APPEAL NO. 991498

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 June 14, 1999. The issues at the CCH were whether the respondent (claimant) had disability from November 24, 1998, to the present, and whether the employer tendered a bona fide offer of employment to the claimant. The hearing officer determined that the claimant had disability beginning on November 24, 1998, continuing through the date of the CCH, and the employer did not tender a bona fide offer of employment to the claimant. The appellant (carrier) appeals urging that the claimant did not suffer disability from November 24, 1998, through the date of the CCH and that if the claimant was found to have disability, the employer made a bona fide offer of employment and is entitled to offset income benefits in the amount the claimant was earning in his light-duty position prior to November 24, 1998. The claimant responds that the appealed findings of fact and conclusions of law are supported by the law and sufficient evidence.

DECISION

Affirmed.

The parties stipulated that the claimant sustained a compensable lower back injury in the course and scope of his employment on _____. The claimant testified that his job was to install windows and doors on manufactured housing and he was injured when he lifted heavy sliding glass doors by himself. Following the injury, the claimant was sent by his employer to (HS). The claimant continued to work, and approximately every two weeks he returned to HS where he received treatment from different doctors and was given differing work status reports, either light-duty or full-duty work. The claimant testified that following each HS visit, he gave a work status report to Mr. TC, the safety coordinator with employer.

On September 17, 1998, the claimant had a lumbar MRI which revealed disc desiccation at the L2-3, L4-5, and L5-S1 levels; posterocentral disc protrusions at the L4-5 and L5-S1 levels with no significant compromise of the neuroforamina; and mild degenerative facet arthropathy at L3-4 through L5-S1. On October 29, 1998, while waiting for approval of a recommended facet joint injection, Dr. RH at HS placed the claimant on light duty with restrictions of no heavy lifting, no bending, no pushing, and no pulling. On November 10, 1998, Dr. RH placed the claimant on light-duty work without establishing any restrictions, and the claimant was to follow up with another doctor for injection therapy.

The claimant testified that he was never given a written offer of employment from employer and that whenever he was released to light duty, his work far exceeded his restrictions. Not appealed was the hearing officer's finding that the employer failed to abide by the claimant's work restrictions in the light duty the claimant was performing for employer prior to November 24, 1998. The claimant testified that on November 24, 1998, he had a meeting with Mr. TC and Mr. RM, the production manager. At that meeting,

Mr. RM wanted to know why claimant was clocking out and only working thirty hours per week, the claimant discussed his work restrictions and the work he was being required to do, and Mr. RM told the claimant that he would have provided him with a light-duty position had he been aware of the claimant's work restrictions. The claimant testified that Mr. TC and Mr. RM told him to go back to the doctor and get new restrictions which they would work with, and he agreed to go back to the doctor, although he already had restrictions.

The claimant did not return to HS on November 24, 1998, because his wife had a baby. On November 25, 1998, the claimant went to HS and Dr. RH's report indicates:

> I spoke with [Mr. TC], the Safety Manager at work concerning the patient's concerns, and he advises me that the patient was advised that he must remain within the medical limitations as set out and it is [the] patient's responsibility to avoid overuse.
>
> He will return to work limitations. The patient was advised that it is indeed his responsibility to avoid going outside the medical restrictions and that he should keep a copy of his restrictions on him at all times, in case some supervisor requests that he perform some duties that would lie outside the restrictions.

The claimant testified that he was very dissatisfied with the treatment he received from HS and changed treating doctors to Dr. C. Dr. C examined the claimant on December 8, 1998, took him off work, and has not released him to return to work. The Texas Workers' Compensation Commission (Commission) appointed Dr. A to examine the claimant. On March 25, 1999, Dr. A opined that the claimant was not at maximum medical improvement; that the claimant could have returned to light duty as indicated in prior medical reports; that the claimant could return to work in a modified-duty position with no lifting more than 25 pounds, avoid static postures, and avoid repetitive bending and twisting; and that the claimant should be able to return to full-duty work in a few weeks. It was the claimant's position that he had disability from November 24, 1998, through the date of the CCH, and that he was not given a bona fide offer of employment.

