APPEAL NO. 971871

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 August 22, 1997, with a hearing officer. The issues at the CCH were whether the appellant (claimant) sustained disability since September 4, 1996, and whether the claimant continues to experience the effects of his compensable injury of _____. The hearing officer found that since September 4, 1996, the claimant's injury has not prevented him from obtaining and retaining employment at wages equivalent to the wage he earned prior to the injury and that the claimant does not continue to experience the effects of his compensable injury. The claimant appeals both these determinations and argues that the great weight and preponderance of the evidence showed that he had disability. The respondent (carrier) replies that while the claimant appeals both determinations, he only presented argument as to the disability determination, and that there was sufficient evidence to support the findings of the hearing officer.

DECISION

We affirm in part and reverse and render in part.

The hearing officer outlines the evidence in this case in her decision and order. The claimant objects to the hearing officer's rendition of the evidence, in that the hearing officer states that the claimant was returned to full-duty work at some point and the evidence shows that the claimant was only released to light duty. As there is no other objection to the hearing officer's rendition of the evidence, we adopt her rendition other than the portion to which claimant objects. We will, therefore, only briefly summarize the evidence in our decision. The hearing officer found that the claimant suffered a compensable injury on _____, and, since this finding has not been appealed by either party, it has become final by operation of law. Section 410.169. The claimant describes his injury as taking place when he slipped while pulling pipe. The claimant consulted the company doctor, who referred him to (Dr. F). Dr. F initially put the claimant on an off-work status but, on May 10, 1996, released him to light duty. On May 24, 1996, a surveillance video was taped of the claimant. The nine minute and four second videotape was admitted into evidence and shows the claimant digging with a post-hole digger. The claimant testified that he did not dig with the post-hole digger; he stated he used it to remove loose dirt from a ditch that had been mechanically dug on the previous day. In July the claimant was terminated by the employer based on the surveillance film. In September 1996 the claimant changed treating doctors to (Dr. R). Dr. R has placed the claimant off work and recommends spinal surgery.

The hearing officer's findings of fact and conclusions of law which are challenged by the claimant on appeal are as follows:

FINDINGS OF FACT

5. Since September 4, 1996, Claimant's compensable injury of _____ has not prevented Claimant from obtaining and retaining employment at wages equivalent to the wage Claimant earned prior to _____.

6. Claimant does not continue to experience the effects of his compensable injury of _____.

CONCLUSIONS OF LAW

3. Claimant has not sustained disability since September 4, 1996.

4. Claimant does not continue to experience the effects of his compensable injury of _____.

The hearing officer's Decision and Order reads as follows:

DECISION

Claimant does not continue to experience the effects of his compensable injury of _____, and therefore has sustained no disability since September 4, 1996.

ORDER

Carrier is not liable for additional workers' compensation benefits, and it is so **ORDERED**.

We first must deal with the question of the scope of the appeal. The claimant, in his brief, specifically challenged Findings of Fact Nos. 5 and 6 and Conclusions of Law Nos. 3 and 4. The carrier states in its response that the argument in the claimant's brief revolves around the issue of disability only and does not state why he contests the hearing officer's finding that he does not continue to experience the effects of his compensable injury. We note that questions of jurisdiction may not only be first considered on appeal, but are always at issue whether raised by the parties or not. In the instant case, we believe that the hearing officer has exceeded her jurisdiction in a number of ways.

The order of the hearing officer states that the carrier is not liable for additional workers' compensation benefits. It appears that, based upon the finding of the hearing officer that the claimant does not continue to experience the effects of his compensable injury, she is ruling that the claimant is entitled to no further workers' compensation benefits, including medical benefits. Whether or not treatment is reasonable and

necessary for the claimant's compensable injury in the past or in the future is not within the jurisdiction of the hearing officer. The determination of what "health care is reasonably required by the nature of the injury" is a matter for the Medical Review Division of the Texas Workers' Compensation Commission (Commission). Section 413.031(a); Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 133.305 (Rule 133.305). The determination of "benefit disputes" are adjudicated by the Commission's Hearings Division. Rule 140.1. A "benefit dispute" is one "regarding compensability or eligibility for, or the amount of, income or death benefits." *Id*.

