

APPEAL NO. 000243

On January 12, 2000, a contested case hearing (CCH) was held. The CCH was held under the provisions of the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). The hearing officer resolved the disputed issues by deciding that appellant (claimant) had disability beginning on October 13, 1999, and continuing through the date of the CCH and that employer tendered a bona fide offer of employment to claimant, which claimant rejected by abandonment on January 4, 1999. Claimant requests that we reverse the hearing officer's decision on the issues of bona fide offer of employment and disability and render a decision in her favor on those issues. Respondent (carrier) requests that the hearing officer's decision be affirmed.

DECISION

Affirmed in part, and reversed and rendered in part.

Claimant began working for employer in February or March 1998. She said that her job in quality control required her to stand all day and that she injured her right knee at work on _____, when she hit it on a bar. Employer records reflect that she was a full-time employee. It is not disputed that claimant sustained a compensable injury on _____. Employer sent claimant to a medical clinic where she received physical therapy. Claimant was referred to Dr. O, an orthopedic surgeon, who recommended an arthroscopic examination and wrote that claimant should do sedentary work. Claimant underwent an arthroscopic procedure on her right knee on November 19, 1998. Claimant said that between the date of her injury and her surgery of November 19th, she missed no time from work and worked light duty. Following surgery, Dr. O recommended physical therapy and that claimant work sedentary work sitting down. On December 1, 1998, employer made a written offer of light-duty work that involved date stamping bags. On December 4, 1998, Dr. O wrote that he would continue claimant on light-duty work. Claimant said that she returned to work for employer a week after her surgery, that she performed a light-duty job marking bags while sitting down, that her hours were from 8:00 a.m. to 12:30 p.m, and that she had no trouble performing that light-duty work. Employer's records reflect that following her surgery, claimant returned to work on December 10, 1998, on limited duty with reduced hours.

Claimant testified that she had an emergency with her daughter in (country) and was given permission by SV, employer's assistant general manager, to be absent from work from December 18, 1998, to January 4, 1999. Claimant said that she agreed to return to work on January 4, 1999. Claimant said that she was unable to return from (country) on January 4, 1999, and that on that day she called SV and GE, employer's quality assurance manager, on January 4, 1999, and told them that she would not be able to return to work that day and that she had no idea when she would be returning. Claimant said that she returned from (country) in the middle of January 1999; that a day or two later she went to work and talked to GE and SV about getting her job back; and that SV told her that she was

supposed to have returned to work on January 4th, that she could not return to work, and that employer would call her in two or three months. Claimant said that she has not returned to work for any employer since January 4, 1999. Claimant said that when she returned from (country) she did not seek further treatment with Dr. O because she thought she was not eligible for treatment when she was not working. Claimant changed treating doctors to Dr. S, D. C., in April 1999 and he began treating her for pain and swelling in her right knee in May 1999. On May 4, 1999, Dr. S noted that claimant should be excused from work and that it was undetermined when she would return to work because she had possibly failed right knee surgery.

Dr. S referred claimant to Dr. W, an orthopedic surgeon, who began seeing claimant in May 1999 and who prescribed injections and continued physical therapy. On August 31, 1999, claimant underwent a second arthroscopic right knee operation, which was performed by Dr. W. Dr. W's records reflect that he prescribed physical therapy following the surgery. Claimant said that she is still receiving therapy three times a week.

Claimant testified that in May 1999 Dr. S took her totally off work and that Dr. W did not want her to work, but she also testified that she had always been capable of working light duty since Dr. O had released her to return to light duty after her first surgery.

GE testified that claimant worked light duty after her injury without complaint; that SV gave claimant permission to be off work from December 18, 1998, to January 4, 1999; that claimant was expected to return to work on January 4th; that claimant did not call him on January 4th; that employer has a policy that an employee is terminated from employment if the employee does not call or show up for work for three days in a row; that that policy is applied equally to all employees; that claimant did not call work or show up for work on January 4th, 5th, and 6th; that claimant was terminated from employment on January 6, 1999, because of not calling or showing up for work for three days; that claimant came to employer's place of business on January 25, 1999, looking for work and told him she had had problems returning from (country); that he referred claimant to SV; and that employer would have had light-duty work available for claimant if claimant had not been terminated from employment.

SV testified that she observed claimant working light duty; that claimant did not appear to have any difficulty working light duty; that claimant told her that she had an emergency in (country) with her daughter; that she gave claimant permission to be off work from December 18, 1998, to January 4, 1999, with the understanding that claimant would return to work on January 4, 1999; that claimant did not contact her on January 4th to let her know that she would not be returning to work that day; that claimant was terminated from employment pursuant to employer's policy when claimant did not call or show up for work for three days beginning on January 4th; that when claimant came to employer's place of business on January 25th and told her that she had had trouble returning from (country) because of problems with her daughter and asked if she could come back to work, she told claimant that claimant had been terminated from employment because she had not called or showed up for work beginning on January 4th; that if claimant had complied with

employer's policy, the light-duty job would have remained available to claimant as long as she needed it; that after termination from employment, claimant was not eligible for rehiring because of violating employer's attendance policy; and that claimant had abandoned her light-duty job. Carrier presented reports recording claimant's absences.

"Disability" is defined in Section 401.011(16). The hearing officer found that, due to the claimed injury, claimant was unable to obtain or retain employment at wages equivalent to claimant's preinjury wage from October 13, 1998, and continuing through the date of the CCH, and the hearing officer concluded and decided that claimant had disability beginning on October 13, 1999, and continuing through the date of the CCH. Claimant appeals the hearing officer's conclusion that her disability began on October 13, 1999. In the Statement of the Evidence portion of his decision, the hearing officer states that claimant lost no time from work until she had her first surgery, which is consistent with claimant's testimony. It is evident from the hearing officer's finding on the disability issue that the year 1999 in his conclusion and decision on the disability issue are probably typographical errors. We reverse the hearing officer's conclusion and decision on the disability issue and render a decision that claimant had disability from November 19, 1998, the date of her first surgery, through the date of the CCH.

Bona fide offer of employment is addressed in Section 408.103(e) and Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 129.5. With regard to the issue of bona fide offer of employment, the hearing officer found that claimant was offered a position of employment that she was reasonably capable of performing given her physical restrictions and that claimant refused the offer of employment by abandoning the position on January 4, 1999. The hearing officer concluded that employer tendered a bona fide offer of employment to claimant, which was rejected by abandonment on January 4, 1999. Claimant states that she did not abandon her job and that she was placed on an off-duty status beginning in May 1999 and, subsequently, had a second surgery. However, claimant's testimony was that she had always been capable of working light duty since Dr. O had released her to return to work after her first surgery. The 1989 Act makes the hearing officer the judge of the weight and credibility of the evidence. Section 410.165(a). The hearing officer resolves conflicts in the evidence. We conclude that the hearing officer's decision on the issue of bona fide offer of employment is supported by sufficient evidence and is not so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986).

We affirm the hearing officer's decision with regard to the issue of bona fide offer of employment. We reverse the hearing officer's decision with regard to the issue of disability and render a decision that claimant had disability from November 19, 1998, through the date of the CCH.

Robert W. Potts
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Dorian E. Ramirez
Appeals Judge