APPEAL NO. 000308

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 13, 2000. The issues at the CCH were whether the respondent (claimant) has had disability, and whether the employer made a bona fide offer of employment. The hearing officer determined that the claimant had disability from September 9, 1998, to January 13, 2000, and that the employer did not make a bona fide offer of employment. Appellant (carrier) appeals the determinations on disability and no bona fide offer of employment, urging that there is insufficient evidence to support the hearing officer's determinations or, in the alternative, the great weight of the evidence is contrary to the determinations. Claimant responds that there is sufficient evidence to support the factual findings of the hearing officer and urges that the decision be affirmed.

DECISION

Affirmed.

The claimant sustained a compensable knee injury in a fall on _____, was initially treated with therapy, and subsequently had arthroscopic knee surgery on October 21, 1998. During the period of mid-September 1998 to mid-October 1998 she worked part time for the employer in the office doing filing, faxing, and counting money. After her surgery, she was released to light duty and states that she attempted to return to work, although she was on crutches and wore a brace. She states that after one day she had pain and was not able to work and was excused by her supervisor, JM. She returned to her doctor who told her she was fine to go to work. Claimant changed treating doctors to Dr. I who took her off work, and who, according to the claimant, continued to keep her off work. The record contains a number of cryptic work notices from Dr. I, most of which indicate no work and others that indicate restricted work. In any event, the claimant was offered light-duty employment by the employer on several different occasions starting in November 1998. After the one-day attempt to work, the claimant did not attempt to work with the employer again; however, in late May–early June 1999, she applied for and took a job with a hotel which required doing physical activities, apparently more demanding than the employment offered by the employer. She states she worked at the hotel for a few days but was not able to continue. She has apparently not worked since. She states her knee has gotten worse and that she was scheduled for a second surgery but that she did not have it because she was afraid to get into the surgery and then the insurance company not pay. Several medical reports in evidence indicate proposed additional surgery.

Regarding the bona fide job offers made by the employer, they generally comply with the specific requirements set forth in Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 129.5(a) and (b) (Rule 129.5(a) and (b)) and with the doctors' releases at the time and, being in writing, are presumed to be bona fide. However, the claimant testified that she attempted to return at one time and was not able to do the work, which she indicated required sitting and standing about one-half the time and did not permit her to elevate her

leg as she did at home to aid the swelling. One of the restricted return-to-work notes from Dr. I stated "elevation of leg at all times and knee brace at all times." In earlier answers to interrogatories, the claimant responded to a question of why she did not feel the employer's four offers of employment were bona fide with she did not know how to do office work and she hardly spoke any English. This was refuted by JM, who indicated the claimant could elevate her leg, could speak passable English, and had done some office work.

The claimant was seen by a carrier doctor for an independent medical evaluation on April 6, 1999, and was determined not to be at maximum medical improvement (MMI) and it was noted that she had not returned to work because of continued anterior pain in her knee and swelling of her leg and foot. The doctor indicated her knee was extremely stable, that she should stop wearing the brace and that she should elevate her leg when not walking or exercising. He opined that she could return to work in six to eight weeks, and thought it appropriate for an MMI and impairment evaluation in about three months.

Initially, we conclude the evidence is sufficient to support the hearing officer's determination that the claimant had disability during the period in issue. Her testimony and the medical records establish that any ability she had to work was restricted significantly and that during most of the period she was taken off work completely.

Section 408.103(e) provides that in determining the amount of temporary income benefits, "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." The hearing officer found that the offers of employment "were not within Claimant's physical limitations because the job offered required standing in excess of Claimant's physical limitations and did not allow adequate opportunity to elevate her left leg." Clearly, the evidence would support inferences different than those found by the hearing officer here; however, as has been previously held, that different inferences find support in the evidence is not a sound basis to overturn the factual findings of a hearing officer. Texas Workers' Compensation Commission Appeal No. 992639, decided January 10, 2000 (Unpublished). Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). It is apparent that the hearing officer gave the benefit of any doubt to the claimant in finding that the jobs offered required excessive standing and did not allow adequate opportunity to elevate her left leg. Thus, the position offered was not a position the claimant was reasonably capable of performing. This finds a degree of support for sufficiency proposed in the testimony of the claimant and the notations contained in medical records. While there was contrary evidence indicated in the hotel job the claimant sought and from the testimony of JM, this became a matter for the hearing officer to assess and weigh, being a factual matter for the hearing officer's resolution. Texas Workers' Compensation Commission Appeal No. 982159, decided October 26, 1998 (Unpublished). However, we cannot conclude that his determination was supported by no evidence or that it was so against the great weight and preponderance of the evidence as

to be clearly wrong or unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Texas Workers' Compensation Commission Appeal No. 92083, decided April 16, 1992.

With the evidence concluded to be at least minimally sufficient, the decision and order are affirmed.

Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Dorian E. Ramirez
Appeals Judge