APPEAL NO. 94303

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, 1994, in (city), Texas, with (hearing officer) presiding as hearing officer. The issue at the CCH was: "Did the Claimant [respondent who will herein be referred to as claimant] have disability resulting from the injury sustained on (date of injury), entitling her to temporary income benefits, and if so, for what period(s)?" The hearing officer ruled that the claimant had disability from May 15, 1993, until August 16, 1993, because of a compensable injury. The appellant (carrier herein) files a request for review asking that we reverse the hearing officer and render a decision that the claimant is barred from recovery. The carrier alleges that the hearing officer erred as follows: 1. finding an injury in the course and scope of employment was stipulated when it was not; 2. finding the employer required the claimant to perform her regular duties which the claimant could not physically perform and failing to provide a reasonable accommodation to the claimant's light duty restrictions; 3. finding that due to her surgery the claimant was unable to perform her job duties and, on May 14, 1993, the claimant was terminated; and 4. finding that the claimant was injured in the course and scope of her employment, and that as a result of a compensable injury had disability from May 15, 1993, until August 16, 1993. The claimant did not respond to the carrier's request for review.

DECISION

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

The evidence was extremely contradictory. The claimant's version of the facts is that she had worked in the automobile industry as a warranty administrator for approximately 14 years and was employed by (employer) from 1989 to May 1993. Her job involved use of the computer, typing and ten-key by touch. She testified and presented documents showing that during her time with the employer she had been cited for outstanding performance. The claimant contended that over time the employer expanded its operation increasing her work load, but failed to provide her additional help which required her to work overtime and caused her to fall behind in her work.

The claimant testified that she began to have symptoms such as swelling of her hands, numbness, and loss of grip sometime prior to being diagnosed with carpal tunnel syndrome and advised that surgery was needed. The claimant testified that on (date of injury), she advised one her supervisors that she needed surgery regarding her carpal tunnel condition. The same day the claimant received a written warning from her employer that unless her job performance improved she would be subject to termination. The claimant testified that about the same time the employer converted her from an hourly to a salaried employee, a change to which she agreed because she would be paid for time missed.

Claimant underwent a right carpal tunnel release on May 5, 1993, and returned to work on the following Monday, May 10, 1993. The employer required the claimant to get a

return to work slip from her doctor and her treating doctor, (Dr. P), who released the claimant to light duty from May 11th to May 17th, with the restriction that she was to work in a brace at all times.

The claimant stated that she was docked for the time she missed due to the surgery as the employer had decided she must remain an hourly employee because it would be illegal for her to be a salaried employee. The claimant testified that the employer required her to perform her regular duties which she was unable to do, particularly since with the brace on she was unable to operate the computer or perform key punch operations. The claimant stated that during this period the employer would provide her with a helper for a few hours here and there but this did not help her because the helper was not only provided irregularly but was unqualified to help the claimant with the work. The claimant stated that on May 14, 1993, she was terminated for being unable to perform her job duties. The claimant submitted a medical report from Dr. P which stated that the claimant would not have been able to return to her full keyboard administrative duties until mid-August 1993.

The claimant testified that she applied for unemployment benefits, and, even though the employer contested her eligibility, she received benefits. The claimant testified that in June she went by the employer's office and sold some pictures. The claimant testified that she was selling these pictures for a friend of hers who gave her gas money for doing so. Apparently the claimant sold the employer more pictures in July, receiving some money for doing so which she stated she reported to the Texas Employment Commission (TEC). The employer reported the claimant to the TEC for working while drawing unemployment benefits due to the sale of the pictures. The TEC decided that the claimant was not disqualified from receiving unemployment benefits. The claimant testified that while drawing unemployment benefits she looked for work and eventually went to work in October 1993 for a company selling pictures on commission.

The carrier presented testimony from some of the employer's supervisory personnel. In their version of the facts the claimant went to work for the employer in 1989 and for some time was an outstanding employee. At some point the claimant began to have marital problems and as a consequence her work suffered. The claimant fell behind and worked overtime, but the employer felt that she was falling behind due to poor work and time management habits rather than the workload. The witnesses also implied that the claimant, who was having financial problems, was motivated to fall behind by a desire to obtain overtime pay. The employer attempted to remedy the situation by counseling and oral warnings, but the claimant did not improve, and, in fact, developed a bad attitude making it difficult for her to get along with other employees.

The carrier's witnesses stated these problems came to a head in (month year) when the employer placed the claimant on probation and told her that unless she performed job duties as specified in writing, she would be terminated. The carrier's witnesses stated that at the time this personnel action was taken no one in the company was aware of any job-related injury. One of the claimant's supervisors testified that around this time the claimant

was converted into a salaried employee, but that this was done at the claimant's request because she needed to be paid for time she was taking off to take her son to the doctor. However, this witness testified that when the claimant found out that as a salaried employee she would not receive overtime pay, she requested a return to hourly status which was done. This same witness also later testified that it was necessary to change the claimant back to hourly status because it violated federal law for a person holding her type of position to be a salaried employee.

