

APPEAL NO. 002076

Following a contested case hearing held on August 10, 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 did not extend a bona fide offer of employment to the respondent/cross-appellant (claimant) and that the claimant did not have disability. The appellant/cross-respondent (carrier) filed an appeal of the bona fide offer determination conditioned upon the claimant's filing an appeal of the disability determination. The claimant has appealed the disability determination on evidentiary insufficiency grounds. Both parties filed responses.

DECISION

Affirmed.

Not appealed are findings that on _____ (all dates are in 2000 unless otherwise stated), while employed by (employer), the claimant sustained an injury while engaged in the exercise of his job duties with the employer, and that on _____, the employer made a written offer of light-duty employment to the claimant.

Concerning the bona fide offer of employment issue, the hearing officer's decision accurately states that the written offer of employment does not fully comply with the requirements for an offer of modified duty set out in Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 129.6(c) (Rule 129.6(c)). We agree and note that the employer's written offer does not state the location at which the claimant will be working; the schedule the claimant will be working; and a description of the physical and time requirements that the position will entail. Further, the claimant testified that the two-page job descriptions for fireguard and for pipe and structural welder positions were not attached to the employer's _____ "Offer of Light Duty Position" that he signed on that date at the employer's job site. Also, Rule 129.6(c) states that a copy of the Work Status Report on which the offer is being based shall be included with the offer. In addition to the conclusion that the employer did not extend a bona fide offer of employment to the claimant, the carrier generally challenges the finding that the employer's offer did not specify the physical location at which the claimant would be working, the schedule the claimant would be working, or a description of the physical and time requirements of the position offered to the claimant. The Appeals Panel will not disturb a challenged factual finding of a hearing officer unless it is so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). We are satisfied that the challenged finding is sufficiently supported by the evidence.

Concerning the issue of disability, the claimant testified that he had been employed by the employer since February 28 as a pipe welder; that on _____ he stepped on a board which collapsed and he fell about six feet striking the side of his chest on a pipe; that Mr. M, the safety man, took him to the industrial medical center (medical center) used by the employer; that he was seen by a nurse practitioner and advised he could return to

work; that he and Mr. M returned to the work site where he signed the offer of light duty and then went home; that he stayed home the next day because of his pain; and that he returned to work the following day, _____, and was assigned the duty of being a fire watcher which involved just sitting and watching for sparks from other welders. The claimant acknowledged that this was light duty which did not involve lifting but contended that had a fire broken out, he would not have been able to physically extinguish it because it would require lifting and using a fire extinguisher. He indicated that after two days of fire watching, he returned to welding "shoes," which required some stretching under pipes; that he mentioned his pain several times to Mr. M but did not ask to return to fire watching duties; and that he managed to perform the welding tasks until April 24, the last day he worked, and did not request any lighter duties. The claimant further stated that on April 27 he saw Dr. M to whom he was referred by the medical center; that he was advised that he had a mass on the right-side corner of his pectoralis muscle; and that the mass is tender to palpation and prevents him from raising his right arm very high without having pain. The claimant further testified that on May 10 he began seeing Dr. L who provided him with multiple heat treatments; and that Dr. M has scheduled him for surgery on the mass on August 18. He further testified that he is 29 years of age, is computer literate, has experience managing a store, and lives with his parents. The claimant said that his daily activities include getting his daughter off to school in the mornings and going to medical appointments.

Mr. M testified that the field fire extinguishers weigh approximately 15 pounds and that fire hoses are two inches in diameter. He further stated that the claimant did not ask to be returned to fire watching duties; that the quality assurance supervisor, Mr. C, told him that the claimant did not appear to be having any problems performing his welding tasks; and that he would have returned the claimant to fire watching had he so requested or accommodated him with other light duty. Mr. M also testified that on _____ when they were returning from the medical center to the job site the claimant asked him how long the job was expected to last, that he replied, six to eight weeks, and asked if the claimant was inquiring because he was planning to go to school and that the claimant responded "no," stating that he takes off from work in the summertime because of the heat.

Mr. D, the employer's job site superintendent, testified that after the claimant commenced his employment at the job site, his welding was not satisfactory for structural welding and he was then assigned to do a less exacting type of welding. He also described the fire watching duties in detail and indicated that the claimant did not ask to be kept on such duty permanently. Mr. D also stated that the claimant's employment was terminated because he lacked sufficient job skills.

One record of Dr. S reflects that he saw the claimant on _____, diagnosed a chest wall contusion, and returned him to full-time work. Another of Dr. S's records reflects that day surgery was planned to excise the lesion and states "light duty until surgery." Dr. L's records reflect that he commenced treating the claimant on May 10 and have him off work until further notice. Dr. L's diagnosis includes chest wall contusion, intercostal neuritis, and costochondritis.

In addition to the conclusion that he sustained no disability, the claimant challenges the finding that his compensable injury has not prevented him from obtaining and retaining employment at wages equivalent to the wages he earned prior to _____. The hearing officer's discussion reflects that despite the evidence that the claimant's doctor has placed him in an off-work status, she feels he could have continued to work for the employer within his physical restrictions had he chosen to do so.

The claimant had the burden to prove by a preponderance of the evidence that he had disability. Disability means the "inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage." Section 401.011(16). The Appeals Panel has recognized that disability may be established by lay testimony including that of the injured employee (Texas Workers' Compensation Commission Appeal No. 92167, decided June 11, 1992); that objective medical evidence is not required (Texas Workers' Compensation Commission Appeal No. 91083, decided January 6, 1992); and that pain can be considered to the extent that it prevents the performance of work (Texas Workers' Compensation Commission Appeal No. 91024, decided October 23, 1991). Further, we have stated that the 1989 Act is not intended to be a shield for an employee to continue receiving temporary income benefits where, taking into account all the effects of the injury, the employee is capable of employment but chooses not to act on reasonable opportunities. Texas Workers' Compensation Commission Appeal No. 91045, decided November 21, 1991. Although another fact finder may have drawn different inferences from the evidence, we are satisfied that the challenged finding is not so against the great weight of the evidence as to be clearly wrong or manifestly unjust.

The decision and order of the hearing officer are affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

CONCURRING OPINION:

I concur with the majority's decision, but I write separately regarding disability. In this case, there was evidence that the claimant already had been working a job within his restrictions for some period after his compensable injury. There was evidence from which

the hearing officer could find that the claimant already knew that this work remained available to him after his injury. The hearing officer determined that the claimant failed to prove that he was unable to obtain and retain employment at wages equivalent to his preinjury wage. Apparently, the hearing officer determined that the claimant did have some work restrictions. However, because the claimant was not able to prove that he was unable to obtain and retain employment at wages equivalent to the preinjury wage (i.e., unable to return to the work with the employer that he already was aware of and had performed before) he did not have disability.

If the claimant had proved that he was actually unable to do the work that he knew was available and was thus unable to obtain and retain employment at wages equivalent to the preinjury wage, then the issue of bona fide job offer would have been relevant to the issue of the amount of temporary income benefits (TIBs) owed to the claimant. The employer would have then had to comply with the bona fide job offer requirements in order to have an offset against TIBs owed. I concur with the majority's decision in this case.

Judy L. Stephens
Appeals Judge