APPEAL NO. 990295

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on January 11, 1999. He (hearing officer) determined that the employer made a bona fide offer of employment to the appellant (claimant), which the claimant failed to accept, and that the claimant did not have disability beginning June 9, 1998. The claimant appeals these determinations, expressing his disagreement with them. The respondent (carrier) replies that the decision is correct, supported by sufficient evidence, and should be affirmed.

DECISION

Affirmed, as reformed.

The claimant worked as a laborer. He sustained a compensable low back injury on _____. Dr. W has been the claimant's treating doctor. His diagnosis was lumbar strain, and the treatment has been conservative, including medication and physical therapy. The report of the claimant's May 20, 1998, visit with Dr. W notes that the claimant was still off work because there was "nothing at work he can do." On May 28, 1998, according to the claimant, the adjuster, Ms. R, called to tell him that she had talked to Dr. W; that Dr. W had released him to light duty; and that the employer would make light duty available to him. The claimant said Ms. R urged him to call Dr. W and the employer. The claimant said he called Dr. W on May 28, 1998, but only contacted an answering machine. He said he also called Mr. O, his crew leader, on May 29, 1998, and was told no light duty was available, but that Mr. H, the president of the employer, would be in touch with him. The claimant said he again unsuccessfully tried to get in contact with Dr. W on May 29, 1998.

The claimant further testified that Mr. H came to his house on May 29, 1998, and asked him to sign a copy of a letter which purported to constitute an offer of light-duty employment. The claimant said he declined to sign it until he saw Dr. W. Mr. H did not give the claimant a copy of the letter, nor did he have with him a copy of the claimant's work restrictions established by Dr. W on May 21, 1998. The claimant saw Dr. C on June 4, 1998, on referral from Dr. W. At this visit, Dr. C told him that he could perform light-duty work. The claimant said he called Mr. H on June 5, 1998, and was told by Mr. H to talk to Mr. O about light duty. The claimant then said he talked to Mr. O on June 17, 1998, and was told no light duty was available. At this point, the claimant said, he was told he was terminated. The claimant also testified that he was not aware of the terms of Dr. W's light-duty release until June 8, 1998, and that he first received a copy of the May 21, 1998, restriction, in August 1998, in preparation for a hearing with the Texas Workforce Commission about unemployment benefits. The May 21, 1998, light-duty release signed by Dr. W contains limitations of no lifting, no repetitive bending and twisting, and no sitting greater than 20 minutes without standing five to 10 minutes.

A copy of Dr. W's telephone log reflects that on May 22, 1998, the claimant called Dr. W's office and was informed he was released to light duty and was to call Dr. W if the work was beyond his restrictions. The claimant denied ever telling Dr. W that the employer had no light-duty work available or that he called Dr. W on May 22, 1998. Although Dr. C wrote in his record of the June 4, 1998, visit that the claimant said his employer wanted him back to full work, the claimant denied telling this to Dr. C. The claimant agreed that Dr. W's light-duty release did not contain any restrictions on the number of hours he could work.

Ms. P, the receptionist for the employer, testified that there was no record of any calls from the claimant to the employer for the period from mid-May to mid-June 1998. Mr. O testified that he did not receive a call from the claimant within seven days of being presented with the letter offering claimant employment. Mr. H testified that he was called by the adjuster on May 20, 1998, to see if light duty was available. He said that Dr. W's office telefaxed a copy of claimant's restrictions and he then wrote the letter and took it to the claimant. The letter itself, signed by Mr. H, states that the employer received a light-duty release from Dr. W, and that it would comply with the terms of the release. The duties were described. The job would last for the duration of his restrictions. The wages were the same as the preinjury wage. The location was the employer's office. And the offer was left open for seven days.

Section 408.103(e) provides that for purposes of calculating the amount of temporary income benefits (TIBS) to which an employee might be entitled, "if an 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 after the injury are equal to the weekly wage for the position offered to the employee." Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 129.5 (Rule 129.5) further enumerates what is to be considered by the Texas Workers' Compensation Commission in determining if an offer is bona fide. These considerations include the duration of the offered position; the length of time the offer was open; the manner in which it was communicated; the physical requirements and accommodation of the position; and the distance of the position from the employee's residence. A written offer is presumed bona fide under the circumstances listed in Rule 129.5(b).

The hearing officer made the following findings of fact and conclusions of law which have been appealed by the claimant:

FINDINGS OF FACT

2. Claimant was informed by [Dr. W's] office of his release to work at light duty on May 22, 1998.

3. Employer offered Claimant light duty work on May 28, 1998.

4. Employer's offer of light duty employment was held open for seven days; Claimant failed to accept the offer within the seven day period provided.

