APPEAL NO. 991725

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 July 20, 1999. He (hearing officer) determined that the appellant/cross-respondent (claimant) did not have disability as a result of a _____, compensable injury; that the Texas Workers' Compensation Commission (Commission) abused its discretion in approving a change of treating doctors to Dr. B, D.C.; and that the employer did not tender the claimant an offer of bona fide employment. The claimant appeals the disability and change of treating doctor determinations, contending that the hearing officer failed to properly consider the evidence. The respondent/cross-appellant (carrier) replied that these determinations are correct, supported by sufficient evidence, and should be affirmed. The carrier initially submitted a conditional appeal of the determination that the employer did not tender an offer of bona fide employment, conditioned on the claimant's appeal of the other two issues and attempting to reserve the right to further "brief this issue." Because the carrier's supporting brief was not timely filed as an appeal, it will be disregarded and the appeal will be considered a challenge to the factual sufficiency of the adverse determination. The appeals file contains no response from the claimant. Unless otherwise indicated, all dates are in 1999.

DECISION

Affirmed.

On _____, the claimant slipped and fell on a wet floor sustaining various injuries including her right elbow and back. A jug of water also spilled on her in the accident. The carrier has accepted a compensable injury. The claimant described resulting pain in her right arm and back and the loss of strength in her right hand. Although there was some dispute as to whether she was supposed to go home or simply change clothes after the incident, she was taken by a coworker to a hospital emergency room (ER). While there, she saw her family doctor, Dr. C. Whether this was by happenstance or because he was at the hospital and was called to the ER is unclear. In any case, according to the claimant, Dr. C asked her to come to his office thereby saving the employer the cost of an ER visit. The claimant declined, she said, because he had no x-ray equipment in his office. So, she was x-rayed at the ER and then saw Dr. C on February 3rd in his office. No records of the ER visit were in evidence.

On February 3rd, Dr. C completed a return-to-light-duty statement, which limited the claimant to no lifting over 10 pounds for a week. The claimant took this form back to the employer that day and told the employer in the person of Mr. S, the controller, that Dr. C wanted a report of some kind. Mr. S testified that he was too busy to prepare the report immediately, but would do so the following Monday. According to Mr. S, the claimant began complaining to everyone in the office that no one cared about her. Mr. S said he then told her he would call Dr. C if he needed information right away, but would not then take the time to prepare a written report. At this point, according to Mr. S, the claimant

"went ballistic." Heated words were apparently exchanged, with Mr. S using a derogatory term in reference to the claimant. At one point, Mr. S said, he went to Dr. C's office, which apparently was next door, and the claimant followed him there. Mr. S said that he eventually told the claimant to "get back to work." The claimant said that she was leaving and believed she had been fired. Mr. S insisted she was never fired, but he said he never talked to her after February 3rd. The claimant again saw Dr. C on February 10th at which time he completed a release to return to regular duty effective the next day. The only medical records of Dr. C in evidence were the two work releases.

Meanwhile, on February 2nd, the claimant saw Dr. B. She said she went to him because she thought she needed more treatment and Dr. C told her she was "okay." Dr. B diagnosed cervical brachial radiculitis, neuritis, cervical sprain/strain, headache, thoracic myofascitis/myalgia, lumbalgia, and elbow sprain/strain. The claimant has not worked since February 3rd and contends she is not able to do so primarily because of loss of strength in the right arm and pain. On February 4th, Dr. B completed a "Disability Request" in which he stated the claimant "was placed on disability" from February 4th to the 9th. His medical report of the February 2nd visit has no entries for the anticipated date of return to work. He later noted that an MRI of the right elbow on March 15th was within normal limits. No other documents of Dr. B in evidence discuss disability.

We address the change of treating doctor issue first. Section 408.022(b) provides that an employee may request, in writing, permission from the Commission to change from the initial treating doctor. The criteria for approving a change may include "whether a conflict exists between the employee and the doctor to the extent that the doctor-patient relationship is jeopardized or impaired." Section 408.022(c)(4). Section 408.022(d) further provides that a "change of doctor may not be made to secure a new impairment rating or medical report." Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 126.9(c) (Rule 126.9(c)) further provides that the initial choice of treating doctor does not include a doctor recommended by the employer, unless treatment is provided for a period of more than 60 days, or any doctor providing emergency care, unless treatment other than emergency follow-up care is received. Rule 126.9(e) also provides that the reasons for approving a change in treating doctors are not limited to those listed in Section 408.022. The standard of review of Commission action in response to a request to change treating doctors is whether there was an abuse of discretion, that is, whether the action to approve or disapprove the request was made without reference to appropriate guiding principles or rules. Texas Workers' Compensation Commission Appeal No. 941281, decided November 4, 1994. Whether there was an abuse of discretion must be determined on the basis of information known to the official acting on the request at the time the decision was made. Texas Workers' Compensation Commission Appeal No. 990328, decided April 15, 1999.

On February 17th, the claimant signed an Employee's Request to Change Treating Doctors (TWCC-53). The reasons contained in Block 11 of the form for the request were as follows:

[Dr. C] was a referral from the Employer, [Dr. C] does not want to see or treat me anymore. The employer has been calling the Dr. not to treat me anymore.

On February 22nd a Commission official approved the requested change.

The hearing officer made the following findings of fact pertinent to his conclusion that the Commission abused its discretion in approving the change to Dr. B:

FINDINGS OF FACT

6. On February 11 or 12, 1999, the Claimant had someone fill out a TWCC-53 form in English to request the Commission to approve he[r] changing her treating doctor for her compensable injury from [Dr. C], a family practice doctor, to [Dr. B], a chiropractor.

