APPEAL NO. 990560

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on January 28, 1999. With respect to the issues before her, the hearing officer determined that the respondent (claimant) had disability as a result of his _____, compensable injury from June 29, 1998, through the date of the hearing, with the exception of July 27, 1998; that the employer made a *bona fide* written offer of employment to the claimant; and that the appellant (carrier) is entitled to adjust the claimant's post-injury weekly earnings based on that job offer for only one day, July 27, 1998. In its appeal, the carrier appeals the hearing officer's finding of fact and conclusion of law concerning disability, her conclusion of law that it is only entitled to adjust the claimant's earnings for one day, and her conclusion of law that good cause existed to hold the hearing in the City 1 Field Office of the Texas Workers' Compensation Commission. In his response, the claimant urges affirmance. The parties resolved an injury issue by executing a Benefit Dispute Agreement (TWCC-24) that the claimant sustained a compensable right knee injury on _____.

DECISION

Affirmed.

As noted above, the parties reached an agreement that the claimant sustained a compensable right knee injury on _____, in the course and scope of his employment as a machine operator. The claimant reported his injury to his supervisor, Mr. L on the day it occurred and Mr. L completed an accident report. The claimant testified that he continued to work after his injury even though he had pain and swelling in his knee because his wife was in the hospital and unable to work; thus, he needed to continue working in order to provide for his family. He stated that he continued to work until June 1998, when his wife convinced him to seek medical treatment for his knee which was not getting better.

The claimant testified that the first doctor he saw was Dr. MR, to whom he was sent by the employer. He stated that Dr. MR referred him to Dr. MBR, an orthopedic surgeon. In his Initial Medical Report (TWCC-61), of June 29, 1998, Dr. MBR lists a date of injury of (subsequent date of injury), rather than _____. At one point in his cross-examination, the claimant denied having sustained any injury to his right knee at work other than the _____, injury and at another point, he stated that he struck his knee a second time after _____ and that he did not seek medical treatment prior to that incident. However, he maintained that he had trouble with pain and swelling in his knee prior to the second incident. Dr. MBR diagnosed an internal derangement of the right knee, possible aggravation of degenerative arthritis, and a possible meniscal tear. He noted that the claimant's work was aggravating his symptoms and took him off work. In a report of July 20, 1998, Dr. MBR recommended an MRI of the claimant's right knee and continued him off work.

Ms. L, the employer's safety director, testified that she contacted Dr. MBR's office on July 22, 1998. She stated that in response to that conversation, Dr. MBR sent her a release that the claimant could return to light duty on July 23rd with the restrictions that he "may sit for 8 hrs. with leg elevated 20 inches from floor." The employer agreed to provide the claimant with a wheelchair to accommodate the restrictions. The parties stipulated that the claimant received the written job offer made in accordance with Dr. MBR's release on July 24, 1998. The claimant returned to work for the employer on July 27, 1998, and worked his eight-hour shift. In an unappealed finding of fact, the hearing officer states:

**FINDING OF FACT**

> 8. The Claimant accepted the offer of employment and returned to work on or about July 27, 1998. Although the Claimant worked the entire shift on July 27, thereafter he was unable to continue working under [Dr. MBR's] restrictions, because given the Claimant's height and the size of the wheelchair, the Claimant had to hold his right leg in a way that aggravated the condition of his right knee.

On July 28, 1998, the claimant was examined by Dr. TR, a chiropractor, who was subsequently approved as his treating doctor. Dr. TR took the claimant off work at that time and has continued him off work through the date of the hearing. Dr. TR obtained an MRI of the claimant's right knee in August 1998, which revealed tears of both menisci, joint effusion, and chondromalacia of the patella. Dr. TR referred the claimant to Dr. W, an orthopedic surgeon, who has recommended arthroscopic surgery. The claimant testified that his knee surgery had been scheduled for the week following the hearing but that it was postponed because of his high blood pressure.

With respect to venue, the claimant testified that due to financial hardship, he spends most of his time living with family members in City 1. On cross-examination, the claimant acknowledged that he maintains a residence in City 2, his residence at the time of his injury, and that he receives mail in both locations. In addition, as the hearing officer noted, the claimant's treating doctor and his attorney are located in City 1.

