APPEAL NO. 001587

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 June 13, 2000. He determined that the employer made a bona fide offer of employment to the appellant (claimant) entitling the respondent (carrier) to adjust the post-injury earnings from _____, through September 2, 1998, and that the claimant did not sustain disability from _____, through September 2, 1998. The claimant appealed the adverse determinations on the grounds of legal and factual insufficiency of the evidence, specifically that the letter from the employer dated January 23, 1998, failed to state the duration of the offer of employment and the duties to be performed as a clerk. The claimant also urged that the finding by the hearing officer that the claimant abandoned medical [treatment] after late January 1998 should be reversed since an issue as to whether the claimant had abandoned medical treatment was not before the hearing officer. The carrier replied, urging that the evidence was sufficient to support the challenged findings of fact and conclusions of law and that the hearing officer's decision and order should be affirmed.

DECISION

Affirmed in part and reversed and rendered in part.

The claimant testified that he worked as a forklift operator for the employer on _____, when he sustained an injury to his lower back. He sought medical treatment with Dr. H who released the claimant back to work with restrictions on January 9, 1998; specifically, only occasional lifting over ten pounds, no pushing, pulling, bending, stooping, squatting, climbing, crawling, kneeling, twisting, or turning, with standing and walking as tolerated. Progress notes from Dr. H were not offered by either party as to what Dr. H diagnosed as the problem with the claimant's back. The claimant was requested to return for a follow-up visit on January 23, 1998, which he did not attend. An MRI had been performed on December 7, 1997, which indicated that the claimant had degenerative changes and a 1 or 2 mm subligamentous protrusion on the bulge located at L5-S1. Prior to January 23, 1998, the claimant was also examined by Dr. Cr who diagnosed him as having a soft tissue contusion with the L5-S1 degenerative disc being only incidental and not related to the injury of _____.

By letter dated January 23, 1998, Mr. P, the employer's manager, offered the claimant a general clerical position. In this letter he wrote that the job duties would not exceed the medical restrictions placed on the claimant by Dr. H, but did not specifically describe what the claimant's duties would be. He notified the claimant where the job was located, that it was the same distance to travel as his last assignment where the claimant had been injured, what the hours and the rate of pay would be, and that the opportunity for employment would remain open until 5:00 p.m. on January 30, 1998. The claimant admitted he received the letter about four to five days later but also claimed he did not have much time to respond. He stated that he called the carrier's adjuster to decline the

offer, citing as the reason for not accepting as that he was in too much pain. Whether he also called the employer was confusing and conflicting in that the claimant's testimony regarding the event was clouded by the claimant's inability to state for sure who he called and when the telephone call was made.

The claimant obtained another duty-status report from Dr. H dated February 5, 1998, which continued the claimant on the same restrictions of January 9, 1998. The report indicated that the claimant had attended a medical examination with Dr. Ha on January 28, 1998, but had not attended physical therapy (PT) as directed. The claimant was scheduled for a return visit on February 19, 1998, which he did not attend. On February 25, 1998, the claimant was discharged by Dr. H for noncompliance with PT and follow-up visits.

Dr. He was appointed designated doctor by the Texas Workers' Compensation Commission for the purpose of determining whether the claimant had reached maximum medical improvement (MMI) and to assign an impairment rating. By report dated June 2, 1998, Dr. He declined to certify that the claimant had reached MMI because of difficulties in obtaining test results and whether sufficient therapy, etc. had been initiated. He did not offer an opinion as to whether the claimant could work.

The claimant changed treating doctors to Dr. M upon suggestion of his attorney and presented to this physician on June 23, 1998. Dr. M noted that the claimant had not sought medical treatment for his _____, injury during the last five months, but in the interim had been involved in a motor vehicle accident on February 24 or 25, 1998, which involved injuries to his cervical spine, head, and the lower back. Nonetheless, he released the claimant to go back to work in three days with "normal back restrictions" based upon a telephone conversation that he had with the employer who assured Dr. M that work was available. The claimant did not return to work or to Dr. M for follow-up treatment until three months later on September 15, 1998. By letter dated March 28, 2000, Dr. M wrote that he could not speculate as to whether the claimant could have worked between June 29, 1998, when he was supposed to have returned to work, and the date he saw him again on September 15, 1998.

On July 15, 1998, the claimant was examined by Dr. Ca at the carrier's request, who opined that he saw no reason why the claimant could not return to his regular job without any significant restrictions.

On September 2, 1998, the claimant returned to Dr. He for a scheduled second examination. Although Dr. He was not satisfied that the claimant had undergone the testing which he had recommended, he found the claimant had reached MMI and certified him to have reached MMI on September 2, 1998.

Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 129. 6 (Rule 129.6) became effective December 26, 1999. Prior to this date, Rule 129.5(b) provided that a written offer of employment which was delivered to the employee shall be presumed to be a bona fide

offer if the offer clearly stated the position offered, the duties of the position, that the employer was aware of and would abide by the physical limitations under which the employee or his treating physician had authorized the employee to return to work, the maximum physical requirements of the job, the wage, and the location of the employment. If the offer of employment was not made in writing, the insurance carrier would be required to provide clear and convincing evidence that a bona fide offer was made.

The carrier clearly relied on the letter as its proof of a bona fide offer. As the letter in controversy was delivered in January 1998, the rule then in effect, Rule 129.5, is controlling. The hearing officer found that the offer of January 23, 1998, conformed to the requirements of "Rule 129.6," while referring to the specific requirements of Rule 129.5(b). We infer that the hearing officer meant to recite that Rule 129.5 governed his decision and presume the recitation of Rule 129.6 to simply be a typographical error.

The hearing officer is the trier of fact and is the sole judge of the relevance and materiality of the evidence and of the weight and credibility to be given to the evidence. Section 410.165(a). The trier of fact may believe all, part, or none of any witness's testimony. Taylor v. Lewis, 553 S.W.2d 153 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.); Texas Workers' Compensation Commission Appeal No. 93426, decided July 5, 1993. The hearing officer resolved conflicts in the testimony related to the issues of disability and bona fide offer of employment against the claimant. He stated that the letter dated January 23, 1998, contained information in conformity with the provisions of Rule 129.6 [sic] and that the claimant declined to accept the offer.

In a case such as the one before us where both parties presented evidence on the disputed issues, the hearing officer must look at all of the relevant evidence to make factual determinations and the Appeals Panel must consider all of the relevant evidence to determine whether the factual determinations of the hearing officer are so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. Texas Workers' Compensation Commission Appeal No. 941291, decided November 8, 1994. An appeals level body is not a fact finder, and it does not normally pass upon the credibility of witnesses or substitute its own judgement for that of the trier of fact even if the evidence could support a different result. National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied).

Under this standard of review, we conclude that the hearing officer's determination as to bona fide offer is so against the great weight and preponderance of the evidence as to be manifestly unjust. In re King's Estate, 150 Tex. 662, 224 S.W.2d 660 (1951); Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986). Rule 129.5(b) provides that a written offer of employment must contain a description of the duties of the employment and the maximum physical requirements of the job if the presumption is to apply. The letter sent to the claimant by the employer does not contain these provisions. Further, the letter does not state the duration of the employment. We reverse the finding of the hearing officer that the employer tendered the claimant a bona fide offer of employment and render

a decision that the employer did not tender the claimant a bona fide offer of employment because the employer's written offer does not fulfill the requirements of Rule 129.5.

Disability means the "inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage." Section 401.011(16). The claimant argues that since the issue as to whether the claimant had abandoned medical treatment was not an issue certified for resolution at the CCH, a finding by the hearing officer that the claimant had abandoned medical treatment could not be made the basis for a finding of no disability. We disagree. The hearing officer was simply propounding an additional underlying finding of fact to support his conclusion that the claimant did not have disability during the dates in question. It is clear the hearing officer believed that since the claimant did not attend the physical therapy ordered by Dr. H in January 1998, and did not return for follow-up visits after February 5, 1998, he did not place much credibility in the claimant's assertions that he was in too much pain to work from _____, through September 2, 1998. The hearing officer did not add the "issue" of abandonment of medical treatment which the claimant alleges occurred. Normally, abandonment of medical treatment only serves to trigger an inquiry to the appropriate doctor as to whether MMI has been reached. A finding of abandonment, standing alone, is generally not in itself dispositive of anything. Texas Workers' Compensation Commission Appeal No. 950295, decided April 12, 1995.

We find the evidence sufficient to support the determination of the hearing officer that the claimant did not show by a preponderance of the evidence that he was unable to obtain or retain employment at preinjury wages from _____, through September 2, 1998. We will not substitute our judgement for his. Texas Workers' Compensation Commission Appeal No. 94044, decided February 17, 1994.

We affirm the hearing officer's decision and order as to disability and reverse and render a decision that the employer did not make a bona fide offer of employment to the claimant which would have entitled the carrier to adjust the post-injury earnings from _____, through September 2, 1998.

Kathleen C. Decker
Appeals Judge

CONCUR:

Alan C. Ernst
Appeals Judge

Gary L. Kilgore
Appeals Judge