

## APPEAL NO. 990361

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On February 2, 1999, a contested case hearing (CCH) was held. With regard to the three issues before her, the hearing officer determined (1) that the Texas Workers' Compensation Commission (Commission) abused its discretion in approving Dr. D as respondent/cross-appellant's (claimant) subsequent treating doctor, (2) that the employer had not made a bona fide offer of employment to claimant and (3) that claimant had disability from November 6, 1998, to the date of the CCH.

Appellant/cross-respondent (carrier) appeals the findings regarding the bona fide offer of employment, contending that claimant refused to return to work or cooperate with the treating doctor, and that the written offers were in compliance with the doctor's restrictions. Carrier contends that claimant did not have disability and requests that we reverse the hearing officer's decision on these issues and render a decision in its favor. Claimant files a timely response, stating that he received the hearing officer's decision and order on February 16, 1999, and urges affirmance on the carrier-appealed issues. In a separate document, mislabeled "Carrier's Request for Review," claimant appeals the hearing officer's findings that the Commission abused its discretion in approving the change of treating doctor. Carrier responds to claimant's appeal, urging affirmance on that issue.

### DECISION

Claimant's appeal of the abuse of discretion issue was not timely filed and the hearing officer's decision on that issue has become final. See Sections 410.169 and 410.202. The hearing officer's decision and order on the two remaining issues are affirmed.

Regarding claimant's appeal of the change of treating doctor, claimant's response to carrier's appeal states that claimant received the hearing officer's decision on February 16, 1999. When claimant actually mailed his appeal is in question as the postmark is obliterated, one postage meter stamp date is illegible and another postage meter stamp indicates a mailing date of March 1, 1999. However, the appeal was not received by the Commission until March 12, 1999, which is more than 20 days after the date of receipt of the hearing officer's decision and consequently is untimely. See Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 143.3(c) (Rule 143.3(c)). Not having been timely appealed, the hearing officer's decision on that issue has become final. See Section 410.169.

On the merits, claimant was employed as a crane operator by the (employer). The parties stipulated that claimant sustained a compensable right knee injury on \_\_\_\_\_ (all dates are 1998 unless otherwise stated). Claimant was first treated for his injury by Dr. C on April 24th who then referred claimant to Dr. W, apparently on May 7th. Dr. W saw claimant on May 11th for internal derangement and severe osteoarthritis of the knee. Claimant had surgery by Dr. W on his knee on May 29th and continued to be in an off-work status until around October 1st. In a September 28th "To Whom It May Concern" letter,

Dr. W writes that he had spoken with Mr. M, employer's manager and safety director, and that light duty in a "fairly sedentary job" was available for claimant. Dr. W writes, "If such a job is available, I feel this patient would be able to do it." Claimant adamantly denies that Dr. W ever told him that he could return to work. Although not clear, claimant admits receiving what was apparently this letter but with no stamp on it. In a Specific and Subsequent Medical Report (TWCC-64) dated October 6th, for the September 24th visit, Dr. W writes that claimant "is still coming along slowly" but releases claimant to return to "limited duty as of 9-28-98" with the following restrictions:

A light duty for [claimant] would be fairly sedentary job. It would be a fair amount of sitting. He certainly can get up and walk around several times a day. I would not want him on his feet for more than 1 to 2 hours at a time. I would want no climbing and no squatting or kneeling. Lifting should also be limited to probably 40 lbs. If such a job is available, I feel this patient would be able to do it.

However, in evidence is a billing statement dated September 24th, which marks that claimant "is not able to return to work" and states "NO WORK." The employer, on a "Bona Fide Offer of Employment" form dated October 6th, offered claimant a position of "General Duties, Clean Up, Etc" with no lifting over 40 pounds. In another "To Whom It May Concern" letter dated October 6th, Dr. W writes, "Evidently [claimant] was not notified by the company that he could return to work" and that he (Dr. W) doesn't believe claimant "should be terminated." The hearing officer interprets that exchange of reports and letters thusly:

Apparently Employer threatened Claimant with termination. Claimant's wife subsequently contacted [Dr. W's] office that same day, whose clerical support told her she needed to contact the company. It is clear [Dr. W] also found out that Claimant tried to contact him.

By letter dated October 6, 1998, [Dr. W] indicated his disapproval of Employer's actions in trying to terminate Claimant because of a miscommunication and that he would try to contact Claimant. A copy of this letter was sent to Claimant. On the same day, or prior thereto, Claimant obtained a Request to Change Treating Doctors form. He signed the document and obtained the signature of [Dr. D] on October 6, 1998.

We would note that these miscommunications may have been compounded by the fact that claimant does not speak or read English and testified at the CCH through a translator.

Notwithstanding that claimant was attempting to change treating doctors during the early October time frame, claimant saw Dr. W on October 14th. In a TWCC-64 dated October 16th, of the October 14th visit with Dr. W, it states that claimant "is able to work light duty-sitting job only as of 10-14-98" and that claimant would probably need a total knee replacement. The TWCC-64 indicates a copy of the report was sent to claimant.