7. All of the allegations that the Claimant had listed in Block 11 of the TWCC-53 as her reasons for needing to change her doctor were totally false.

In her appeal of this determination, the claimant does not take issue with Finding of Fact No. 7, but asserts that the hearing officer "failed to consider that [Dr. C's] brother worked for the employer and was a witness for the Carrier. The fact that the Claimant believed that there was communication between the brothers impairs the doctor-patient relationship." She describes this as a "conflict between Patient and current Treating Doctors [sic]." Mr. S testified that the claimant's brother does work for the employer and the brother signed a statement, which was admitted into evidence at the request of the carrier, which essentially described the incident at work on February 3rd. Because the statutory reasons for changing treating doctors are not exclusive, adequate proof of the existence of a conflict of interest on the part of the treating doctor may be sufficient reason to approve a change. In this case, however, such an allegation was not raised in the TWCC-53, and there was no evidence from which it could be inferred that the initial approving official was made aware of this contention. As noted above, the abuse of discretion standard of review is applied to facts known at the time of the request and initial approval. When, as here, the Commission at the time of the request to change treating doctors did not have the information on which the claimant now relies for approval of the request to change treating doctors, there can be no abuse of discretion in not considering that information. For the same reason, we find no abuse of discretion in the hearing officer's failure to consider such information for the first time at the CCH. In concluding that the Commission abused its discretion in approving the requested change, the hearing officer relied on the information submitted to the Commission on the TWCC-53 and, in an unappealed finding, determined that that information was false. We find no error of law or abuse of discretion in the conclusion reached by the hearing officer.

The claimant appeals the determination that she did not have disability for the sole reason that the hearing officer "failed to consider medical reports from [Dr. B]." In his

decision and order, the hearing officer commented that Dr. B's "medical conclusion of disability was based on [claimant's] subjective complaints, which turned out to be not necessarily true." The hearing officer also commented that "subsequent diagnostic tests failed to show an injury sufficient to cause disability." The claimant argues on appeal that Dr. B's reports should not be given less weight than Dr. C's report, even if Dr. B is not the treating doctor, and that reliance on subjective complaints does not preclude a finding of disability.

Section 401.011(16) defines disability as the "inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage." Whether disability exists is a question of fact for the hearing officer to decide and can 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, in light of his comments about the TWCC-53, did not find the claimant credible in her assertion that the injury to her right arm precluded her from returning to her old job. She, in fact, did return to some form of light duty for a number of days, but she did not offer evidence that during this time she earned less than her preinjury wage. There was evidence to the contrary from the employer that she was paid her full wages for at least a week after she left the work site on February 3rd. Section 410.165(a) provides that the hearing officer is the sole judge of the weight and credibility of the evidence. Thus, contrary to the claimant's assertion on appeal, the hearing officer could elect to give more weight to Dr. C's full-duty release than to Dr. B's placement of the claimant on "disability." We do not read into the hearing officer's statement that Dr. B relied on subjective complaints as suggesting that such complaints are insufficient as a matter of law to establish disability, but rather to reflect the hearing officer's weighing of the evidence in favor of objective tests and Dr. C's opinion over the claimant's own testimony and her comments to Dr. B. 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 decline to substitute our opinion of the credibility of the evidence for that of the hearing officer. Rather, we find the opinion of Dr. C, found credible and persuasive by the hearing officer, in conjunction with the lack of evidence that until Dr. C's release to full duty the claimant earned less than her preinjury wage, sufficient to support his finding that the claimant had no disability.

The carrier appeals the finding that the employer did not tender an offer of bona fide employment, the wages of which, if the employment were accepted, would offset the claimant's entitlement to temporary income benefits (TIBS). *See* Section 408.103(e). The alleged offer was contained in a letter of February 12th from Mr. S to the claimant, in which he explained that the claimant was mistaken if she believed she had been terminated on February 3rd; that he understood the claimant had a release to return to work from Dr. C; and that if she wanted to return to her duties "as before" she should report to work at 8:00 a.m. on February 15th. The hearing officer concluded this was not an offer of bona fide employment and based this conclusion on Finding of Fact No. 11:

> On February 12, 1999, through the letter of the Claimant's supervisor to the Claimant, the Employer did not intend to make a good faith offer of bona fide employment pursuant to Section 408.103(e) of the Act. The supervisor's letter failed to state the duties of the position would be modified if necessary to comply with her doctor's limitations on her, failed to state that the supervisor knew of restrictions or limitations by her doctor, and failed to keep the offer open for even 48 hours from the time the Claimant first could have received it.

It is unclear whether the hearing officer based his finding of lack of intent to make a bona fide offer of employment on Mr. S's lack of knowledge of what a bona fide offer was or because he believed the offer was, in effect, a ploy to defeat the claimant's entitlement to TIBS. These rationales are obviously inconsistent. In his comments, the hearing officer stated that Mr. S just did not know what a bona fide offer was and therefore could not have intended by this letter to make one. We disagree that a written offer of employment that on its face complies with Section 408.103(e) and Rule 129.5 is necessarily rendered ineffective simply by the intentions or hopes of the offer or about the claimant's reaction to it. We also note that as of February 12th, Dr. C had imposed no work restrictions on claimant. In any case, Rule 129.5(a)(2) states that the Commission is to consider the length of time the offer is kept open in determining if it is bona fide. The offer in this case was mailed to the claimant on February 12th. It was reasonable for the hearing officer to assume it was actually received no earlier than the next day, which gave the claimant less than 48 hours to consider her response. The hearing officer found this not sufficient time to make the offer bona fide. We find the evidence sufficient to support this determination and for this reason alone we affirm the finding of no offer of bona fide employment.

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

_____
Tommy W. Lueders
Appeals Judge