5. Claimant's compensable injury is not the cause for Claimant's failure to obtain or retain employment at wages equivalent to his pre-injury wage beginning June 9, 1998 and continuing through the date of this hearing.

CONCLUSIONS OF LAW

3. Employer made a bona fide offer of employment to the Claimant on May 28, 1998.

4. Claimant did not have disability.

The claimant does not challenge the existence of the written offer of employment or that he read it on May 29, 1998. Rather, he contends that he was not aware of Dr. W's work restrictions until he saw Dr. W on June 8, 1998. The hearing officer found that the claimant was aware of these restrictions of May 22, 1998, before the offer of employment was made, as evidenced by the record of a telephone conversation between the claimant and Dr. W's office. This obvious conflict in the evidence was resolved by the hearing officer who noted the inconsistencies and was not persuaded that the claimant's testimony was credible. We will reverse a factual determination of a hearing officer only if that determination is so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986). Applying this standard of review to the challenged findings, we decline to substitute our opinion of the credibility of the respective witnesses for that of the hearing officer or to reverse that finding.

The claimant also expresses his disagreement with Finding of Fact No. 3, contending that he "did not see or talk to [his] employer on May 28." The letter containing the offer of employment was dated May 28, 1998, but the uncontradicted evidence was that the letter was presented to the claimant by Mr. H on May 29, 1998. We consider this to be a minor discrepancy not amounting to prejudicial error and will conform the finding to the evidence.

Next, the claimant appeals Finding of Fact No. 4 on the basis that he called his employer four times during the seven-day period the offer was kept open, presumably to accept some form of light duty or convince the employer that he could not perform light duty. Again, the testimony was in conflict on this issue with Ms. P, Mr. H and Mr. O denying that they received any phone messages from the claimant during this time, with telephone logs in evidence for this period showing no calls from the claimant, and with Mr. H testifying that he was not present at the office the entire day of June 5, 1998, one of the days the claimant said he called. The hearing officer, as the sole judge of the weight and

credibility of the evidence under Section 410.165(a), did not find the claimant credible in these assertions. Under our standard of review, we will not disturb this determination.

The claimant also raises on appeal, as he did at the CCH, our decision in Texas Workers' Compensation Commission Appeal No. 980806, decided June 8, 1998. In that case, we affirmed the decision of the hearing officer that the employer did not tender a bona fide offer of employment. The compensable injury occurred on October 25, 1997. The next day he was examined by an employer-selected doctor who released him to light duty. On October 27, 1997, the employer made an offer of light-duty employment. There was some dispute over whether the claimant actually received this or a follow-up letter, but was advised to report to work by October 30, 1997. Additional letters were written offering light-duty employment. Meanwhile, the claimant's treating doctor did not release the claimant to return to work until December 21, 1997. The Appeals Panel noted that because the offers of employment were based on restrictions imposed by the doctor selected by the employer and not the treating doctor the offer was not presumptively valid under Rule 129.5(b). In extensive dicta, this decision examined the conduct of the employer in terms of the "manner" in which the offer was communicated and inferred that because the offer was made so soon after the injury the re-employment of the claimant was not "sincerely sought after a reasonable recovery period." In the case we now consider, the claimant argued at the CCH that the manner in which the offer was made (Mr. H not giving the claimant a copy of the offer and secretly recording his conversation with the claimant) and its timing (some six weeks after the injury) should divest the offer of its presumptive validity as a bona fide offer. The circumstances of Appeal No. 980806 are significantly different from the case under appeal. In the case we now consider, there was evidence that the offer was based on restrictions established by the treating doctor and came some six weeks, not two days, after the injury. That it was secretly recorded may seem crude or distasteful, but this fact does not as a matter of law render the offer invalid.

Finally, the claimant appeals the separate determination that the claimant did not have disability beginning June 9, 1998. It is not clear why this was added as a separate issue. The report of the benefit review conference suggests that on this date the carrier stopped payment of TIBS. In any case, the claimant was only released in a light-duty status and would arguably have had disability beginning June 9, 1998 (or before), but for the bona fide offer of employment. Because the bona fide offer of employment was made at the preinjury wage rate, these wages were imputed to the claimant. Thus, he did not establish disability, which 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).

For the foregoing reasons, we affirm the decision and order of the hearing officer.

_____
Alan C. Ernst
Appeals Judge

CONCUR:

_____
Robert W. Potts
Appeals Judge

_____
Gary L. Kilgore
Appeals Judge