APPEAL NO. 000406

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 November 22, 1999, with a second hearing convened on January 13, 2000. The issues at the CCH were: (1) whether (employer), the employer of the respondent (claimant), tendered a bona fide offer of employment to claimant, entitling the appellant (carrier) to adjust claimant's weekly earnings; and (2) whether the claimant had disability as a result of the _____, compensable injury. The hearing officer determined that: (1) employer did not tender a bona fide offer of employment to claimant; and (2) claimant had disability resulting from the compensable injury of _____, from May 27, 1999, through the date of the hearing. Carrier appeals the hearing officer's determinations, contending that employer tendered a verbal bona fide offer of light duty to claimant and that claimant did not have disability. Carrier appeals on sufficiency grounds and requests that the Appeals Panel reverse the hearing officer's decision and render a decision in its favor. The claimant responds, contending that the hearing officer's determinations are supported by the evidence.

DECISION

We affirm.

Carrier contends that the hearing officer erred in determining that employer did not make a bona fide offer of employment in this case. Carrier asserts that employer made a verbal bona fide offer which was accepted by claimant when he showed up to work. Carrier asserts that claimant refused to do the work after working for three hours and that he was terminated for cause.

Claimant testified that he sustained a neck and back injury on _____, while lifting boxes in the warehouse where he worked. He said he told Mr. K, a supervisor, about the injury and he was sent to a medical clinic where he saw Dr. E on May 27, 1999. He said Dr. E sent him back to work and so claimant brought a light-duty work release back to work that day. Claimant said employer "gave [him] light duty" and that another supervisor later told him that he would be labeling files. He testified that he was initially not told of a title or activity that he would be doing. Claimant said that the next time he came to work, he sat at a desk in a broken chair that had no back and labeled files. He said he bent down to get files, sometimes twisted, and lifted a box two times. Claimant said he was required to do this "light-duty" work that required lifting and bending. Claimant said that after three hours he went to tell Mr. K that he was having pain; that he told Mr. K he could not lift the boxes; that Mr. K's response was that claimant was already on light duty; and that when claimant returned to his workstation, Mr. K terminated his employment for slamming a door that was known to slam on its own. Claimant testified that Mr. K then told claimant to clock out, but that claimant did not do so because he had been fired. Claimant said Mr. K also

followed him out and said he was firing claimant for insubordination. Claimant said he went to see Dr. H on June 8, 1999, who took him off work.

Mr. K stated that after claimant's injury he was told that claimant could lift 10 pounds, but that he told the supervisor giving claimant work that claimant was not to lift at all. Mr. K also said at a later time that he knew claimant's restrictions were "no lifting, no bending." He said he communicated the wages and location of the job and explained the duties, but he did not state the duration of the job because he was not sure how long claimant would be on light duty. Mr. K said he told claimant not to lift anything, that he would have accommodated claimant's restrictions, and that claimant did not complain about a broken chair. Mr. K said claimant said he refused to continue doing the work because he was "not hired to do paperwork," that claimant was cussing and yelling, and that claimant was fired because he refused to "clock out."

Dr. H testified that claimant had a back strain, that an MRI showed a herniated disc at C4-5, that neurological testing confirmed that claimant had nerve root irritation, that claimant is experiencing numbness and tingling in his upper and lower extremities, and that he is not confident that claimant is ready to return to any kind of work. A report from Dr. E dated May 27, 1999, states that claimant's restrictions are "no lifting, no bending." An MRI report Dated October 1, 1999, states that claimant has a small cervical disc herniation. Dr. A diagnosed cervical disc syndrome and suggested EMG studies due to the abnormalities seen on claimant's MRI.

The hearing officer determined that: (1) claimant went to the company doctor on May 27, 1999, and was released to work with restrictions not to lift or bend; (2) when claimant returned to work, he was given a "light-duty work assignment"; (3) the work assignment was not commensurate with claimant's ability to work; (4) claimant was terminated after working about three hours; (5) on June 8, 1999, claimant began treating with Dr. H who took him off work that day and has not released him to return to work; (6) employer did not make a bona fide offer; and (7) claimant had disability from May 27, 1999, to the date of the hearing.

