APPEAL NO. 001201

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 April 27, 2000. With regard to the issues before her, the hearing officer determined that the respondent (claimant) had disability from November 10, 1999, through January 13, 2000, as a result of his compensable _____, injury (all dates are 1999 unless otherwise specified); that the Texas Workers' Compensation Commission (Commission) did not abuse its discretion in approving the change from Dr. F to Dr. N, as the claimant's treating doctor; and that the employer did tender to the claimant a bona fide offer of employment, and that the claimant had not been released to light duty. The appellant (carrier) appeals, contending that the claimant had been released to light duty by Dr. F; that the employer had made the claimant a bona fide offer of employment; and that the Commission had abused its discretion in approving Dr. N as the claimant's treating doctor. The carrier requests that we reverse the hearing officer's decision on the appealed issues and render a decision in its favor. The claimant responds, urging affirmance.

DECISION

Affirmed.

The claimant testified through an Arabic translator. The claimant was employed as an air conditioner installer and, on _____, he was working in an attic when a board broke and he fell several feet. The parties stipulated that the claimant sustained a compensable injury on _____. The claimant testified that he was knocked unconscious and was taken to a hospital where he was seen by a Dr. R. The claimant said that Dr. R referred him to Dr. F. Dr. F saw the claimant on August 24 and, in a report of that date, recited the history and results of diagnostic studies which showed "a wedge shaped anterior compression fracture" at L1 and facet hypotrophy at the L3-4 and L4-5 levels. The claimant was prescribed a "molded body jacket for support," with the jacket to be worn for "a month," and told that he would be "off work for a total of two (2) months." The claimant was scheduled for a follow-up in one month. The claimant saw Dr. F again on September 29 and, in a report of that date, Dr. F commented that the claimant was to remain "in his orthoplastic mold for another six (6) weeks and then switch him to a soft corset." The claimant was scheduled for a follow-up in six weeks, apparently on November 10. What happened next is unclear, but apparently the carrier's "case worker" spoke with Dr. F on November 2, when she discussed the claimant's return to work with Dr. F. Dr. F, in a "To Whom It May Concern" memo dated November 2, referred to a "letter issued in the latter part of September" (perhaps his report of September 29) and commented that "it is anticipated that after this next visit, which is scheduled for the 10th of November, he will be able to return to work on a light-duty basis." This note also gave the claimant's lifting restrictions. There is no evidence that this letter was sent to the claimant, and the claimant denied knowledge of this report at that time; although a copy was sent to the carrier who sent it to the employer. Around the end of October the claimant retained an attorney. On November 10, the employer wrote the claimant, stating that the employer had

been informed that the claimant's doctor had released the claimant to work and that the employer was aware of and would abide by the physical limitations imposed by the treating doctor. The letter goes on to say:

> We have a position available for you as an office clerk, which includes the following duties: making copies, file, label, and other duties that will allow [you] to follow the doctor's indications. You are scheduled to work 40 hours per week at $8.00 per hour. Your schedule for the week beginning on 11/18/99 is Monday to Friday from 7:00 a.m. to 4:00 p.m.

At the CCH, the employer's human resources director testified that the other duties included making "labels, sorting, correspondence [and] creating manuals."[1] The claimant replied in a note dated November 15, stating "If you have any question please call attorney office," giving his attorney's name and telephone number. Added was "P.S. The doctor hasn't release me to return to work." The claimant testified that he was unaware of Dr. F's November 2 letter, but the claimant did agree that he had not returned to Dr. F on November 10. In an Employee's Request to Change Treating Doctors (TWCC-53) dated November 15, the claimant requested a change in treating doctors from Dr. F to Dr. N for the stated reason "I am not satisfied with my current medical care this is why I would like to change to [Dr. N]." The request was approved on November 23. Dr. N subsequently took the claimant off work.