We also note that the hearing officer does not have jurisdiction over prospective or unaccrued income benefits. Thus, we have held that the hearing officer only has jurisdiction to determine disability up to the date of the CCH. Texas Workers' Compensation Commission Appeal No. 931049, decided December 31, 1993. Thus, the hearing officer's order exceeded her jurisdiction in determining that the claimant has no future disability. A large part of the problem here is the issue regarding whether the claimant continues to experience the effects of his compensable injury. It is not tied to any period of time at all, making it incomprehensibly vague. Further, its resolution does not appear to be tied to any income benefit issue whatsoever. The hearing officer appears to use it has a vehicle to determine that the claimant's injury has "resolved," and, therefore, one for which the carrier was no longer liable. Section 406.031 provides that a carrier is liable for an injury that arises out of and in the course and scope of employment if, at the time of the injury, the employee is subject to the 1989 Act, unless one of the exceptions of Section 406.032 applies. It is clear that the present injury is a compensable injury under the 1989 Act and that the exceptions of Section 406.032 are inapplicable. We do not find a jurisdictional basis for the hearing officer to resolve the injury or to excuse the carrier from liability unrelated to the disability issue in the present case.

Disability is a question of fact. Texas Workers' Compensation Commission Appeal No. 93560, decided August 19, 1993. There was conflicting evidence on whether or not the claimant had disability from September 4, 1996, through the date of the CCH. Section 410.165(a) provides that the 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). We do not find this to be so in the present case.

We, therefore, must reverse the decision and order of the hearing officer in part and affirm in part. We specifically strike Finding of Fact No. 6 and Conclusion of Law No. 4. We reverse the decision of the hearing officer and render a new decision to read as follows:

DECISION

> Claimant did not sustain disability from September 4, 1996, through the date of the CCH.

We reverse the order of the hearing officer and enter an new order stating as follows:

ORDER

> The claimant did not have disability from September 4, 1996, through the date of the CCH. The carrier is liable for all medical and income benefits pursuant to the 1989 Act, the Rules of the Texas Workers' Compensation Commission and this decision.

Gary L. Kilgore
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

CONCURRING OPINION:

I concur but wish to write a separate opinion in order to underscore some points.

The hearing officer is supportable in her determination that there is no disability only from September 4 through the date of the hearing. We have repeatedly stated that it is possible to move in and out of disability, and, regardless of how successful he might be, the claimant remains free to raise the prospect of disability until he reaches maximum medical improvement.

I would hold, however, that her decision on the second issue, does claimant continue to suffer the effects of his compensable injury--is, at best, an advisory pronouncement on an improperly cast issue. There is no assertion here at all that claimant is contending he has a different medical condition or follow-on injury aside from the compensable injury. To the extent that this issue was formulated to question the continuing impact of the injury on claimant's ability to work, it was already included in the disability issue. To the extent it is intended as a dispute on the reasonableness and necessity for further medical treatment, which I believe it plainly was, that issue is plainly within the purview of the medical review division and the State Office of Administrative Hearings, in accordance with Section 413.031, and not within the jurisdiction of the hearing officer. While it may be that resort of these issues may in some cases shift the burden of proof away from the carrier, or may be cheaper and faster, the legislature has in no uncertain terms set forth a different dispute resolution process for medical benefits and dissatisfaction with that process should be communicated in the legislative process, and not through disruption of the medical treatment of individual injured workers. I see no threshold compensability question underlying the effects-suffering "issue" in this case, and in my opinion the hearing officer's determination on this matter is a nondecision on a nonissue, with no prospective effect whatsoever on income or medical benefits.

Susan M. Kelley
Appeals Judge