered by the employer after he had tried for a number of days. As a consequence of these findings, the hearing officer concluded that the employer "retracted" the bona fide offer. Clearly, the termination could be construed as tantamount to a retraction. Of far greater significance than how the end of the employment relationship can be characterized is the underlying reason why the claimant no longer performed the assigned light duties. The hearing officer found that the relationship ended because the claimant's attendance problems were related to his injury. The carrier argues that the relationship ended simply because the claimant did not follow personnel rules on accounting for absences in advance. We will reverse a factual determination of a hearing officer only if that determination is so against the great weight and preponderance 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). Applying this standard of review to the record of this case, we find the testimony of the claimant sufficient to support the determination of the hearing officer; in effect, that a bona fide offer of employment no longer existed on and after September 20, 1999.

The carrier also appeals the finding of disability, arguing that the hearing officer failed to place the burden of proof of disability on the claimant after the termination; that there was no medical evidence of post-termination disability; and that the claimant was simply terminated for violating the claimant's personnel policies. The existence of disability presents a question of fact for the hearing officer to decide and it can be proved by the claimant's testimony alone if found credible. Texas Workers' Compensation Commission Appeal No. 93560, decided August 19, 1993. We have long held that termination for cause does not in itself preclude the recurrence of disability (Texas Workers' Compensation Commission Appeal No. 92200, decided July 2, 1992) and that the compensable injury need only be a cause of the disability, not the sole cause. Texas Workers' Compensation Commission Appeal No. 931117, decided January 21, 1994. There was a genuine issue in this case of whether the claimant was in fact able to perform light duty before he was terminated. The hearing officer, as discussed above, concluded he was not. Since the termination, the claimant has undergone extensive medical testing and treatment and there was no evidence that the claimant was ever placed in a full-duty status by any doctor. Given the existence of a release only to restricted duty, we cannot agree that the claimant had a special burden, beyond the burden of proving disability, to prove that he had "an inability to do other jobs." *See* Texas Workers' Compensation Commission Appeal No. 91045, decided November 21, 1991. The latter notion may properly apply to entitlement to supplemental income benefits, but not to disability and entitlement to TIBs. In any case, under our standard of review, we find the evidence sufficient to support the disability determination.

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

Alan C. Ernst
Appeals Judge

CONCUR:

Tommy W. Lueders
Appeals Judge

Robert W. Potts
Appeals Judge