APPEAL NO. 990859

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 March 15, 1999. She determined that the respondent (claimant) sustained a compensable back injury on _____; and he had resulting disability from September 11, 1998, through the date of the CCH. The appellant (carrier) appeals these determinations, contending that they are contrary to the great weight and preponderance of the evidence, and that the hearing officer failed to address the issue of bona fide offer of employment. The claimant replies that the decision is correct, supported by sufficient evidence, and should be affirmed.

DECISION

Affirmed.

The claimant's job involved cleaning engine parts. He testified that on Wednesday, _____, while pulling a turbine shaft, which he estimated to weigh about 30 pounds, he felt a pop in his low back. He said he felt pain but continued working his 12-hour shift. He worked 12-hour shifts the next two days and could do this, he said, because his boss put him on lighter-duty work. In a transcribed statement, the work-site supervisor said simply that the claimant worked without problems on Thursday and Friday and made no mention of any accommodation for him. The following day, a Saturday, he worked seven hours doing inventory, which he described as light duty. On Sunday, he said, he woke up sore and stiff with radiating pain. He called his employer on Monday to report his injury and was referred by the employer to Dr. O, whom he saw on September 1, 1998. Dr. O diagnosed back and sacroiliac strain, prescribed physical therapy, and released him to light duty with a 15-pound lifting restriction. The claimant testified that he continued physical therapy over the following week, but was unhappy with the therapist.

On September 9, 1998, Ms. C, a manager, discussed the claimant's work restrictions with his physical therapist and whether he could perform an office job of "putting together packets" of information. The therapist apparently had no problem with the claimant doing this work, so Ms. C spoke to the claimant by telephone while he was with the therapist and offered him the job. Ms. C testified that the only restriction imposed on the claimant was the lifting restriction, as noted above. She said the light-duty job offered was at the preinjury hourly rate for as many hours as he could work, up to 40 per week, the job was at her office, and the offer was held open, according to Ms. C, indefinitely. Ms. C believed the claimant accepted the job over the telephone and she told him to come in for training that day or the next. The claimant said he told her he would come by the office to "check out" the job offer. In any case, Ms. C said she was surprised when the claimant did not report for light-duty work the next day.

Instead of reporting for the light-duty job, the claimant said, he went to Dr. G for a second opinion. Dr. G examined the claimant on September 11, 1998, and diagnosed lumbar and sacroiliac strain, referred him for an orthopedic evaluation, and placed him in a no-work status. A lumbar MRI of November 4, 1998, showed bulging at L5-S1 with no focal

herniation. On September 11, 1998, Ms. C faxed a letter to Dr. G in which she described the offered job and asked if the claimant could do it. Dr. G responded that "at this point it is believed that [claimant] will not benefit from returning to work [in] any capacity. We will, however, keep in mind the fact that light duty is available and will return to the [claimant] to work when it is in his best interest." There was no evidence that as of the date of the CCH, Dr. G had released the claimant to any type of work.

The claimant had the burden of proving both a compensable injury and disability. Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). These issues presented questions of fact for the hearing officer to decide and, in each case, could be proved by the testimony of the claimant alone if found credible. Texas Workers' Compensation Commission Appeal No. 93560, decided August 19, 1993. The hearing officer found the claimant credible and determined that he injured himself in the course and scope of his employment as alleged. The carrier, in its appeal of this determination, points to evidence it considers inconsistent with a finding of a compensable injury, such as the lack of an immediate report of an injury, the claimant's ability to continue working for several days, and the onset of severe pain at home, not at work. The hearing officer was the sole judge of the weight and credibility of the evidence. 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 record of this case, we find the testimony of the claimant deemed credible by the hearing officer, sufficient to support her finding of a compensable injury and decline to reverse that determination.

Disability 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(26). The claimant has not worked since August 29, 1998, except as a part-time instructor in music at a church school for which, he said, he was paid approximately $115.00 per week. It was undisputed in this case that the claimant had a limited-duty release from Dr. O, and not a release to unrestricted duty. Under these circumstances, the claimant was not required to look for work in order to establish disability or to show that work within his restrictions was not available. Texas Workers' Compensation Commission Appeal No. 91045, decided November 21, 1991; Texas Workers' Compensation Commission Appeal No. 941261, decided November 2, 1994. Dr. G placed the claimant in a nonwork status on September 11, 1998. We find this medical evidence sufficient to support the determination of disability.

Section 408.103(e) provides that, for purposes of calculating the amount of temporary income benefits in cases of disability, "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." Although the question of a bona fide offer of employment was not expressly listed as a separate issue, the record reflects that the parties actually litigated this question. *See* Texas Workers' Compensation Commission Appeal No. 970588, decided May 16, 1997. The carrier took the position that the employer

made a bona fide offer of employment to the claimant on September 9, 1998, the wages of which should therefore be attributed to the claimant. The claimant's position was that any such offer no longer fit the claimant's physical restrictions as of Dr. G's full-duty excuse.

Critical to determining whether a bona fide offer of employment has been made is an evaluation of whether the offered employment meets the physical restrictions imposed by the treating doctor. Texas Workers' Compensation Commission Appeal No. 972275, decided December 22, 1997. We assume that Dr. G became the treating doctor on September 11, 1998, two days after the offer of employment was made. His note in response to Ms. C's inquiry about her offer of employment to the claimant is subject to various interpretations, but his Initial Medical Report (TWCC-61) for this visit reflects that the date of the claimant's return to limited work is "undetermined." Subsequent statements also place the claimant in an "unable to work" status. Whether this is consistent with the claimant's actual work experience as a music instructor is not for us to resolve. Because Dr. G excused the claimant from all work and there was evidence that this was not modified to limited duty at any time up to the CCH, the employer's offer of limited employment would not comply with the terms of the work excuse. Thus, the evidence is sufficient to support the inferred determination of the hearing officer that no bona fide offer of employment was made.

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

_____
Alan C. Ernst
Appeals Judge

CONCUR:

_____
Philip F. O'Neill
Appeals Judge

_____
Judy L. Stephens
Appeals Judge