Initially, we will consider the carrier's assertion that the "hearing officer erred with respect to her finding of good cause for the venue provisions of the "Act to be ignored." In determining that good cause existed to hold the hearing in City 1, the hearing officer found that because of financial hardship, the claimant "has lived between City 1 (with relatives), and City 2, where he usually resides." In addition, she noted that his treating doctor and his attorney are located in City 1, and that the claimant wants the hearings and conferences in his case to be held in City 1. We review a good cause determination under an abuse of discretion standard. Thus, we look to see if in making her good cause determination, the hearing officer acted without reference to guiding rules and principles. Morrow v. H.E.B., Inc., 714 S.W.2d 297 (Tex. 1986). We do not so find here. In his response, the claimant stated that due to the financial hardship resulting from the denial of his claim, he has become "transient, relying on family and friends for support, wherever they lived." The hearing officer could consider the fact that the claimant spent most of his time in City 1 due

to financial concerns in conjunction with the facts that his treating doctor and his lawyer are in City 1 in determining that good cause existed to hold the hearing in City 1 rather than in City 2. We perceive no error. In addition, although it is not determinative, we note that the carrier did not advance any argument at the hearing, or on appeal, as to how it was prejudiced by the decision to hold the hearing in City 1 and no prejudice is apparent.

The carrier also asserts error in the hearing officer's disability determination. Specifically, the carrier argues that the claimant's testimony "was so incredible and unbelievable that there is no way the Hearing Officer could have arrived at her decision absent some sort of bias." In addition, the carrier emphasizes the fact that the claimant sustained a second knee injury at work on (subsequent date of injury), contending that "[t]he evidence is overwhelming that the Claimant suffered disability as the result of his non-compensable (subsequent date of injury), injury and not his compensable injury of _____." That "overwhelming evidence" was apparently the evidence that the claimant continued working and did not seek medical treatment until after his subsequent injury. We note that the claimant also continued working and did not seek medical treatment for nearly two months after the alleged second injury. There was no sole cause issue before the hearing officer; however, in arguing that the subsequent injury is the cause of the claimant's disability, it is difficult to characterize that argument as anything other than a sole cause defense. (Emphasis added.) The carrier has the burden to prove sole cause. Texas Employers Ins. Ass'n v. Page, 553 S.W.2d 98 (Tex. 1977); Texas Workers' Compensation Commission Appeal No. 990191, decided March 10, 1999, and it did not produce any such evidence in this case. In her discussion section, the hearing officer noted that much emphasis was made of the effect of the alleged subsequent injury. She stated that "[t]he credible evidence showed, however, that the undisputed _____ injury, at all times relevant hereto, has been a producing cause of the Claimant's condition, need for treatment, and disability." The hearing officer was acting within her province as the sole judge of the weight and credibility of the evidence under Section 410.165(a) in determining, based on the claimant's testimony and the medical evidence of the nature of the claimant's injury and the off-duty slips, that he has had disability as a result of his _____, compensable injury from June 29, 1998, the date Dr. MBR took him off work, until the date of the hearing, with the exception of July 27, 1998, the day he worked for the employer under the *bona fide* job offer. As noted above, the carrier did not appeal the hearing officer's factual findings that the claimant could not continue working under Dr. MBR's restrictions because his knee condition was aggravated by the way he had to hold his leg in the wheelchair. In addition, it did not appeal her finding that the claimant was taken back off work on July 28, 1998, and that he has remained in an off work status since that time. In light of these unappealed findings, we find no merit in the assertion of error in the determination that the carrier is entitled to adjust the claimant's post-injury earnings for only one day as a result of the *bona fide* offer of employment made by the employer. Our review of the record does not reveal that the disability determination is so against the great weight of the evidence as to be clearly wrong or manifestly unjust; therefore, no sound basis exists for us to reverse that determination on appeal. Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986); Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

The hearing officer's decision and order are affirmed.

_____
Elaine M. Chaney
Appeals Judge

CONCUR:

_____
Stark O. Sanders, Jr.
Chief Appeals Judge

_____
Thomas A. Knapp
Appeals Judge