APPEAL NO. 950271

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing was held in (city), Texas, on January 6, 1995, to determine whether the employer made a bona fide offer of employment to the claimant entitling the carrier to adjust the post injury weekly earnings and, if so, for what period; with the permission of hearing officer (hearing officer) a second issue was added: whether the claimant had disability entitling him to temporary income benefits (TIBS) after June 27, 1994. The hearing officer determined that the employer made a bona fide offer of employment to the claimant, and that under such offer the claimant's weekly wage from March 1 through June 27, 1994, was equivalent to his preinjury wages; however, the carrier appeals as against the great weight and preponderance of the evidence her determination that from June 27, 1994, through the date the hearing was closed (January 25, 1995), the claimant had disability as a result of his (date of injury), injury. In the alternative, carrier argues, claimant's disability ended on September 6, 1994, when epidural steroid injections provided relief from his pain. The claimant contends that the evidence supports the hearing officer's decision.

DECISION

Affirmed.

The claimant had been employed for three years by (employer), as an electrician's helper. He testified that he injured his back on (date of injury), when lifting wire, although the evidence showed that he did not report the injury until December 27, 1993, the date he saw (Dr. T). Dr. T's Initial Medical Report (Form TWCC-61) noted spasm and tenderness with decreased lumbar range of motion, and he stated the claimant would require therapy for approximately four to six weeks. An MRI performed in January 1994 showed disk bulges at L3-4 and L4-5; (Dr. W), a neurosurgeon who evaluated that test, said he agreed with Dr. T that claimant had a lumbosacral strain. On February 9, 1994, Dr. T wrote that claimant showed "significant improvement," and he released the claimant to a "modified work program," stating that he should avoid bending for approximately one month.

Thereafter, on February 22nd, (Mr. O), employer's owner, sent claimant a letter offering him a temporary, modified duty job as warehouseman. Mr. O testified that this position was created solely to accommodate the claimant. According to the offer and to Mr. O's testimony, the position paid $8.00 per hour (claimant's preinjury wage) and required sorting lightweight materials (which Mr. O stated weighed no more than five pounds) and organizing the shop, with no heavy lifting or bending. The letter further said that that job would be offered "until your physician determines you can perform the essential functions of your previous position with or without reasonable accommodation," and that claimant's abilities would be re-evaluated after March 9, 1994, the date Dr. T had estimated the claimant would reach maximum medical improvement (MMI). Although claimant received this offer, Mr. O stated (and claimant acknowledged) that claimant never contacted the employer. The claimant testified at the hearing that the employer's warehouse contained

heavy items and that he did not think he could perform this job. The claimant did not return to work for the employer after December 21, 1993. Mr. O testified that the light duty job offer remained open as of the date of the hearing.

During the period from the end of March 1994 to near the end of June the claimant worked for three different courier companies as a delivery driver. He contended that while he did no heavy lifting on this job, he said he continued to have back problems which caused him to miss some days from work. The manager at one of the courier companies gave a statement that the job required daily lifting of boxes weighing from five to 30 pounds; the dispatcher at another company gave essentially the same statement but also said the claimant said he was receiving treatment for a back injury sustained at a prior job. The claimant testified that his physical limitations prevented him from continuing at the last of these jobs, although the dispatcher's statement said the claimant left due to his father's illness. Claimant said he did not see Dr. T during the period in which he was working for the courier services; a patient note dated June 23rd reflects that the claimant "lifted heavy boxes causing back pain," and that Dr. T subsequently referred the claimant to a neurosurgeon, (Dr. C). On June 27th Dr. C reported claimant's statement that he had worsened since March and that he now had pain "all the time." Dr. C stated his opinion that the December 1993 MRI showed a "prominent disk herniation at L4-5;" he recommended another MRI, stating that if the herniation had enlarged the claimant should consider surgery and if it had improved or was unchanged he could consider epidural injections. He concluded that the claimant should not work "until this issue is resolved." A second MRI on June 29th showed the herniation was no larger than originally shown on the first MRI, with mild mass affect upon the thecal sac and no neural impingement. The claimant proceeded to receive epidural injections administered by (Dr. D) in September and October of 1994. The claimant said that the first injection relieved his pain for a period of three weeks and the effects of the second were wearing off at the time of the hearing. As of the date of the hearing the claimant was continuing to treat with Drs. C and D. Dr. D wrote that the claimant had excellent pain relief in his legs after the second injection and had only intermittent back pain, although he stated claimant had an anxiety disorder and would benefit from psychiatric evaluation and therapy.