Nonetheless, in evidence is a billing statement for the October 14th visit showing in the disability section, "NO WORK." In addition, there is a "Return to Work" slip, dated October 14th, stating claimant was released to light duty with restrictions of "[s]itting only" signed by Dr. W. That slip was sent to the employer by facsimile transmission on the afternoon of October 14th. On the bottom of the facsimile transmittal sheet Mr. M made the note, "Now were released for a sitting only job." The employer then sent claimant another "Bona Fide Offer of Employment" form, dated October 15th, for a position of "[s]teel [p]reparation" with duties of "sitting only," with that offer being left open for three days. The hearing officer attempted to ascertain what "steel preparation" involved but the answers she received were apparently unclear to her. By letter dated October 16th, claimant's attorney wrote Dr. W requesting clarification of claimant's work status.

Apparently in response to the employer's October 15th bona fide offer of employment claimant returned to work on October 28th but when he asked for a sitting job he was told by a supervisor that the employer had no light-duty work and sent claimant home. Mr. M, at the CCH, verified that the individual that sent claimant home was a supervisor but that the supervisor's action was "not endorsed by the employer" and was "outside of the scope" of the supervisor's duties.

Claimant again saw Dr. W on October 22nd. In a TWCC-64 of that visit, Dr. W noted again that claimant "may need a total knee replacement" and that claimant "is able to work sedentary work." The billing statement reflected claimant could do "sitting job duties." In a letter dated October 29th to claimant's attorney, Dr. W wrote:

[Claimant] was indeed returned to work at a sitting job. He has problems with his knee but I saw nothing, despite the fact he has severe arthritis, that would prevent him from doing a sedentary job primarily sitting. [Claimant] seems to have refused to do this despite the fact that I feel he can and the company feels he can.

The hearing officer, in her Statement of the Evidence, commented:

Claimant's evidence is sufficient to support a finding of disability from November 6, 1998 to the date of hearing based upon [Dr. W's] records that Claimant would need retraining and was restricted to sedentary work. When Claimant finally relented to return to work, he was told no light duty work was available. It is also clear that Claimant felt he could not work at all, and his testimony that [Dr. W] was not communicating with him about his work status was not persuasive and was controverted by the other evidence. The problem was Employer offering a job that Claimant could not do on October 6, 1998. The written offer of October 6, 1998 does not conform to [Dr. W's] restrictions. Clean-up duties all around the worksite is not a sedentary-"sitting job." The offer of October 15, 1998 does state "steel preparation" as the position offered but does not state the duties of the position. Therefore, a presumption as to bona fide offer does not apply. It is also clear that

Employer did not intend to abide by the written and oral representations, as Claimant was put to work at an entirely different job when he did finally return, which he could not do. Carrier's evidence is insufficient to support a finding of a bona fide offer of employment on either October 6, 1998 or October 15, 1998.

Carrier, in its appeal, recites the evidence from its perspective, emphasizing that claimant "failed and refused to cooperate" with the employer and Dr. W, that claimant was "non-compliant" with efforts to return him to work and that Mr. M had described "steel preparation" as a standard position describing the duties. Carrier contends that the two job offers "are clearly bona fide offers, as supported by all available evidence" and contrary to the hearing officer's decision. We disagree. The evidence to us was clearly in conflict and while carrier may believe that Mr. M adequately described the duties involved in "steel preparation," the hearing officer, by specifically asking for further clarification, obviously did not agree that the duties as described met claimant's physical restrictions. Certainly the "general duties" and "clean up" did not meet the requirements of a sitting only job. We have many times held that Section 410.165(a) provides that the hearing officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence as well as the weight and credibility that is to be given the evidence. It was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). This is equally true regarding medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). The trier of fact may believe all, part, or none of the testimony of any witness. Aetna Insurance Company v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ). The hearing officer resolved the conflicts and contradictions in claimant's favor and we cannot say that decision was 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).

As for the disability issue, even Dr. W has recommended a knee replacement and although the duties of a crane operator were not specified, it appears fairly clear that claimant cannot, at least at this time, return to his preinjury job. Disability is defined to mean the inability to obtain and retain employment at the preinjury wage. Section 401.011(16). Carrier offered into evidence a surveillance videotape to argue that claimant does not have disability. Our review of the video shows claimant limping, reaching down to lift and carry a cat, and vacuuming a car (this is not a back injury nor a total inability to work situation). In one sequence, claimant is even shown walking with the aid of a crutch. There is nothing in the video that would compel us to hold that the hearing officer's decision on this point is against the great weight and preponderance of the evidence. Carrier also argues that since Dr. W has released claimant to light duty and that the hearing officer has ruled that Dr. D was approved for an improper purpose, "no evidence exists from any authorized medical provider to support disability." That may or may not be so; however, we point out that the hearing officer can find disability based on the claimant's testimony alone, if believed, even though contradicted by medical reports. Houston General Insurance Company v. Pegues, 514 S.W.2d 492 (Tex. Civ. App.-Texarkana 1974, writ ref'd n.r.e.);

Texas Workers' Compensation Commission Appeal No. 971558, decided September 24, 1997.

Upon review of the record submitted, we find no reversible error and we will not disturb the hearing officer's determinations unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). We do not so find and, consequently, the decision and order of the hearing officer are affirmed.

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Thomas A. Knapp  
Appeals Judge

CONCUR:

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Tommy W. Lueders  
Appeals Judge

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Judy L. Stephens  
Appeals Judge