APPEAL NO. 950663

This appeal is brought pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on March 30, 1995. The issues at the hearing were:

1. Who was the respondent's (claimant herein) treating doctor on June 17, 1994.

2. Did the employer (self-insured herein) make a bona fide offer of employment to the claimant on June 17, 1994,

3. Did the claimant have disability resulting from his _____, compensable injury, and if so, for what periods.

The hearing officer determined that Dr. P, D.C., was the claimant's treating doctor; that the self-insured did not make a bona fide offer of employment; and that the claimant had disability from April 11, 1994, to May 2, 1994, and from May 27, 1994, to the date of the hearing.

The self-insured appeals arguing that the decision and order of the hearing officer are against the great weight and preponderance of the evidence. The claimant replies that the decision and order are supported by sufficient evidence and should be affirmed. Unless otherwise indicated, all dates are in 1994.

DECISION

We affirm.

The claimant worked as a custodian. It was not disputed that he sustained a compensable left wrist and thumb injury on _____, while he was moving furniture. He was sent by the self-insured to a clinic and from there was referred to Dr. C, a hand specialist, who saw the claimant four times between March 31st and May 12th. Dr. C diagnosed persistent basal joint arthritis and flexor carpi radialis tendinitis. He scheduled surgery for June 8th for division of the pulley overlying the flexor carpi radialis tendon, but this was cancelled because the self-insured refused to authorize it. Instead, according to the claimant, the self-insured referred him to Dr. A for further treatment. The claimant said he never heard of Dr. A until then. Mr. M, the adjuster, said in his testimony that he accompanied the claimant on the first two visits to Dr. A. Dr. A. treated the claimant between May 17th and June 22nd. He generally diagnosed severe tenderness in the wrist and referred the claimant to Dr. E who saw the claimant on at least two occasions. On May 18th, Dr. E diagnosed early arthritis in the left thumb and left carpal tunnel syndrome.

On May 31st, the claimant completed an Employee's Request to Change Treating Doctors (TWCC-53) from Dr. C to Dr. P. The reason for the request was that "[p]resent

doctor is not helping me with the pain and would like to go to [Dr. P], D.C." At the hearing, the claimant amplified this reason by stating that he was dissatisfied with Dr. A's returning him to work (discussed below) and that by then he was "desperate" because he could not get a decision on his operation and the pain was extending from his wrist up to his neck.[1] On June 14th, a Disability Determination Officer approved the request.

Mr. M testified that the self-insured wanted a second opinion on Dr. C's surgery recommendation and referred the claimant to Dr. A for this purpose. He said he knew as early as June 10th that the claimant was seeing Dr. P because of a call from Dr. P's office. Apparently not aware of the Commission's approval of the change to Dr. P, Mr. M said he called Dr. P on June 17th to advise him the self-insured was not going to approve any payments to him until the Commission approved the change. On June 13th, Dr. A wrote "To whom It May Concern" that as of May 17th, "I have been the treating physician for [claimant]." On June 15th, Mr. M wrote the claimant "to clarify your medical treatment and who can treat you for your work related injury." He referred to a request of May 17th by the claimant (not in evidence) to be treated by Dr. A and said "you clearly told [Dr. A] you wanted him to be your treating physician." If this was not true, he asked the claimant "to put it in writing." On June 17th, Mr. M wrote a statement signed by the claimant which said: "Claimant is aware that [Dr. A] was his second choice of Dr . . . ."

Section 401.011(42) defines treating doctor as "the doctor who is primarily responsible for the employee's health care from an injury." Section 408.022 allows an injured employee to select an initial treating doctor and to request permission from the Commission to change treating doctors. The Commission may approve such a request in accordance with certain criteria. *See* Texas Workers' Compensation Commission Appeal No. 950232, decided April 4, 1995. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 126.9 (Rule 126.9) further implements this section. It provides that an injured employee may choose an initial treating doctor, but a change from the initial treating doctor requires Commission approval. Rule 126.9(c) states that an initial choice of treating doctor does not include:

> a doctor recommended by the carrier or employer, unless the injured employee continues . . . to receive treatment from the doctor for a period of more than 60 days; or . . . any doctor providing emergency care unless the injured employee receives treatment from the doctor for other than follow-up care related to the emergency treatment.

