APPEAL NO. 990627

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 22, 1999. The issues at the CCH were whether the respondent/cross-appellant (claimant) sustained a compensable injury on _____, whether he had disability, and whether the employer made a bona fide offer of employment. The hearing officer determined that the claimant sustained an injury on _____, that he had disability from October 8, 1998, through October 28, 1998, and that the employer made a bona fide offer of employment. The appellant/cross-respondent (carrier) appeals only the determination that the claimant sustained a compensable injury urging that the determination was so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. The claimant appeals the determinations that the employer made a bona fide offer of employment and that the claimant only had disability from October 8, 1998, through October 28, 1998, urging that the carrier did not meet its burden to show the requirements for a bona fide offer of employment, and further, the evidence established that the claimant was disabled after October 28, 1998, the day he was terminated. The claimant responds to the carrier's appeal urging there was sufficient evidence to establish a compensable injury on _____. The carrier responds to the claimant's appeal, arguing that there was sufficient evidence before the hearing officer to support the determinations of a bona fide offer of employment and the limited period of disability.

DECISION

Affirmed.

The claimant, who worked the night shift as a porter, states that he felt "something" in his back as he was unloading bags from a bus late on _____. He states that he went on working, did not tell anyone at the time, told a supervisor the next morning, and went to a clinic. Medical records show that he was diagnosed with a back strain, that x-rays were negative, that he was prescribed some medication, and that he was put on light duty until October 12, 1998. He subsequently went to a chiropractor who placed him on light duty and prescribed several weeks of therapy. In the meantime, the employer sent the claimant a letter dated October 8, 1998, which indicated it had a transitional light-duty position available meeting the claimant's restrictions, and stated the hourly rate and generally described the duties. The claimant responded to the letter and, in fact, went back to work at the part-time work position (apparently about 4 hours a day) and continued to work until October 28, 1998, when he was terminated because of excessive tardiness and absenteeism. The claimant stated that he subsequently sought employment at one establishment but was not offered employment, and states that he still has trouble with his back.

The carrier introduced numerous disciplinary reports concerning the claimant's tardiness, offered testimony indicative of the claimant's difficulties with other employees, and submitted a report of an incident that occurred during the late evening or early morning

hours (before any complaint of an injury) involving assertions of claimant making lewd gestures toward a passenger. The carrier urged that the claimant, knowing he was in trouble, falsely claimed an injury. A terminal supervisor who was advised of the lewd incident testified that he observed and spoke with the claimant three times after the incident with the passenger and before the claimant made any complaint the next morning to employer of an injury. The assistant terminal manager testified that there was "always something going on with" the claimant and that he was warned several times that, if his conduct continued, he would be terminated. He did not improve and was terminated when he again reported late for work on October 28, 1998.

The hearing officer found that the claimant sustained a compensable back injury on _____, apparently concluding the claimant's testimony, as supported by the medical report from the clinic visit on October 7, 1998, diagnosing a strain, to be credible on the matter of an injury in course and scope. The hearing officer assesses credibility and the weight to be given the evidence. Section 410.165(a). In doing so, the hearing officer could believe all, part, or none of the testimony of any given witness. McGalliard v. Kuhlmann, 722 S.W.2d 694 (Tex. 1986). With the close proximity of the medical diagnosis of a strain to the claimed incident stated by the claimant, we cannot conclude that there was no evidence to support a compensable injury, nor can we conclude that the findings of the hearing officer were so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. Employers Casualty Company v. Hutchinson, 814 S.W.2d 539 (Tex. App.-Austin 1991, no writ).

Section 408.103(e) and Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 129.5 (Rule 129.5) set forth the requirements for a bona fide offer of employment. Regarding the issue of whether a bona fide offer of employment was made, it is not fatal that all the information requirements for a written bona fide offer are not present where there is also oral communication about the offer that provides the information. Texas Workers' Compensation Commission Appeal No. 92248, decided July 24, 1992. Both the written and oral communication can and should be considered. It seems somewhat disingenuous to argue that where there is a written communication offering a position and containing a number of particulars about a position which meets the particular medical restrictions and where there is oral communication about the position between the employer and worker, and the worker in fact accepts and fulfills the position for several weeks until terminated for other misconduct, that the bona fide offer of employment provisions have not been satisfied. We do not find merit to this assertion of error. Appeal No. 92248, *supra*.

No appeal has been lodged about disability between October 8 and October 28, 1998, and it appears that the claimant was not working his normal hours during that particular time frame. Section 401.011(16). The hearing officer found that the claimant was terminated for cause on October 28, 1998. A note in evidence dated November 4, 1998, indicates that the claimant was sufficiently recovered to return to work with only a 25-pound lifting restriction (relaxed from the earlier restriction of 10 pounds and no bending, stooping, kneeling, or twisting). The claimant stated that he looked for one position after his termination on October 28, 1998. The burden to prove that he had disability after October

28, 1998, was on the claimant. Texas Workers' Compensation Commission Appeal No. 93953, decided December 7, 1993. Here, there was evidence that the claimant was able and did return to work for the employer with some restrictions. There is evidence that the claimant's condition improved to the point that his restrictions were significantly relaxed in the time period immediately following his termination for cause. Further, had it not been for the claimant's other misconduct, there is a basis for an inference that he would be in the employ of the employer. Although he stated he inquired about employment at one establishment and that he still had effects from his injury, the hearing officer was not compelled to accept this evidence as establishing disability, that is, the "inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage" following his termination for cause on October 28, 1998. *See* Texas Workers' Compensation Commission Appeal No. 91027, decided October 24, 1991. The determinations of the hearing officer are not so against the great weight and preponderance of the evidence as to be clearly wrong or 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).

For the foregoing reasons, the decision and order are affirmed.

_____
Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

_____
Thomas A. Knapp
Appeals Judge

_____
Elaine M. Chaney
Appeals Judge