APPEAL NO. 990164

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 December 17, 1998. The issues at the CCH were injury and disability. The hearing officer determined that the appellant (claimant) suffered a compensable injury in the form of a bruise to the upper right side of her head and that she did not show by a preponderance of the evidence that she had disability as a result of this injury. The claimant appeals, challenging certain findings of the hearing officer as being contrary to the evidence. There is no response from the respondent (self-insured) to the claimant's request for review in the appeal file.

DECISION

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

The claimant testified that she was injured on the job while working for the self-insured on _____, when a coworker accidentally struck her in the head with a box. There is conflict in the evidence between the claimant's description of this incident and that of the coworker who struck her. The claimant testified that the box was heavy and the blow was serious enough to make her feel like she was going to black out and resulted in her seeing twinkles, dizziness, nausea, headaches and ringing in the ears. The coworker, in a transcribed statement, describes the incident as minor, the blow as glancing and the box as not that heavy.

The claimant treated with Dr. H, M.D., a physical medicine and rehabilitation specialist, who diagnosed her with a mild concussion. Dr. H testified live at the CCH that his diagnosis was postconcussive syndrome. Dr. H placed the claimant on an off-work status on January 29, 1998, and released her to full duty on July 28, 1998. The claimant testified that she was unable to work from January 29 until July 28, 1998.

There was considerable additional medical evidence. Dr. B, M.D., a neurosurgeon who examined the claimant on referral from Dr. H, concurred with Dr. H's diagnosis. Dr. L, a neurologist, was selected by the Texas Workers' Compensation Commission (Commission) to perform a second opinion and also essentially agreed with Dr. H's diagnosis. Dr. T, Ph.D., a neuropsychologist who examined the claimant on referral from Dr. L, concurred in the diagnosis of post-concussive syndrome. Dr. D, a psychiatrist who examined the claimant at the request of the self-insured, disagreed with the diagnosis of postconcussive disorder and stated that the claimant suffered from a personality disorder and a somatoform disorder. Dr. D based his opinion at least in part on the results a Minnesota Multiphasic Personality Inventory (MMPI). Dr. H testified that the MMPI was not useful in diagnosing post-concussive disorder. Dr. L, when requested to clarify his opinion in light of Dr. D's, also indicated that personality testing would not determine whether or not the claimant had cerebral cognitive dysfunctions. Dr. C, D.O., the designated doctor

selected by the Commission, agreed with Dr. H that the claimant attained maximum medical improvement on July 28, 1998, and agreed with Dr. D that the claimant had a zero percent impairment rating.

On appeal, the claimant challenges the following findings of fact and conclusions of law made by the hearing officer:

FINDINGS OF FACT

4. On _____, while in the course and scope of her employment, the Claimant sustained a compensable injury in the form of a mild bruise to her upper right side of her head.

5. The Claimant did not show by the preponderance of the evidence that the additional symptoms which she claimed arose were causally related to the bruise to her head.

6. The Claimant did not show by the preponderance of the evidence that she was not unable to obtain or retain employment at preinjury wages as a result of the compensable injury of _____.

CONCLUSIONS OF LAW

3. The Claimant sustained a compensable injury on _____, in a form of a mild bruise to her upper right head.

4. The Claimant did not sustain disability as a result of the injury of _____.

The claimant appeals the hearing officer's finding of injury. The claimant believes that the hearing officer erred in finding that her injury did not result in postconcussive syndrome. The claimant, in her appeal, also states that the issue of extent of injury was litigated at the CCH, but that the extent-of-injury issue finding by the hearing officer is erroneous because it does not address the extent of injury litigated at the CCH concerning whether or not the claimant suffered from postconcussive syndrome. The claimant cites Texas Workers' Compensation Commission Appeal No. 971411, decided September 4, 1997, for the proposition that when the issue is compensability and the extent of injury is litigated, specific findings are required. In Appeal No. 971411 we reversed and remanded to the hearing officer to make a finding as to whether or not the claimant's lower back was injured when the issue was injury, and not extent of the injury, but the parties actually litigated whether or not the claimant's injury included an injury to the lower back.