The carrier presented the testimony of Mr. TC, Mr. RM and Ms. MC to support its position that the claimant did not have disability after November 24, 1998, and that the employer tendered a bona fide job offer to the claimant at the meeting on November 24, 1998. Mr. TC testified that at a meeting in November 1998, the claimant was instructed to obtain new restrictions from his doctor since the claimant complained about the current work restrictions being too difficult; that the claimant did not return with the new restrictions after the meeting; the claimant had missed several days of work prior to the meeting which was in violation of the employer's policy; and that the claimant was terminated following the meeting for violating the employer's policy of not reporting he would be absent from work. Mr. RM testified that in November 1998, he noticed that the claimant was not reporting for work, so he asked Mr. TC to call the claimant's doctor to find out the claimant's work status; that there was a meeting with the claimant in which the claimant was told he would have to

call in if he was going to be absent; and that he told the claimant that if he could not do his job restrictions, to go back to the doctor and the employer would make accommodations. Ms. MC was a manager of a restaurant, owned by the claimant's father-in-law. Ms. MC testified that the claimant worked at the restaurant for approximately four weeks in November 1998.

Section 408.103(e) provides that for purposes of determining the amount of temporary income benefits owed a claimant, if the claimant "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 specifies that in determining whether an offer of employment is bona fide, the Commission is to consider the expected duration of the position; the length of time the offer was kept open; the manner in which it was communicated to the employee; the physical requirements and accommodations of the position compared to the employee's physical capabilities; and the distance of the position from the employee's residence. A written offer of employment is "presumed to be a bona fide offer, if the offer clearly states the position offered, the duties of the position, that the employer is aware of and will abide by the physical limitations under which the employee or his treating physician have authorized the employee to return to work, the maximum physical requirements of the job, the wage, and the location of employment." Rule 129.5(b). If the offer is verbal, it must be proved by clear and convincing evidence. Rule 129.5(b).

The carrier had the burden to prove that a bona fide offer, either written or oral, was made. Texas Workers' Compensation Commission Appeal No. 92432, decided October 2, 1992. Whether a bona fide offer was made presented a question of fact for the hearing officer to determine. The hearing officer determined that the employer failed to make either an oral or written offer of employment to the claimant on or after November 24, 1998, that clearly stated the position offered; the duration of the position offered; the duties of the position offered; that employer was aware of and would abide by the physical limitations indicated by his doctor; the maximum physical requirements of the job; the wage of the position offered to the claimant; and the location of the position offered to the claimant. Even had a bona fide offer been made, any such offer would have been withdrawn with the termination, which the hearing officer found to be on November 24, 1998. The hearing officer notes in his decision that there was a conflict as to when the claimant was actually terminated from employment and that he determined that the most reliable date was on November 24, 1998, based on Mr. TC's testimony that the claimant was terminated following the meeting.

The claimant had the burden to prove disability. Whether disability exists is a question of fact and can be established through claimant's testimony alone if found credible. Texas Workers' Compensation Commission Appeal No. 93560, decided August 19, 1993. To prove disability, a claimant need not prove that he either looked for work or that he is totally unable to do any kind of work at all. As we have previously noted "a

restricted release to work, as opposed to an unrestricted release, is evidence that the effects of the injury remain, and disability continues." Texas Workers' Compensation Commission Appeal No. 92432, decided October 2, 1992. In this case, on November 24, 1998, the claimant was released to light duty and he testified that he could no longer perform the job duties he was being assigned, because of the pain from his injury. Dr. C placed the claimant in an off-duty status effective December 8, 1998.

The 1989 Act makes the hearing officer the sole judge of the relevance and materiality of the evidence offered and of the weight and credibility to be given to the evidence. Section 410.165(a). As the finder of fact, the hearing officer resolves conflicts in the evidence and may believe all, part, or none of the testimony of any witness. An appellate level body is not a fact finder and does not normally pass upon the credibility of witnesses or substitute its judgment for that of the trier of fact, even if the evidence would support a different result. Texas Workers' Compensation Commission Appeal No. 950084, decided February 28, 1995. 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 evidence sufficient to support the determination that the employer did not tender a bona fide offer of employment to the claimant and the claimant had disability beginning on November 24, 1998, and continuing through the date of the CCH.

The decision and order of the hearing officer are affirmed.

_____
Dorian E. Ramirez
Appeals Judge

CONCUR:

_____
Joe Sebesta
Appeals Judge

_____
Elaine M. Chaney
Appeals Judge