An order approving or disapproving the change is to be issued within ten days of the request and the employer or carrier must dispute the approval or disapproval within ten

[1]Eventually the claimant returned to Dr. E to expedite his treatment and surgery was performed on December 15th.

days of receipt of the order.

In its appeal, the self-insured contends that the determinations of the hearing officer that the claimant did not choose Dr. A as his treating doctor and that Dr. P was the treating doctor on June 17th "totally ignores the evidence" that Dr. A "was chosen by the Claimant to be his treating physician." The evidence it refers to is the statement of Dr. A that he considered himself the treating doctor and that the claimant himself considered Dr. A to be his treating doctor because the question of who is the treating doctor on a given day is one of fact. In this case, it seems of little moment whether Dr. A had been a treating doctor. The claimant could change his mind and request a change of treating doctors. Without doubt he did this on May 31st and without doubt the Commission approved the change on June 14th. No suggestion was made at the hearing or on appeal that the self-insured contested this approval within tens days of notice or that the approval constituted an abuse of discretion by the Commission.[2] *See* Texas Workers' Compensation Commission Appeal No. 94857, decided August 17, 1994. The self-insured's position seems grounded on the erroneous proposition that once Dr. A had the status of treating doctor, the claimant could not change treating doctors. The uncontradicted evidence is that the Commission by order of June 14th, approved Dr. P as treating doctor. There was no evidence that the Commission ever superseded this order with another. A claimant may have only one treating doctor at a time, Texas Workers' Compensation Commission Appeal No. 93714, decided September 28, 1993. The self-insured's contention that the claimant was "doctor shopping" neither voids the Commission's approval of Dr. P, nor fairly characterizes how the claimant came to be treated by the several predecessor doctors. We conclude that there was more than sufficient evidence to support the challenged findings of the hearing officer that Dr. P was the claimant's treating doctor on June 17th.

We next address the question of whether the self-insured made a bona fide offer of employment. Section 408.103(e) provides if an injured 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 for the purpose of calculating the amount of temporary income benefits (TIBS) owed are equal to the weekly wages for the position offered. Rule 129.5 provides that in determining whether the officer is bona fide, the Commission shall consider the expected duration of the position; how long the offer was kept open; the manner in which it was communicated; the physical requirements and accommodations of the position compared to the injured employee's physical capabilities; and the distance of the position from the injured employee's residence. A written offer

[2]While not necessary to our decision, we question whether approval of a request to change treating doctors in connection with a wrist injury from a medical doctor who specialized in the treatment of the hand and who referred the claimant to two other hand specialists to a chiropractor would not be an abuse of discretion. In Appeal No. 95232, *supra*, we expressed our disapproval of such routine approvals done without apparent consideration of the facts of the case.

delivered to the employee "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 work, the maximum physical requirements of the job, the wage, and the location of employment." An unwritten offer must be proved by "clear and convincing evidence."

By letter of June 13th, Dr. A wrote that he was informed that there was a position open for "one handed work" for the claimant. He therefore released the claimant to return to return to work with his right hand only. With this information, Mr. W, the Safety Coordinator, wrote, in pertinent part, to the claimant on June 14th:

> I have received a copy of your medical release to modified duty from [Dr. A]. I have shared this information with [Mr. Q, the administrator of custodial services], and he is willing to make reasonable accommodations allowing you to return to work within your physician's guidelines . . . .

Both Mr. M and Mr. Q testified that there was light duty available, at the preinjury wage, which consisted primarily of dusting, picking up papers and washing windows and specifically excluded operation of power equipment or anything else that required the use of two hands. This was essentially the same type of work the claimant was offered as early as May 2nd and which, according to these witnesses, he performed at two locations until May 16th. Whether intentionally or not, the claimant missed two meetings where this information about the light duty was to be given the claimant. On May 30th, he was terminated for failing to return to limited duty.