There are several concerns raised by this point. For one thing there is a question of whether or not the hearing officer exceeded not only the issue before him but even his jurisdiction with the breadth of his Finding of Fact No. 5. The problems with determining for

all time that an injury is limited to a very specific body part is illustrated by our decision in Texas Workers' Compensation Commission Appeal No. 962338, decided January 2, 1997. In that case, a hearing officer found that the claimant's injury extended to his head. The majority in Appeal No. 962338 reversed and rendered against this finding because a hearing officer in an earlier CCH had determined that the claimant's injury only included an injury to his face and cervical spine. The majority felt that decision limiting the claimant's injury had become unassailable because it had been affirmed by the Appeals Panel in Texas Workers' Compensation Commission Appeal No. 93397, decided July 5, 1993. The dissenting opinion in Appeal No. 962338, *supra*, argued, among other things, that the hearing officer exceeded the scope of the issue before him in the CCH reviewed in Appeal No. 93397, *supra*, in finding that the claimant's injury was limited to his face and cervical spine when the issue he was actually litigating was whether or not the claimant's injury included an injury to his low back.

We have stated many times that when determining whether or not there was a compensable injury that it is useful and desirable for a hearing officer to indicate the nature of the injury. However, there is a balance to be struck here. It generally does not seem appropriate for a hearing officer to forever set in stone the parameters of an injury in determining whether or not there was a compensable injury. First, such a determination smacks of a general verdict, which was abandoned by design when the 1989 Act under which specific issues concerning a case as decided rather than determining all the issues in a claim at one time. This is what is meant by our the statement we have made many times that the 1989 Act created an "issue-driven" system of dispute resolution. The hearing officer is generally limited to the issues before him or her. To broadly determine the issue of extent of injury when the stated issue is whether or not there is an injury can lead to a dispute resolution that goes beyond the issues before the hearing officer. Second, we must be cognizant of the fact that the nature of an injury and the diagnoses involved may evolve over time. This is certainly one of the primary bases of the oft-stated doctrine that a claimant may go in and out of disability. Third, setting the parameters of an injury in stone when determining the issue of injury raises the specter of a hearing officer exceeding his or her jurisdiction by prejudging what medical care may be reasonable and necessary for an injury. This raises thorny jurisdictional issues. *See* Texas Workers' Compensation Commission Appeal No. 971871, decided October 29, 1997.

We note that in the present case the claimant states in her brief that the issue of whether her injury included postconcussive syndrome was actually litigated before the hearing officer. We also note that the medical evidence concerning this issue was well developed, particularly in light of the fact that the claimant had received considerable treatment and that her symptoms had largely abated by the time of the CCH. It is apparent from the hearing officer's decision that he did not believe that the claimant's injury included post-concussive syndrome. While there was considerable medical evidence that the claimant's injury did include postconcussive syndrome, the hearing officer is the finder of fact under the 1989 Act.

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). This is so even though another fact finder might have drawn other inferences and reached other conclusions. Salazar v. Hill, 551 S.W.2d 518 (Tex. Civ. App.-Corpus Christi 1977, writ ref'd n.r.e.).

Thus, we can affirm the implicit finding by the hearing officer that the claimant's injury did not include postconcussive syndrome, which is apparently based on his giving greater weight to the opinion of Dr. D than to the opinions of Dr. H, Dr. L, Dr. B, and Dr. T. We do find that the hearing officer's Finding of Fact No. 5 exceeds the issue before him in that it states additional symptoms were not causally related to the claimant's bruise to her head. This finding is too vague to be comprehensible. We therefore strike Finding of Fact No. 5, holding it is without force and effect. We also specifically find that Conclusion of Law No. 3 does not forever limit the claimant's injury to medical treatment for a mild bruise, but merely is a general statement of the nature of the injury by the hearing officer at the time of the CCH. We encourage hearing officers to state the general nature of an injury when determining the issue of injury. Without such statements, a finding of injury may not be comprehensible. However, we do not believe that such statements set the parameters of injury in stone for all time or should control the issue of what constitutes reasonable and necessary medical care for an injury.

Disability is an issue of fact to be determined by the hearing officer. Texas Workers' Compensation Commission Appeal No. 93560, decided August 19, 1993. A finding of disability may be supported by the testimony of the claimant alone. Appeal No. 93560. However, the hearing officer is not required to make a finding of disability based on such evidence. Nor was the hearing officer bound to accept the opinion of Dr. H that the claimant had disability. Applying the standard of appellate review described above, we will not disturb the hearing officer's finding regarding disability. Again this is so even though another fact finder might have drawn other inferences and reached other conclusions. Salazar, *supra*. We do note that despite the very broad language in Finding of Fact No. 4

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.

With Finding of Fact No. 5 struck and Conclusions of Law Nos. 3 and 4 clarified by our decision, the decision and order of the hearing officer are affirmed.

Gary L. Kilgore
Appeals Judge

CONCUR IN THE RESULT:

I believe the only reasonable inference in Finding of Fact No. 5 is that the hearing officer is finding there was no postconcussive syndrome injury in this case.

Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR IN THE RESULT:

Joe Sebesta
Appeals Judge