APPEAL NO. 010577

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 5, 2001. The hearing officer determined that the appellant (claimant) had disability from August 1, 2000, through the date of the CCH and that the employer had tendered a bona fide offer of employment (BFOE) beginning July 22, 2000, and remaining in effect through the date of the CCH. The hearing officer's decision regarding the period of disability has not been appealed and has become final. At issue is whether temporary income benefits (TIBs) may be adjusted because the employer made a BFOE which was not accepted by the claimant.

The claimant appealed, contending that the BFOEs given to the claimant were not within his work restrictions and that the claimant also has restrictions "from [Dr. C] [his current treating doctor] . . . that he cannot work in any capacity." The respondent (carrier) responds, urging affirmance.

DECISION

Affirmed.

The claimant was employed to do oil changes in the automotive department of a large retail store. The parties stipulated that the claimant sustained a compensable (cervical) injury on _____. It is undisputed that the claimant's family doctor referred him to Dr. H, a chiropractor, who became the claimant's treating doctor. Dr. H released the claimant to restricted duty in a report dated April 6, 2000, and in a report dated July 10, 2000, again released the claimant to light duty on a Work Status Report (TWCC-73). Pursuant to the July 10, 2000, TWCC-73, the employer sent the claimant a letter dated July 17, 2000, offering him a position as a service writer. The claimant rejected that offer on the basis that his restrictions precluded him from looking down to write. (At the CCH, the carrier presented testimony that orders are written on an "electronic clipboard" that could be held at any height sitting or standing.) The claimant rejected the offer without attempting the job. The employer contacted Dr. H, who on another TWCC-73 indicated the claimant's restrictions of no looking down, no writing, and no forward postures. By letter dated July 27, 2000, the employer offered the claimant a job as a greeter for "no more than 6-8 hours [a day]" and meeting all of Dr. H's restrictions. (Both offers were at the same store where the claimant worked, at his preinjury wage, and met the other requirements of Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 129.6 (Rule 129.6).) When the claimant received this offer, he retained an attorney and at the CCH testified that he had refused the second offer on his "attorney's instructions . . . to not accept the job offer."

The hearing officer, on commenting on the claimant's testimony that the BFOEs did not meet his restrictions, commented:

> Further, the claimant testified that his condition at the time of the hearing was, if anything, worse than at the time of the offer; during the hearing, the

> claimant was able to sit at a table, slightly lean forward from the back, and be in a position to easily see and write on documents at the table before him. The "greeter" position offered by the employer involved almost no physical effort in the part of the claimant, allowing him to sit, stand, move about, and request assistance as needed. Again, the claimant's assertion that the offered position would fall outside of [Dr. H's] restriction was not persuasively supported by the evidence.

Regarding the claimant's contention on appeal about the recommendation of Dr. C, "his current treating doctor," we note that Dr. C, in a very brief note dated August 28, 2000, said that after talking with the claimant, Dr. C thought it "most cost effective and medically just to decline to treat [claimant]."

Section 408.103(e) and Rule 129.6 provide the requirements of a BFOE and what must be included in the written offer to qualify as a BFOE. The claimant argues that the BFOEs did not meet his restrictions. The hearing officer considered that argument and after observing the claimant's demeanor and testimony, concluded differently.

The hearing officer is the sole judge of the weight and credibility of the evidence (Section 410.165(a)) and, as the trier of fact, resolves the conflicts and inconsistencies in the evidence, including the medical evidence (Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ)). The hearing officer's determination is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

Accordingly, the hearing officer's decision and order are affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Michael B. McShane
Appeals Judge

Philip F. O'Neill
Appeals Judge