APPEAL NO. 980086

This appeal arises pursuant to the Texas Workers' Compensation Act of 1989, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On December 10, 1997, a hearing was held. He (hearing officer) determined that respondent (claimant) sustained a compensable low back injury on _____, and that she had disability from August 5, 1997, to the date of the hearing, December 10, 1997. An employer's offer of work was found not to be a bona fide offer of limited duty which could affect payment of temporary income benefits (TIBS). Appellant (carrier) asserts that claimant did not correctly report an injury prior to July 25, 1997, and generally states that claimant failed to prove her injury was related to the work; carrier also says the offer made was bona fide but says nothing about disability; carrier does, however, assert disagreement with the finding of fact that addressed disability. Claimant replies that the decision should be affirmed.

DECISION

We affirm.

There was no notice issue in this case. The issues were whether an injury occurred in the course and scope of employment, was there disability, and did the employer tender a bona fide offer of employment.

Claimant testified that she worked for a janitorial service (employer), on _____. She said that she lifted a half-filled box of books, labeled as trash, at the job site when she felt a pop in her low back. She described it as somewhat painful but it did not keep her from completing her shift (claimant worked four hours each night cleaning offices for employer). The box had been placed in a hall outside an office and (DS), a supervisor, was also in the hall at the time, according to claimant, who further said that when she felt the pop, she put the box of books back down and did not try to take it to her trash barrels that she rolled around her area. She indicated that DS saw her pick up the box and immediately put it down. When the hearing officer asked her how she knew DS was a supervisor, she said because "she had on a blue thing that said supervisor on there." She added that DS asked her if she was all right when she saw claimant try to pick up the box.

The evidence does not include a statement from DS or testimony from DS that contradicts claimant's testimony. As stated, there was no issue as to timely notice.

Claimant went on to say that she was able to work for approximately two weeks until she could not work any more because of her back pain. She said that during the time she kept working she did not try to lift anything heavy, such as a box of books, in doing her cleaning. She first sought medical help on July 28th. She testified that the employer sent her to a doctor on July 30th, and she then began seeing (Dr. I) on August 6, 1997. All

medical practitioners described claimant as having a lumbar strain. An MRI was reported as normal.

The employer in a letter dated August 4, 1997, offered claimant employment within the restrictions set forth by (Dr. H), who claimant saw on July 30, 1997. While the employer's letter recites that Dr. H was claimant's treating doctor, claimant testified that the employer sent her to see Dr. H. When claimant saw Dr. I on August 6th, Dr. I noted that claimant was not to return to work.

The hearing officer is the sole judge of the weight and credibility of the evidence. *See* Section 410.165. The hearing officer could credit claimant's testimony as to how the injury occurred and conclude that she injured her low back at work on _____. The hearing officer did not have to consider whether DS was claimant's supervisor because Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 122.1(c) (Rule 122.1(c)) provides that notice to the employer may be given to any supervisor. As stated, notice was not an issue. The hearing officer could also consider that claimant's injury was witnessed by another employee, who was also a supervisor. The evidence sufficiently supports the determination that the claimant sustained a compensable low back injury.

Dr. I provided claimant with written instructions not to return to work on August 6, September 16, and October 1, 1997; from these the hearing officer could determine that claimant had disability from August 6th to the day of the hearing, December 10, 1997. The appeal does not dispute any particular doctor's statement or indicate that claimant was able to return to unrestricted work prior to December 10, 1997.

While Section 408.103 addresses a bona fide offer as affecting payment of TIBS, Rule 129.5(b) states that the restrictions contained in the bona fide offer must emanate from a claimant's treating doctor or from the claimant. *Also see* Texas Workers' Compensation Commission Appeal No. 91023, decided October 16, 1991. With claimant's testimony that she saw Dr. H at the behest of the employer and that Dr. I was her treating doctor, the evidence was sufficient to support the finding of fact that the written offer of employment was not based on a treating doctor's restrictions; the conclusion of law that a bona fide offer was not tendered is sufficiently supported by the evidence and finding of fact, and that conclusion is consistent with Rule 129.5(b).

Finding that the decision and order are sufficiently supported by the evidence, we affirm. *See* In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

Joe Sebesta
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Judy L. Stephens
Appeals Judge