APPEAL NO. 931174

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act) (formerly V.A.C.S., Article 8308-1.01 *et seq.*). A contested case hearing (CCH) was held on November 23, 1993, in (city), Texas, with (hearing officer) presiding as hearing officer. The issues at the CCH were injury, disability, and bona fide offer of employment. The hearing officer found that the respondent (claimant herein) suffered an injury in the course and scope of his employment on (date of injury), and that the claimant had been unable to obtain and retain employment at his preinjury wage as result of this injury from March 25, 1993, and continuing through the date of the CCH. The hearing officer also found that the appellant (carrier herein) did not establish that the employer had made an offer of light work that matched the restrictions imposed by the claimant's doctor. The carrier appeals questioning the hearing officer's summary of the evidence, pointing to specific evidence and excepting to certain findings of fact and conclusions of law of the hearing officer. The claimant replies that the decision of the hearing officer was supported by the evidence and requests that we affirm.

DECISION

Finding sufficient evidence to support the decision of the hearing officer and no reversible error in the record, we affirm.

The claimant testified that he worked for the employer as a mechanic and that he felt a pop in his back on (date of injury), while removing the engine from an ST Blazer. The claimant testified that his injury included his lower back, upper back, shoulders and legs. The claimant testified that he reported his injury thirty minutes later to his immediate supervisor (Mr. Z). The claimant continued to work for a few days and then stated he was referred to (Dr. CH) by his employer. On February 16, 1993, the claimant saw Dr. CH who prescribed medication and physical therapy and who placed the claimant on an off work status. Dr. CH later referred the claimant to (Dr. K) who released the claimant to light duty work on March 4, 1993. The claimant testified that the employer requested that he return to work and he returned to work and worked until around March 24, 1993, when the employer reprimanded the claimant in writing for performing unsatisfactory work. The claimant testified that he was unable to do the work assigned because it exceeded his doctor's restrictions so he left work and continued the physical therapy recommended by Dr. K. The claimant testified that when he later applied for a loan with a finance company, the finance company told him that it had been informed by the employer that the claimant had been terminated from employment.

On April 13, 1993, the claimant saw (Dr. AH) who ordered a cervical MRI. This MRI showed disc herniations at the C3/C4, C4/C5 and C5/C6 levels. These disc herniations were confirmed by CAT scan. Dr. AH recommended a three level cervical fusion and the carrier filed a request for a second opinion in regard to surgery. The carrier also requested a Medical Examination Order (MEO) and the claimant was examined by the carrier's MEO doctor, (Dr. P), on July 12, 1993. It was Dr. P's opinion based upon his review of the claimant's medical history that the claimant's injury of (date of injury), involved his lumbar

spine as opposed to his cervical spine and that the claimant had sufficiently recovered from his lumbar spine injury to return to work.

Mr. Z, the claimant's supervisor, testified that the claimant only reported an injury to his back not his neck. Mr. Z testified that when the claimant returned to work in March that he was given work only within the doctor's restrictions. Mr. Z testified that the written reprimand of the claimant on March 24, 1993, was issued due to customer complaints. Mr. Z testified that the claimant was never terminated but by leaving work on March 24th, in the employer's view, quit his job. Mr. Z testified that the employer had at all times since the claimant's release to work been willing, and at the time of the CCH, remained willing, for the claimant to return to work on light duty.

The carrier specifically excepts to the following findings of facts and conclusions of law by the hearing officer:

FINDINGS OF FACT

5.Claimant also suffered in (sic) injury to his cervical spine as a result of removing an engine for employer on (date of injury).

6.Claimant has been unable to obtain and retain employment at his preinjury wage as a result of his (date of injury) cervical spine injury beginning on March 25, 1993 and continuing thereafter.

7.Employer offered claimant work identified as light work beginning on March 4, 1993, and claimant attempted to return to work from March 4, 1993 to March 24, 1993; however, claimant was not physically capable of performing the work actually assigned by employer.

8.Carrier did not establish that employer made an offer of light work that matched the restrictions imposed by [Dr. K]. In addition, the record indicated that claimant's physical therapist (SD), rather than [Dr. K], may have identified specific work restrictions to employer.

9.Claimant's second treating doctor, [Dr. AH], ordered claimant off work on April 13, 1993 and continuing thereafter.

CONCLUSIONS OF LAW

2.Claimant suffered a cervical spine injury that arose out of and in the course and scope of his employment on (date of injury).