In any case, the carrier's witnesses stated that when the claimant returned to work with her restricted duty slip, the employer provided her with other employees to help her do her work. The witnesses stated that the claimant refused to delegate her duties to these employees, who the witnesses contended were qualified to help her and in fact are now doing her old job for the employer. The witnesses contend that had it not been for the claimant's personal problems she would still be working with the employer.

The carrier also sought to establish that after May 14, 1993, the claimant could have worked at positions similar to her job with the employer and was seeking such a job. The carrier further contended that the claimant was working selling pictures shortly after her termination.

The carrier's first point of error is that the hearing officer erred in finding that the carrier stipulated to injury in the course and scope of injury when it did not. It is clear from the transcript that the hearing officer was ascertaining whether the parties could agree to the date of the injury that the claimant is alleging. The parties did in fact stipulate as to the date of the alleged injury--(date of injury), and it is clear from the transcript of the hearing that at the time of this stipulation the hearing officer understood that the carrier was not stipulating to course and scope. Inartful wording of the stipulation in the hearing officer's decision might make it appear that she was reciting that the carrier was stipulating injury in the course and scope of employment. We recognize that the carrier stipulated to the date of the claimant alleged injury, not its occurrence. We do not agree with the carrier's argument that the hearing officer based her finding of injury purely on this stipulation. There is other evidence in the record, most notably the testimony of the claimant to establish injury. Injury may be established by the claimant's testimony alone. Gee v. Liberty Mutual Fire Insurance Co., 765 S.W.2d 394 (Tex. 1989)

As we have two entirely different versions of the facts, most of the conflict in this case is factual. 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).

In its second point of error the carrier complains of the hearing officer's findings to the effect that the employer required the claimant to perform her regular duties after surgery which the claimant was unable to perform and did not provide reasonable accommodation. The carrier in its argument basically argues its version of the facts. Under the proper standard of appellate review, discussed *supra*, we cannot substitute our judgment for the hearing officer when, as here, her decision is not contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. This is equally true of the carrier's third point of error where the carrier reargues the facts against the findings of the hearing officer that the claimant was unable to perform her job duties due to her surgery and was terminated on May 14, 1993.

The carrier does raise some legal, as opposed to factual, arguments in its fourth assignment of error. First, the carrier argues that injury was not an issue in the case coming up from the benefit review conference, so it should not have been decided by the hearing officer. A review of the issue in this case, quoted verbatim at the beginning of this opinion, clearly shows that injury was in issue.

The carrier also cites our decisions in Texas Workers' Compensation Commission Appeal No. 91027, decided October 24, 1991, and Texas Workers' Compensation Commission Appeal No. 93707, decided September 17, 1993, for the proposition that if a claimant is fired for good cause it precludes a finding of disability under the 1989 Act. This is an overbroad reading of these decisions. As we stated in Appeal No. 91027, *supra*:

It is our opinion that a broadly stated rule forever denying workers' compensation benefits to an employee returned to light duty and subsequently discharged for cause, [citation omitted] has the potential to undermine a very basic purpose of workers' compensation programs: to compensate injured workers for loss of earnings attributable to a work-related injury. While virtually all case authority holds that the reasons of the termination must be justified or for a just cause, the results of the injury remain and may prevent any or very limited gainful employment at all. Therefore, we are convinced that an approach to this issue which also factors in the continuing effect of the injury on the capacity to obtain and retain some gainful employment is more

in keeping with the 1989 Act, the intent and purposes of workers' compensation and is fairer to all parties.

The key question is whether the claimant had disability as defined by the 1989 Act after she was terminated by the employer. The employer argues that she did not and references evidence in the record in support of its position. The claimant testified that she looked for work and was unable to find it until October (although she is only requesting benefits until August 16, 1993). This is again a question of fact for the hearing officer to determine. Disability can be established by a claimant's testimony alone, even if contradicted by medical testimony. Texas Workers' Compensation Commission Appeal No. 92285, decided August 14, 1992; Texas Workers' Compensation Commission Appeal No. 92167, decided June 11, 1992. In the present case, the medical evidence from Dr. P supports rather than contradicts disability. We cannot say the hearing officer's findings on disability are not supported by sufficient evidence.

The carrier's fifth point of error merely restates its previous four, which we have rejected for the reasons already stated. The decision and order of the hearing officer are affirmed.

Gary L. Kilgore
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Alan C. Ernst
Appeals Judge