APPEAL NO. 001978

Following a contested case hearing held on July 25, 2000, pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act), the hearing officer, resolved the disputed issues by determining that the employer made a bona fide offer of employment to the appellant (claimant) effective September 24, 1999, therefore entitling the respondent (carrier) to adjust the post-weekly earnings from that date, and that the Texas Workers' Compensation Commission (Commission) did not abuse its discretion in approving the change of treating doctors to Dr. S and then to Dr. M. The claimant has appealed the bona fide offer determination, contending that it did not meet the requirements of Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 129.5(a)(3) (Rule 129.5(a)(3)) because it was written in the English language which the claimant does not read, speak, or understand and because one of the stated duties implied other duties and thus was not clearly communicated. In its response, the carrier asserts that the claimant's contentions concerning the written offer being in English and a problem with the clarity of the duties to be performed are raised for the first time on appeal and urges that the evidence is sufficient to support the hearing officer's determination.

DECISION

Reversed and rendered.

The employer's letter to the claimant, dated September 13, 1999, written in English, and signed by the production manager, states that the employer has been notified by Dr. W that the claimant has "been released on light duty effective 9/13/99 with the following restrictions:

1. Light duty - with the following restrictions:

    a) stand/walk - 1 to 4 hours
    b) sit/ 3-5 hours
    c) drive/ 3-5 hours

2. You can not do any of the following:

    a) Bend
    b) Twist
    c) Squat
    d) Climb

3. You can occasionally:

    a) Reach"

The letter goes on to state that the employer is fully aware of and will abide by the physical limitations under which the doctor has authorized the claimant's return to work; that the letter is a BONA FIDE OFFER to the claimant for a light-duty position which will remain open or until the doctor gives him a full-duty release; that the wages will be $5.75 an hour and 40 hours for this light-duty position; that the duties of this position include "sorting parts"; that the offer will remain open until "9/17/99" and that if the employer has not heard from the claimant as of that date, the employer "can only assume" that the claimant does not wish to accept the position or to continue his employment. The claimant is invited to contact the signatory if he has any questions about the bona fide offer.

The letter was initially mailed by the employer on September 14, 1999, but was returned to the employer because the address on the letter was to a vacant box. On September 16, 1999, the employer sent the letter to the claimant's post office box. Despite the remailing of the letter on the day before the offer contained therein would expire, the offer was neither amended nor modified by the employer. The claimant testified, through a Spanish language translator, that he received a letter from the employer by certified mail on September 24, 1999, and that he did not thereafter return to work for the employer. A return receipt indicates that the letter referred to by the claimant as having been received on September 24, 1999, was the light-duty job offer which had expired on September 17, 1999.

Rule 129.5, Bona Fide Offers of Employment, in effect when the employer's offer was sent to the claimant, provides in subsection (a) that in determining whether an offer of the employer is bona fide, the Commission shall consider the expected duration of the offered position; the length of time the offer was kept open; the manner in which the offer was communicated to the employee; the physical requirements and accommodations of the position compared to the employee's physical capabilities; and the distance of the position from the employee's residence. Subsection (b) of Rule 129.5 provides that 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 the job.

The hearing officer's Finding of Fact No. 2 states "[t]he Employer tendered a written offer of employment that fulfilled all the requirement of a bona fide offer of employment." The hearing officer also states in his discussion of the evidence that he "find[s]" that the offer was indeed an effective bona fide offer; that the claimant received this offer on or about September 24, 1999; that although the claimant was still having trouble with his knee, the offer clearly stated that the employer would abide by the light-duty restrictions of Dr. W, then the treating doctor, and the offer met all the legal requirements. (These findings are actually findings of fact and are more appropriately set out in the Findings of Fact portion of a Decision and Order.)

While the purported offer tracks the requisites of Rule 129.5(b), as noted above, that rule also directs the Commission to consider other factors in determining whether an offer constitutes a bona fide offer of employment. Two of the factors which the Commission is required to consider, the term "shall" in the rule indicating that the consideration of those facts is mandatory, are the length of time the offer was kept open and the manner in which the offer was communicated.

The claimant asserts that the employer failed to communicate the offer to him in an acceptable manner because his primary language is Spanish and the offer was made in English. We find that there is no requirement in the 1989 Act that an employer accommodate an employee in such a manner and we find no error in the hearing officer's determination that the language discrepancy did not invalidate the light-duty offer.

However, the employer drafted the offer of light-duty employment on September 13, 1999, but did not send the offer to the claimant's post office box until September 16, 1999, as evidenced by the certified mail receipt attached to the carrier's copy of the offer. On its face, the offer expired the day immediately following the day it was placed in the mail to the claimant. And the claimant, in fact, did not receive the offer until almost a week after it expired by the explicit terms set forth in the letter.

It is not unusual for mail to take several days to be delivered in the same city, even when sent by first class mail. To expect a certified letter to arrive at its destination the day after it was mailed, and in time for the claimant to have the offer contained in that letter interpreted, considered, and then either accepted or rejected, is unreasonable. If the manner in which an offer is conveyed, together with the length of time the offer remains open, fails to allow an employee reasonable time to consider and respond to the offer, we fail to see how such an offer can be considered a bona fide offer of employment. Because reasonable time for the claimant was not allowed in this case, the hearing officer's decision that the employer tendered a bona fide offer is reversed and a new decision is rendered that the offer was not a bona fide offer of employment under the particular facts of this case.

Kenneth A. Huchton
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

DISSENTING OPINION:

I respectfully dissent from the majority opinion. In my opinion, the Appeals Panel should not, on its own, raise the issue of the employer's offer either having expired on September 17, 1999, or of the employer's not having provided a reasonable time for the claimant to consider the offer, because the claimant himself, who was represented, did not raise such issue or issues at either the hearing below or on appeal. While Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 129.5(a)(2) (Rule 129.5(a)(2)) provides that the Texas Workers' Compensation Commission (Commission) shall consider the length of time the offer was kept open, it seems to me that the Commission should not turn a blind eye to the treatment of such issue by the parties at the hearing and, incidentally, the hearing officer, who is a Commission employee. Because of the necessity of the employer's having to remail the offer, the offer's expiration date of September 17, 1999, if indeed that date is to be construed as an expiration date, would have expired before the claimant signed for receipt of the offer on September 24, 1999. If the claimant and the carrier, and hearing officer for that matter, had regarded the date of September 17, 1999, as a viable expiration date, it is inconceivable that this issue would not have been raised at the hearing and on appeal because it would obviously nullify the offer. Accordingly, in my opinion, the majority errs in going behind the hearing officer and the parties to “fix” a perceived problem with the offer not raised by the parties and not perceived as a problem by the Commission at the hearing level. The parties did not treat the September 17, 1999, date as a self-executing deadline.

Philip F. O'Neill
Appeals Judge