The hearing officer, in the discussion portion of her decision, comments:

> [Dr. F's] records do not support a credible release to work status. It appears the "case worker" changed the course and timing of Claimant's treatment with [Dr. F]. Further, the evidence established that Claimant did not treat with [Dr. F] on November 10, 1999, a fact that supported Claimant's contention that he was unaware of a release to work effective after November 10, 1999. The record further supported that Claimant's attempt to change doctor's [sic] from [Dr. F] to [Dr. N], was for a valid reason.

The carrier contends that the "evidence is clear" that Dr. F had released the claimant to return to work in a modified capacity and that the written offer in question complies with the bona fide offer of employment rule then in effect. While Dr. F did give a prospective return-to-work release effective November 10, the hearing officer could find that the release was never communicated to the claimant and believe the claimant's testimony, as supported by Dr. F's September 29 report, and that the claimant was to be off work in an orthoplastic mold for six weeks after September 29 and then be fitted with a "soft corset." The September 29 report gave no indication of a return to work and the hearing officer could

[1]The claimant's attorney pointed out that the claimant neither reads nor writes English and this might make it difficult for the claimant to sort correspondence and create manuals. The human resources director agreed that if the claimant could read and write English he "can be a better clerk."

believe that the contents of the November 2 report were not made known to the claimant until sometime after November 10.

Regarding whether the employer's letter constituted a bona fide offer of employment, the claimant's attorney cited Texas Workers' Compensation Commission Appeal No. 980839, decided June 12, 1998. That case held that Section 408.103 provides that for purposes of determining the amount of temporary income benefits (TIBs) 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), the version in effect for this case, 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. 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).

Appeal No. 980839, *supra*, goes on to state that whether an employer makes a bona fide offer of employment as defined by the 1989 Act and rules is generally a question of fact for the hearing officer to decide. Texas Workers' Compensation Commission Appeal No. 962197, decided December 16, 1996. The hearing officer's decision is subject to reversal only if it is so against the great weight and preponderance of the evidence as to be clearly 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). That decision also states that "[a]n offer simply to comply with a claimant's physical restrictions . . . does not constitute a bona fide offer of employment," citing Texas Workers' Compensation Commission Appeal No. 92637, decided January 11, 1993; and Texas Workers' Compensation Commission Appeal No. 92432, decided October 2, 1992. In this case, the carrier's adjuster apparently spoke with Dr. F who, without waiting for the November 10 follow-up appointment to remove the "orthoplastic mold," released the claimant to return to light duty on November 10. The carrier then sent that release by facsimile transmission to the employer which, on November 10, sent claimant, who does not read or write English, a bona fide offer of employment letter to be a clerk doing labeling, sorting correspondence and "creating manuals" (presumably in English). The hearing officer found that the release to work was not credible and could well believe that the employer's bona fide offer of employment was something less than bona fide. We find the hearing officer's decision on this point supported by sufficient evidence.

The carrier speculates that "it is clear the claimant sought the services of [Dr. N], through his attorney, because he knew a bona fide offer had been extended." The carrier argues that the only difference in treatment prescribed by Dr. F and Dr. N was that Dr. F could prescribe medication which Dr. N, a chiropractor, could not. We observe that perhaps the claimant could also believe that Dr. N had the claimant's interest at heart; whereas, Dr. F apparently was willing to release the claimant to light duty, without reexamination or testing, while he was still wearing an orthoplastic mold, without discussing the matter with the patient. As the claimant points out, he only saw Dr. F twice in a period of a month and one-half and Dr. F released the claimant to light work without removing or checking the mold.

In that we are affirming the hearing officer's findings on the change of treating doctor and the bona fide offer of employment issues, we also affirm the hearing officer's findings on the disability issue, which we observe may not truly be a question of disability as defined in Section 401.011(16), but rather an issue of entitlement to TIBs.

Upon review of the record submitted, we find no reversible error and we will not disturb the hearing officer's determinations unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). We do not so find and, consequently, the decision and order of the hearing officer are affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Tommy W. Lueders
Appeals Judge

Judy L. Stephens
Appeals Judge