APPEAL NO. 990576

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 January 6, 1999. The issue at the CCH was whether the respondent (claimant herein) had disability. The hearing officer determined that the claimant had disability on March 17 and 18, 1998, and from March 21, 1998, through the date of the CCH. The appellant (carrier herein) files a request for review, arguing that the great weight and preponderance of the evidence is contrary to the hearing officer's finding of disability. There is no response from the claimant to the carrier'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 hearing officer summarized the evidence as follows in his decision and order:

> Claimant injured his right knee jumping from the back of a truck on _____. Claimant was unable to work March 17 and 18, 1998. He then returned to work two days and again began missing work from March 21, 1998, to the present. Carrier asserts that Claimant was terminated for cause on March 24, 1998, and did not re-establish disability. Also, Carrier asserts that Claimant was able to work and placed in evidence a videotape which carrier argues [shows] that Claimant has been active inconsistent with his claim of disability. On September 8, 1998, a MRI showed a torn medial meniscus. Claimant had knee surgery on December 11, 1998.
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> The videotape shows mild activity consistent with Claimant's assertions. Although Claimant may have been terminated for cause, his disability was immediately re-established and is supported by medical evidence of ongoing treatment and instability. Medical reports from [Dr. E], the "company doctor", are given minimal weight and have little credibility. Carrier's argument that Claimant has some ability to work and should have been looking for a job is more appropriate to a supplemental income benefits [SIBS] issue. Swelling and internal derangement to Claimant's right knee support disability to the date of surgery; Claimant is presently recovering from the surgery at least through the date of this [CCH]. Carrier did commence temporary income benefits after the surgery.

Disability is a question of fact to be determined by the hearing officer. Texas Workers' Compensation Commission Appeal No. 93560, decided August 19, 1993. 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).

On appeal the carrier argues that the hearing officer erred in finding disability. The carrier argues that the claimant failed to prove disability because he failed to search for work commensurate with his ability to work. As the hearing officer pointed out, this is a matter for consideration regarding entitlement to SIBS rather than disability. Also, even though the carrier asserts that the hearing officer found that the claimant was terminated for good cause, there was no such finding and the evidence of this the carrier points to--that the employer contended the claimant abandoned his job--was less than conclusive and could in fact be considered self-serving.

The carrier argues that the claimant was released to full duty by Dr. E, who also certified that the claimant was at MMI on March 23, 1998, with a zero percent impairment rating (IR). The carrier argues that the hearing officer should have given more weight to the opinion of Dr. E and contends it was improper for the hearing officer to discount the testimony of Dr. E merely because the claimant was sent to him by the employer. We note first of all that it was up to the hearing officer to determine what weight to give the medical evidence and he could disbelieve any of it. We believe that the fact that the claimant was referred to Dr. E by the employer is a matter the hearing officer can consider in weighing Dr. E's credibility. Also, the fact that Dr. E certified MMI and assessed a zero percent IR almost immediately after the injury when it was undisputed that the claimant later needed surgery for the injury may have reflected less than favorably on Dr. E's credibility and medical judgment in the mind of the hearing officer. In any case, disability can be established by a claimant's testimony alone, even if contradictory of medical testimony. Texas Workers' Compensation Commission Appeal No. 92285, decided August 14, 1992; Texas Workers' Compensation Commission Appeal No. 92167, decided June 11, 1992.

The carrier argues that the claimant's ability to work was established by his return to work for two days after the injury. We note that the claimant testified that he only returned to light-duty work and there is no evidence in this case of any bona fide offer of employment. In any case, it is well established that a claimant may go in and out periods of disability.

Finally, the carrier points to its surveillance film of the claimant. The hearing officer discussed how he viewed this evidence in the portion of his decision quoted above and we find no error in his not assigning greater weight to this evidence. As for the carrier's argument on appeal that there was evidence that the condition of the claimant's knee may have been partially caused by a basketball injury, we note that the hearing officer was not required to give any weight to this evidence[1] and in any case this evidence, even if entirely accepted by the hearing officer, fell short of establishing that the claimant's condition was solely caused by something other than the compensable injury, which would have been the only issue to which it might have been relevant.

Gary L. Kilgore
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Tommy W. Lueders
Appeals Judge

[1]This is especially true when, as here, the evidence in question was in the form of a statement from a coworker. The hearing officer was certainly not required to give much weight to the lay testimony of an interested witness concerning issues of causality of a medical condition.