The claimant testified that he attempted prior to May 16th to do this one-handed duty, but was, contrary to the testimony of his supervisor, compelled to do work such as moving furniture that required the use of both hands. Because of this and because Dr. P on June 8th issued a total work excuse through June 24th, the claimant did not return to work.

The hearing officer determined that the self-insured did not make either a written or oral bona fide offer of employment that complied with the applicable rule. The self-insured in its appeal contends that the offer of employment was bona fide considered as either written or oral and that at the time the offer was communicated, it did not know the Commission approved the change of treating doctors.

We agree with the hearing officer that the alleged written offer by letter of June 14th, quoted above, which essentially says only that the self-insured will make reasonable accommodations within Dr. A's guidelines does not satisfy the criteria for a bona fide written offer of employment, also set out above. We thus consider whether this letter in conjunction with oral representations to the claimant - essentially that he was only to do

work involving his right hand and under no circumstances use his left hand - constituted a bona fide offer of employment by clear and convincing evidence. In Texas Workers' Compensation Commission Appeal No. 93777, decided October 13, 1993, the Appeals Panel affirmed a finding of a hearing officer that the carrier did make a bona fide offer of employment. The claimant in that case, at least for part of the time, performed janitorial duties. The offer was described in terms of duties similar to pre-injury duties "only lighter and that accommodations would be made for claimant's physical condition." Such an offer was remarkably similar to the one now under appeal. However, there was one critical difference: in Appeal No. 93777, an initial treating doctor agreed that the claimant "need[ed] to go back to work." In the case now under consideration, the treating doctor, Dr. P, placed the claimant in an off-work status. While we do not suggest that an unrestricted duty excuse from a treating doctor is in all cases determinative, as a matter of law, of whether an offer of employment is bona fide, *see* Texas Workers' Compensation Commission Appeal No. 93705, decided September 27, 1993, whether a bona fide offer of employment had been made is a question of fact for the hearing officer to decide. In reaching this decision, the hearing officer may consider not only the medical evidence, but also the testimony of the claimant about his physical ability to work. There was conflicting evidence about whether the claimant in fact demonstrated he could do the light duty offered and whether, despite the self-insured's representations that he would only have to use his right hand, the claimant would likely have to use both hands in his custodial duties. The hearing officer is the sole judge of the weight and credibility to be given this evidence. Section 410.165(a). He determined that the self-insured did not produce clear and convincing evidence of a bona fide offer of employment. Indeed, the focus of the self-insured's case was that Dr. A's opinion was controlling because at the time the offer was made, it was not aware that Dr. P was the treating doctor. The hearing officer obviously believed the claimant that the light duty was essentially similar to the pre-injury duty. Having reviewed the record, we cannot say that this determination was so against the great weight and preponderance of the evidence as to be manifestly wrong or unjust. Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986); and Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

The other issue raised in this appeal is disability. According to the parties, the only period in dispute is from June 17th, when the self-insured contends it made a bona fide offer of employment, to December 15th, when the claimant underwent surgery and was released from duty by Dr. E. After December 15th and for the period from April 11th to May 2nd, the carrier has paid TIBS.

Disability is defined as the "inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage." Section 401.011(16). Whether disability exists is a question of fact and may be established by the testimony of the claimant alone if found credible. Texas Workers' Compensation Commission Appeal No. 93560, decided August 19, 1993. In its appeal, the self-insured argues, not that the claimant failed to prove disability, but that the bona fide offer effectively ended his

entitlement to TIBS. The claimant testified that he was unable to work because of his injury. This is confirmed at least to a limited extent by the work release of Dr. P. The hearing officer found the claimant credible. We are satisfied that this decision is supported by sufficient evidence and, for this reason, we decline to reverse it on appeal.

The decision and order of the hearing officer are affirmed.

Alan C. Ernst
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Thomas A. Knapp
Appeals Judge