Also in evidence was a videotape of claimant performing in a rock band on January 23, 1994; it shows the claimant playing the guitar and lifting and pushing some cabinets containing speakers. The claimant said he had taken prescription painkillers prior to the performance. According to the evidence the group played in (city) on February 5th, (city) on February 26th, and in (city) on a date he said he could not remember. He said that a performance scheduled in (city) on December 18, 1994, had been cancelled and that the group has since disbanded; he also said he only made minimal money playing with the group. The claimant contended that Dr. T had released him to work on February 9th only because the carrier had showed him the videotape.

The hearing officer determined that on March 1, 1994 (the date the claimant received notice), the employer made the claimant a bona fide offer of employment that met the

requirements of Tex. W. C. Comm'n, TEX. ADMIN. CODE § 129.5 (Rule 129.5), and that under such bona fide offer the claimant's wages were equivalent to his preinjury wage, through June 27, 1994. Neither party appeals this determination, which is thus binding upon this panel. However, the carrier argues that any disability from the compensable injury ended prior to June 27, 1994, (and that any incapacity the claimant had after that date was not due to the compensable injury); that Dr. C's report only took claimant off work for three days; and that, in the alternative, any disability ended after the September 6, 1994, epidural injection.

The evidence in this case regarding disability is conflicting. It shows that the claimant never responded to his employer's offer of light duty employment; he then worked at three other jobs where, the evidence shows, the strenuousness of the work is in factual conflict. In June he complained of back pain to the treating doctor who had released him to modified duty work; that doctor sent him to Dr. C who on June 27th ordered a second MRI to determine the status of claimant's problem and took him off work "until this issue is resolved." The exact meaning of Dr. C's words, key to resolution of the issue at hand, can be subject to a difference of opinion. While the subsequent medical evidence showed that claimant's condition was essentially unchanged since the first MRI and that he proceeded, per Dr. C's recommendation, to undergo steroid injections which claimant and Dr. D agreed gave claimant pain relief, nevertheless the evidence shows that claimant was under active medical treatment during the months following Dr. C's statement and that pain was documented. We therefore distinguish this case from those in which a claimant relied upon an isolated off-work statement which was never affirmatively revoked and failed to seek medical treatment in the ensuing period. *See* e.g., Texas Workers' Compensation Commission Appeal No. 941275, decided November 3, 1994, (concerning entitlement to supplemental income benefits, but analogous to disability); Texas Workers' Compensation Commission Appeal No. 92158, decided June 5, 1992). In short, we believe that the evidence pertaining to the period after June 27, 1994, involved facts which it was the hearing officer's obligation to weigh and interpret. The hearing officer, as sole judge of the evidence, Section 410.165(a), could have chosen to believe that Dr. C's off-work statement was binding during the period of active treatment for the problem identified by Dr. C, even with the evidence showing that the treatment had been successful. In addition, the hearing officer could have chosen to believe the claimant's statement that he was not continuing to play with the rock group during the period in question; the dates of performance confirmed by the evidence pre-dated the disability period, as did his work for the courier service. As to whether those activities were the cause of his inability to obtain and retain employment, we note that sole cause was not an issue at the hearing; in addition, we have held that the compensable injury itself need not constitute the sole reason why a claimant is unable to work. Texas Workers' Compensation Commission Appeal No. 92242, decided July 24, 1992.

Clearly, this case presents evidence which could have supported a different result; however, that is not sufficient grounds for reversal by an appellate body. Garza v. Commercial Insurance Co. of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-

Amarillo 1974, no writ). Because we find the hearing officer's decision is not so against the great weight and preponderance of the evidence as to be manifestly unjust, In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951), we will not overturn it on appeal.

The hearing officer's decision and order are accordingly affirmed.

Lynda H. Nesenholtz
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Tommy W. Lueders
Appeals Judge