APPEAL NO. 000413

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 14, 2000. The issues at the CCH were whether the Texas Workers' Compensation Commission (Commission) abused its discretion in approving a change of an alternate doctor, whether the employer tendered a bona fide offer of employment, and whether the appellant (claimant) had disability beginning on September 22, 1999. The hearing officer determined that the Commission abused its discretion in approving a change of an alternate doctor, that the employer tendered a bona fide offer of employment, and that the claimant did not have disability beginning on September 22, 1999. Claimant has appealed a number of the hearing officer's findings of fact and conclusions of law, urging they are against the great weight and preponderance of the evidence and arguing that the principal issue of the case, that is, whether the Commission abused its discretion in approving the alternate doctor, was erroneously decided. Respondent (carrier) urges that there is sufficient evidence to support the findings and conclusions of the hearing officer and asks that the decision be affirmed.

DECISION

Affirmed.

The Decision and Order of the hearing officer sets out in rather expanded detail the evidence in this case and it will only be summarized here. Not in issue was the fact that on _____, the claimant sustained a severe injury to his left arm when it was lacerated by a large piece of glass he was carrying that shattered. He was taken to an emergency room and underwent surgery, to repair the tendons and nerves in his left arm, performed by Dr. H, who had completed three residencies and was board certified in general surgery, plastic surgery, and hand surgery. The claimant was subsequently placed in physical therapy and was seen in follow-up examinations by Dr. H. On September 8, 1999, Dr. H indicated improvement in claimant's hand condition but noted the possibility of not regaining functional use of the hand, that further physical therapy was needed, that future surgery was a possibility, and that claimant was released to work with restrictions to use only his right hand. Dr. H testified that, contrary to the claimant's assertions, he never indicated that no more than six weeks of therapy would be authorized, that the claimant never indicated dissatisfaction with the treatment being administered, and that he was in no way connected to the employer or the carrier. Dr. H also stated that the claimant told him he did not want to return to work and that he had some duties at home involving taking care of some younger children. Regarding the success of the therapy, the claimant indicated he did not think his hand was getting better although he was receiving therapy, that he wanted a second opinion for himself, that he had difficulty dressing himself, and that he did not have transportation. Subsequently, and after notification of the restricted release, on September 13, 1999, the employer made a written offer of employment providing the information about the employment prescribed in Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 129.5 (Rule

129.5), and providing that the offer was to remain open until September 22, 1999. Claimant signed for this correspondence on September 15, 1999, but according to the employer did not respond to the offer and was subsequently terminated following September 22, 1999.

In any event, after Dr. H told the claimant he could return to restricted duty not involving the use of his left hand/arm, the claimant consulted an attorney, was referred to a chiropractor, Dr. L, and requested a change of treating doctors to Dr. L. Claimant acknowledged he never complained to Dr. H, the employer, or the carrier about the treatment he was receiving from Dr. H. Claimant indicated the Employee's Request to Change Treating Doctors (TWCC-53) requesting the change, dated September 10, 1999, was prepared by Dr. L from information he provided and states:

> [Dr. H] says he's done all he can for me and then sent me back to work to do a one-handed job. I cannot use my left hand–still having all kinds of problems with it and he won't listen to what I'm telling him. I want to go to somebody who is not a company doctor and who will listen to me and help me get well.

This form was received by the Commission on September 13, 1999, and the change was approved on September 14, 1999. Dr. L, in a note dated September 21, 1999, took the claimant completely off work as of that date. This note was faxed to the employer and carrier on September 22, 1999. Upon learning of the request to change treating doctors, the carrier's adjuster filed a dispute contesting the change of treating doctors. The adjuster testified that it came as a surprise as she had talked to the claimant several times during the course of administering the claim and the claimant had indicated in August that things were going well and that he was encouraged. She also stated that claimant never expressed any dissatisfaction with Dr. H. Claimant testified that Dr. L released him to restricted duty on October 1, 1999, when he asked him to. Later, the claimant went to the employer to see about a restricted-duty position but the employer was unable to accommodate him at that time. Medical reports from Dr. L indicate basically therapeutic and manipulative physical therapy treatment. The claimant was referred to a neurologist, Dr. LI, who reported on January 3, 2000, that claimant had transaction injuries to both the left ulnar and median nerves, with severe denervation with a few voluntary motor units present in the left median distribution indicating that some of the fibers are regrowing. Dr. LI recommended follow-up in six months.

The hearing officer indicates in his discussion that the claimant was inconsistent in his testimony, his testimony was in conflict with other evidence, and that he did not find the claimant to be particularly credible. The hearing officer goes on to state that considering the evidence and circumstances surrounding the request to change treating doctors, the claimant's stated reasons were not borne out by the evidence. The hearing officer found that the claimant's request to change treating doctors was because Dr. H had released him to restricted duty and that claimant wanted a new medical report taking him off duty. Clearly, the evidence before the hearing officer was sufficient to support these inferences,

particularly given the circumstance that the hearing officer did not find the claimant's testimony to be credible or entitled to much weight. The hearing officer makes these judgments (Section 410.165(a)), and he is not required to accept a claimant's testimony at face value; rather, he may believe all, part, or none of the testimony of any given witness. Bullard v. Universal Underwriters Insurance Company, 609 S.W.2d 621 (Tex. Civ. App.-Amarillo 1980, no writ); Cobb v. Dunlap, 656 S.W.2d 550 (Tex. App.-Corpus Christi 1983, writ ref'd n.r.e.). The hearing officer, as the fact finder, resolves conflicts in the evidence. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ).

Under the provisions for requesting a change to an alternate doctor (Section 408.022(d)), it is specifically provided that a change of doctors may not be made to secure a new impairment rating or medical report. The hearing officer found as fact from the evidence that the claimant's request was because of the release to restricted work and to obtain a new medical report taking him off work. As stated, we conclude there is sufficient evidence to support the hearing officer's findings. We have previously upheld hearing officers' decisions holding there was an abuse of discretion on the part of the Commission in approving a change of doctors under similar circumstances. Texas Workers' Compensation Commission Appeal No. 982207, decided November 2, 1998, citing Texas Workers' Compensation Commission Appeal No. 961187, decided July 31, 1996, and Texas Workers' Compensation Commission Appeal No. 972480, decided January 16, 1998. *See also*, Texas Workers' Compensation Commission Appeal No. 992447, decided December 22, 1999. *Compare* Texas Workers' Compensation Commission Appeal No. 992308, decided December 2, 1999; Texas Workers' Compensation Commission Appeal No. 991258, decided July 23, 1999.

Having concluded that the hearing officer did not err in his determination that the Commission abused its discretion in approving the change of doctors, we find the evidence of record sufficient to support the findings that a bona fide offer of employment was made that was not accepted by the claimant and that under the theory advanced by claimant at the hearing and on appeal, the claimant did not have an inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage. Section 401.011(16). While we note that under Section 408.103(e), the consequences of an employee being offered a bona fide offer of employment is that the employee's weekly earnings after the injury are equal to the weekly wage for the position offered to the employee, the claimant's appeal only attacks the disability determination on the basis that he was taken off duty and subsequently placed on light duty by Dr. L, based on the position that Dr. L was properly appointed as claimant's treating doctor. The issues of bona fide offer and disability were factual issues for the hearing officer to decide and we cannot conclude that his determinations on the theory advanced were 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); Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986).

Accordingly, the decision and order are affirmed.

_____
Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

_____
Joe Sebesta
Appeals Judge

_____
Tommy W. Lueders
Appeals Judge