

APPEAL NO. 000422

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 February 2, 2000. The hearing officer determined that the employer did tender a bona fide offer of employment to the respondent (claimant), entitling the appellant (carrier) to adjust the claimant's post-injury weekly earnings from May 17, 1999, and continuing through July 13, 1999; and that claimant had disability resulting from the injury sustained on \_\_\_\_\_, beginning on May 15, 1999, and continuing through the date of the hearing. The carrier appeals, contending that these determinations are contrary to the great weight and preponderance of the evidence. The appeals file contains no response from the claimant.

DECISION

Affirmed.

The claimant worked as a "machine operator." No details about the physical requirements of this job were in evidence. On \_\_\_\_\_, she tripped and fell. There was some suggestion at the CCH that the injury was limited to her knees and perhaps the right ankle. The claimant also contended that she suffered a low back injury in this incident. We assume for purposes of this decision that the compensable injury included the knees and low back and that the issues before the hearing officer were determined largely by the continuing effects of the low back injury.

The claimant was referred to Dr. J by the employer on the date of the injury. His diagnoses were limited to a contusion to the knee and knee and ankle sprain. He released the claimant to return to work with a limitation on standing and kneeling for long periods. The employer offered the claimant a job of "researching possible marketing contact[s] using the phone book." She was permitted to perform this job at home. The claimant did this job full time for two weeks and was paid her normal wages. After two weeks, the employer notified the claimant that she had to perform this job at the office. The claimant did not report for work at the office contending her back problem prevented her from doing so. Ms. Z, the employer's workers' compensation administrator, testified that the claimant told her she could not come to the office because of her child care responsibilities. In any event, a series of written additional job offers were sent by the employer to the claimant.

On July 12, 1999, the claimant changed treating doctors to Dr. JZ, D.C. He diagnosed a knee strain, lumbar segmental dysfunction, and muscle spasms and placed the claimant in an off-work status. An August 21, 1999, functional capacity evaluation (FCE) requested by Dr. JZ placed the claimant in a sedentary work level and found her capable of returning to her former work. An FCE on November 3, 1999, found her able to work at the same level, but "not currently physically capable of safely performing her job at this time." Dr. JZ continued her in an off-work status.

Section 408.103(e) provides that 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 employer made a bona fide offer of employment for the period from May 17 through July 13, 1999, entitling the carrier to adjust the claimant's weekly earnings for this period, but not thereafter. The claimant has not appealed this finding. The carrier appeals this determination insofar as the ending date of the offer, which was, effectively, the date Dr. JZ placed the claimant in a no-work status.

Critical to finding whether a bona fide offer of employment has been made is the determination that the offered employment meets the claimant's restrictions. Texas Workers' Compensation Commission Appeal No. 931174, decided January 28, 1994. The offer must be based on restrictions agreed to by the employee or the treating doctor. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 129.5(b) (Rule 129.5(b)); Texas Workers' Compensation Commission Appeal No. 960223, decided March 8, 1996. See *also* Rule 129.6, effective December 26, 1999. If a treating doctor has not released a claimant to return to work in a limited capacity, there is generally no basis for extending an offer of employment. In this case, the carrier argued both at the CCH and on appeal that Dr. J's work release and the actual performance of the job by the claimant for two weeks should outweigh the opinion of Dr. JZ that the claimant could not return to work.<sup>1</sup> Whether an offer of employment is bona fide in that it meets the requirements of the statute and rule is a question of fact for the hearing officer to decide. Texas Workers' Compensation Commission Appeal No. 970033, decided February 20, 1997. In this case, the hearing officer concluded that Dr. JZ's opinion that the claimant was unable to earn her preinjury wage because of her compensable injury was credible. The carrier asserts it was not credible. The hearing officer was the sole judge of the weight and credibility of the evidence. Section 410.165(a). We will reverse a factual determination of a hearing officer only if that determination is so against the great weight and preponderance of the evidence as to be clearly wrong and 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). Although another hearing officer may well have found otherwise, we believe the decision of this hearing officer has sufficient evidentiary support in the opinion of Dr. JZ and there is no basis to reverse it.

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<sup>1</sup>At the CCH, the only duty excuses of Dr. JZ in evidence were those which placed the claimant in an off-work status. Attached to the carrier's appeal was a copy of a limited work release from Dr. JZ effective December 13, 1999. This was faxed to the employer on December 9, 1999. The carrier stated in its appeal that for unexplained reasons, it did not obtain this release until February 24, 1999, some two weeks after the CCH. In the absence of any explanation for the delay in obtaining this evidence from the employer, we will not consider it for the first time on appeal. See Section 410.203(a) and Texas Workers' Compensation Commission Appeal No. 93943, decided December 2, 1993.

For the foregoing reasons, we affirm the decision and order of the hearing officer.

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Alan C. Ernst  
Appeals Judge

CONCUR:

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Tommy W. Lueders  
Appeals Judge

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Elaine M. Chaney  
Appeals Judge