

APPEAL NO. 000287

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 11, 2000. The issues at the CCH were whether the respondent (claimant) had disability as a result of an injury on \_\_\_\_\_, and, if so, for what periods; and whether the employer made a bona fide offer of employment to the claimant, entitling appellant (carrier) to adjust the post weekly earnings, and, if so, for what periods. The hearing officer determined that the claimant had disability beginning March 11, 1998, and continuing through February 1, 1999; and that the employer did not make a bona fide offer of employment to the claimant on or after March 18, 1998. The carrier appeals, contending that the evidence is insufficient to support the decision of the hearing officer, or, alternatively, that the hearing officer's decision is against the great weight of the evidence. The appeals file contains no response from the claimant.

DECISION

Affirmed.

The claimant sustained a compensable injury on \_\_\_\_\_, when she slipped and fell while performing her job duties as a housekeeper at a hotel. The claimant testified that the employer sent her to (clinic 1) to receive treatment on \_\_\_\_\_. The medical records indicate that the claimant was examined by Dr. T, who diagnosed the claimant with an upper and lower back contusion and a cervical neck strain, recommended physical therapy (PT), and released the claimant to return to sedentary work on March 11, 1998. The claimant testified that she returned to work and was not paid when she left work to attend PT from March 11 through March 18, 1998. The claimant testified that she was dissatisfied with her medical treatment and sought medical treatment with Dr. M at the (clinic 2) on March 18, 1998. Dr. M diagnosed the claimant with a cervical, thoracic and lumbosacral sprain, and post-traumatic headaches and insomnia/stress, and took the claimant off work. An off-work slip from Dr. M indicates that the claimant was taken off work from March 18 through April 18, 1998. The claimant testified that she did not work after March 18, 1998, until she obtained employment with another employer on February 2, 1999. The parties stipulated that disability, if any, ended no later than February 2, 1999.

It is undisputed that the claimant did not receive any medical treatment between April 4, 1998, and January 10, 1999. The claimant testified that she did not receive medical treatment because she received a letter from the Texas Workers' Compensation Commission (Commission) indicating that she could have no more medical treatment. The claimant testified that during this time, she was unable to work because of her injury. According to the claimant, she received a letter from the Commission in December 1998 indicating that she could receive medical treatment again, so she returned to clinic 2. On January 11, 1999, the claimant received medical treatment from Dr. C, who took the

claimant off work and prescribed medication. An MRI performed in February 1999 revealed a moderate to large 5mm posterior central disc herniation at L4-5 with an acute full thickness tear and disc desiccation at L4-5.

It is the carrier's position that the claimant cannot prevail on the disability issue because she did not present any corroborating evidence of disability. The carrier presented an affidavit from Mr. B, the claimant's supervisor. Mr. B states that on March 11, 1998, he called and spoke with the claimant's daughter, informed her that the employer did have light duty available at the same location and that he "would accommodate the restrictions imposed by the claimant's treating doctor"; and that the claimant's daughter advised she would convey the information to the claimant. The carrier argues that Mr. B made a bona fide job offer to the claimant and it should be relieved of liability because the claimant rejected the job offer. The claimant testified that she does not remember whether Mr. B called and spoke with her daughter.

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 established by the testimony of the claimant if found credible. Texas Workers' Compensation Commission Appeal No. 93560, decided August 19, 1993. The hearing officer found that the claimant had disability beginning March 11, 1998, and continuing through February 1, 1999. Although the claimant did not seek medical treatment from April 4, 1998, through January 10, 1999, the hearing officer found the claimant's testimony persuasive.

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. 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 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 states that Mr. B's conversation with the claimant's daughter did not meet the requirements of a bona fide offer; however, because the claimant was working for the employer until March 18, 1998, the work arrangements necessarily constituted a bona fide offer of employment. The hearing officer believed, contrary to the

opinion of Dr. T, that the claimant was unable to work after March 18, 1998, and determined that the employer did not make a bona fide offer of employment to the claimant on or after March 18, 1998.

The hearing officer was the sole judge of the weight and credibility to be given the evidence. Section 410.165(a). Where there are conflicts in the evidence, the hearing officer resolves the conflicts and determines what facts the evidence has established. As an appeals body, we will not substitute our judgment for that of the hearing officer when the determination is not so against the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Texas Workers' Compensation Commission Appeal No. 950456, decided May 9, 1995. Applying this standard of review to the record of this case, we find the evidence sufficient to support the hearing officer's determinations that the claimant had disability beginning March 11, 1998, and continuing through February 1, 1999, and that the employer did not make a bona fide offer of employment to the claimant on or after March 18, 1998.

The decision and order of the hearing officer are affirmed.

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Dorian E. Ramirez  
Appeals Judge

CONCUR:

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Gary L. Kilgore  
Appeals Judge

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Tommy W. Lueders  
Appeals Judge