APPEAL NO. 041337
FILED JULY 20, 2004

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing was held on May 6, 2004. The hearing officer determined that the employer did not tender a bona fide offer of employment (BFOE) to the respondent (claimant), and that the claimant had disability from November 24, 2003, through May 6, 2004. The appellant (carrier) appealed the hearing officer's determinations based on sufficiency of the evidence grounds. The claimant responded, urging affirmance.

DECISION

Affirmed.

It is undisputed that the claimant sustained a compensable left ankle injury on _____. The claimant testified that on _____, he stepped off a moving locomotive and twisted his left ankle. The claimant was taken to the emergency room and he was diagnosed with a fractured left ankle. The claimant was referred to Dr. W, an orthopedic surgeon, who performed surgery on the claimant's left ankle on November 25, 2003. A Work Status Report (TWCC-73) dated November 25, 2003, reflects that Dr. W released the claimant to sedentary duty beginning on _____, and continuing through "after surgery." The evidence reflects that the day after surgery, the claimant sought treatment from Dr. B, a chiropractor, and that the claimant requested Dr. B to be his treating doctor. A TWCC-73 dated November 26, 2003, reflects that Dr. B took the claimant off work beginning on _____, through December 30, 2003. It is undisputed that Dr. B is the claimant's treating doctor. The claimant testified that he has not been released to work due to his injury.

BFOE

Regarding the BFOE issue, Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 129.6 (Rule 129.6) sets out the requirements for a BFOE. Rule 129.6(b) provides in relevant part that an employer may offer an employee a modified-duty position which has restricted duties that are within the employee's work abilities as determined by the employee's treating doctor (the rule goes on to provide for an offer of employment based on another doctor's assessment of the employee's work status in the absence of a TWCC-73 from the treating doctor, provided the treating doctor has not indicated disagreement with the restrictions identified by the other doctor). The claimant argues that his treating doctor, Dr. B, had not released the claimant to return to work. The carrier argues that Dr. W released the claimant to sedentary duty, and that the employer tendered two BFOEs to the claimant based on Dr. W's TWCC-73. The evidence reflects that a job offer dated _____, and another job offer dated December 1, 2003, were sent to the claimant. The claimant testified that he received both job offers after he was taken off work by Dr. B. The hearing officer reviewed the evidence

and commented in the Background Information section that both job offers comply with the requirements of Rule 129.6 “if [Dr. W’s] work release was valid”; however, the hearing officer further commented that the claimant could not be reasonably expected “to leave the hospital and go straight to work, no matter how sedentary the job.” We note that Rule 129.6(f) contains an "order of preference" of doctors' opinions to be used in evaluating an offer of employment. The hearing officer found that the claimant received the two job offers from the employer after he had been taken off work by his treating doctor. In view of the evidence presented, the hearing officer could conclude that the employer did not tender a BFOE to the claimant. The hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). As the finder of fact, the hearing officer resolves the conflicts in the evidence and determines what facts have been established. We conclude that the hearing officer’s determination that the employer did not tender a BFOE to the claimant is supported by sufficient evidence and is not 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 (Tex. 1986).

DISABILITY

Section 401.011(16) defines “disability” as “the inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage.” Although there is conflicting evidence on the disability issue, we conclude that the hearing officer’s decision on that issue is supported by the claimant’s testimony and by the reports of the treating doctor. The hearing officer’s disability determination is not so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain, *supra*.

The hearing officer's decision and order are affirmed.

The true corporate name of the insurance carrier is **ST. PAUL FIRE AND MARINE INSURANCE COMPANY** and the name and address of its registered agent for service of process is

CORPORATION SERVICE COMPANY
701 BRAZOS, SUITE 1050
AUSTIN, TEXAS 78701.

_____
Veronica L. Ruberto
Appeals Judge

CONCUR:

_____
Thomas A. Knapp
Appeals Judge

_____
Robert W. Potts
Appeals Judge