3.Claimant has had disability resulting from his cervical spine injury beginning on March 25, 1993 and continuing thereafter.

4.Carrier did not establish by clear and convincing evidence that employer made a bona fide offer consistent with the requirements of TWCC Rule 129.5 that claimant was physically capable of performing.

While we certainly understand the carrier's concern over the paucity of discussion of the evidence, nonetheless we cannot say this was error as the 1989 Act does not require a statement of evidence by the hearing officer. Texas Workers' Compensation Commission Appeal No. 92650, decided January 20, 1993. The heart of the carrier's case on appeal is that the hearing officer erred in finding that claimant's injury included an injury to his cervical spine and in finding that the carrier failed to establish that the employer had made a bona fide offer of employment to the claimant. In regard to the issue of the extent of injury, we have previously held that in cases, such as the present case, where timely notice is not an issue, it is a question of fact for the hearing officer to determine. In Texas Workers' Compensation Commission Appeal No. 93694, decided September 23, 1993, we affirmed a hearing officer who held that the claimant injured his neck where he had initially reported the injury as being hit in the mouth and was initially treated for injuries other than his neck. As we stated in Appeal No. 93694, *supra*:

> The Appeals Panel has indicated that when notice of an accident on the job has been given in a timely manner, the extent of the injuries stemming therefrom is a causation question for the hearing officer to decide. The reference to an injury to a particular area may be so removed in time or logic from the initial event as to result in a finding that claimant failed to show connection between the accident and that injury. *See* Texas Workers' Compensation Commission Appeal No. 92617, decided January 14, 1993, and No. 93086, decided March 17, 1993. *Compare* to Texas Workers' Compensation Commission Appeal No. 92503, decided October 29, 1992; this latter appeal reversed a finding of no connection of injury to the job accident and is similar in its facts to the case on appeal. The factor stressed throughout these cases is that the issue was one of causation, a fact question, for the hearing officer to decide. Notice did not control.

In reviewing such a factual finding we must be careful to apply the proper standard of appellate review. Section 410.165(a) provides that the contested case hearing officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence as well as of the weight and credibility that is to be given the evidence. It was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701, 702 (Tex. Civ. App.-Amarillo 1974, no writ). This is equally true regarding medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286, 290 (Tex. App.-Houston [14th Dist.] 1984, no writ). The trier of fact may believe all, part, or none of the testimony of any witness. Taylor v. Lewis, 553 S.W.2d 153, 161 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.); Aetna Insurance Co. v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ). An appeals level body is not a fact finder, and does not normally pass upon the credibility of witnesses or substitute its own judgment for that of the trier of fact, even if the

evidence would 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). When reviewing a hearing officer's decision for factual sufficiency of the evidence we should reverse such decision only if it is so contrary to the overwhelming weight 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 Co., 715 S.W.2d 629, 635 (Tex. 1986).

Applying the above standard of review it is clear that there is sufficient evidence in the record to support the finding of the hearing officer that the claimant suffered a neck injury. The claimant's own testimony to that effect is supported by medical evidence. While there is contrary evidence to the effect that the claimant did not tell his employer or doctor immediately of the involvement of his neck, we certainly do not believe this evidence rises to the great weight and preponderance of the evidence.

As to the issue of bona fide offer of employment, the carrier argues that there was an offer of employment at the pre-injury wage which was initially accepted and therefore the offer must have been a bona fide offer. Whether or not it is accepted is not controlling in determining whether or not an offer of employment was a bona fide offer. What is controlling is whether or not the offer meets the requirement of the 1989 Act. Section 408.103(e) provides as follows:

> For purposes of Subsection (a), 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 key point of contest here was whether or not the claimant was "reasonably capable of performing [the position], given the physical condition of the employee." *See* Texas Workers' Compensation Commission Appeal No. 92293, decided August 17, 1992; Texas Workers' Compensation Commission Appeal No. 92325, decided August 28, 1992. The claimant testified that he was not; his supervisor testified that he was. The hearing officer also indicated that she reviewed the medical records in making her determination on this issue. Again we have an issue of fact with conflicting evidence and again the

proper standard of appellate review requires us to defer to the hearing officer. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

The decision and order of the hearing officer are affirmed.

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Gary L. Kilgore
Appeals Judge

CONCUR:

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Philip F. O'Neill
Appeals Judge

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Thomas A. Knapp
Appeals Judge