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." The version of Rule 129.5 then in effect specified that in determining whether an offer of employment is bona fide, the Texas Workers' Compensation Commission (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).

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.

Carrier complains that Dr. E was not a "company doctor," as determined by the hearing officer. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 126.9(c)(2) (Rule 126.9(c)(2)) provides that the first doctor that provides health care is the claimant's treating doctor. The first physician to treat a claimant is not the treating doctor if it is "a doctor recommended by the . . . employer, unless the injured employee continues . . . to receive treatment from the doctor for a period of more than 60 days. . . ." It is undisputed that the employer sent claimant to the clinic where Dr. E practiced and that claimant saw Dr. E on only one occasion. In Appeal No. 960233 the Appeals Panel reversed the hearing officer's determination of a bona fide offer of employment holding that "the physical restrictions upon which the offer of employment was based were not originated by the treating doctor," as provided by the version of Rule 129.5(b) then in effect, and that "no bona fide job offer was tendered."[1] Texas Workers' Compensation Commission Appeal No. 960223, decided March 8, 1996. Similarly, in this case, there was evidence that the work restrictions were not created by claimant's treating doctor. Whether or not Dr. E was the "company doctor," the hearing officer could consider the evidence that he was not claimant's treating physician for the purposes of Rule 129.5(b). Therefore, we perceive no error in the bona fide offer determination. The hearing officer could determine that carrier did not offer clear and convincing evidence of a verbal bona fide offer.

Additionally, Section 408.103(e) provides that an employee must be reasonably capable of performing the bona fide offer of employment position. In this case, claimant testified that he was unable to do the work and that he spoke to Mr. K to tell him this. Dr. H's off-work slips and testimony stating that claimant was not ready to return to even light-duty work would tend to support the determination that claimant could not do the "light-duty" work offered. The hearing officer determined that claimant's "light duty" work assignment "was not commensurate with claimant's physical capabilities." The hearing officer clearly found claimant credible and found claimant's physical condition prevented him from doing the work offered by employer on May 27, 1999, based on claimant's and Dr. H's testimony and the medical reports.

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[1]The Commission has amended the rules that affect bona fide offers. However, the rule changes effective in December 1999 were not in effect at the time the employer made the alleged bona fide offer in May 1999. Therefore, the employer could not have been expected to comply with the requirements of the rules as amended.

Carrier contends that employer made a bona fide offer, as was shown by the fact that claimant showed up and performed the work. Again, claimant testified that he was not able to do the bending and lifting involved in the "light-duty" work and that the position was not commensurate with claimant's physical capabilities. *See* Section 408.103(e). We note that, even if there had been a bona fide offer, it would have terminated as of the date that employer terminated claimant's employment. We perceive no error in the determination regarding bona fide offer.

Carrier contends the hearing officer erred in determining that claimant had disability from May 27, 1999, to the date of the CCH. Disability is defined in Section 401.011(16) as the "inability to obtain and retain employment at wages equivalent to the preinjury wage." The claimant has the burden of proving disability. Texas Workers' Compensation Commission Appeal No. 93959, decided November 30, 1993. Whether disability exists as claimed is a question of fact for the hearing officer to decide and may be based on the testimony of the claimant alone, if found credible. Texas Workers' Compensation Commission Appeal No. 93854, decided November 9, 1993.

The hearing officer was the sole judge of the relevance and materiality of this evidence and of its weight and credibility. Section 410.165. It was her responsibility to resolve conflicts and inconsistencies in the medical evidence and judge the weight to be given to expert medical testimony. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). The hearing officer could believe all, part or none of the testimony of any witness. The hearing officer considered evidence concerning claimant's ability to work, the fact that Dr. E had placed claimant on light duty, and the fact that Dr. H took claimant off work, and determined that claimant had disability. An appeals level body is not a fact finder, and does not normally pass upon the credibility of witnesses or substitute its own judgment for that of the trier of fact. National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied). Based on our standard of review, we find that the evidence is sufficient to support the decision and order of the hearing officer on the disputed issue of disability and decline to reverse it on appeal.

We affirm the hearing officer's decision and order.

_____
Judy L. Stephens
Appeals Judge

CONCUR:

_____
Susan M. Kelley
Appeals Judge

_____
Gary L. Kilgore
Appeals Judge