APPEAL NO. 991352

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 May 10, 1999. The issues at the CCH were whether the respondent (self-insured herein) was barred from litigating the issue of disability from October 15, 1997, through February 26, 1998, based on the doctrine of res judicata; whether, if consideration of the issue is not barred by res judicata, the appellant (claimant herein) had disability from October 15, 1997, through February 26, 1998; and whether the self-insured is entitled to reduce claimant's impairment income benefits to recoup the temporary income benefits paid from October 15, 1997, through February 26, 1998. The hearing officer concluded that the self-insured was not barred by res judicata from litigating the issue of disability from October 15, 1997, through February 26, 1998, that the claimant did not have disability during this period and that the self-insured was entitled to recoupment by a reduction in future income benefits. The claimant appeals, arguing that the evidence established he had disability during the period in question, that the self-insured had waived the issue of disability and the hearing officer did not have jurisdiction over the issue of disability. The self-insured responds that the decision of the hearing officer should be affirmed. The self-insured states that consideration of disability during the time period in question was not barred by res judicata as this time period had not been considered in the earlier CCH concerning disability, where the issue before the hearing officer specifies another time period. The carrier argues that the claimant first brings up the issue of waiver on appeal and we should not consider it.

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.

Many of the facts of this case are not in serious dispute. It was undisputed the claimant suffered a compensable injury on _____. The claimant testified that he became self-employed in October 1997 in the furniture business. The claimant testified that he primarily provided capital for the business but at times was on site. The carrier put into evidence a video of the claimant which showed him moving furniture. The claimant testified that he made no money in the business and the business closed in March 1998. A CCH was held in November and December 1998 on the issue of whether the claimant suffered disability from February 7, 1998, to August 21, 1998. An agreement was entered at the CCH that the claimant did not have disability from the period of February 7, 1998, to August 21, 1998.

Under the facts of this case we do not find that the hearing officer committed error by stating that the carrier was not barred by the doctrine of res judicata from litigating the issue of disability before her in the present CCH. While there appears to be some overlap in the time periods under consideration at the earlier CCH and the present CCH (the period between February 7, 1998, and February 26, 1998), the two CCH's dealt with largely different time periods. While the self-insured certainly could have litigated the issue of the

first period of disability first rather than later, we do not find that this alone would constitute waiver under the facts of the present case. While the claimant argues that the present case is analogous to the situation where we have held that a claimant waives the issue of whether a carrier has timely disputed compensability by not raising it prior to litigating the issue of compensability, we find the situation different in regard to disability. The difference is that a claimant can go in and out of disability; this is not true of compensability. Also, as the self-insured points out, the present case is distinguishable from those in which the issue of disability had been considered at a prior CCH without reference to a specific time period. In such circumstances the hearing officer is determining any and all periods of disability prior to the CCH. Here, the prior CCH only dealt with whether the claimant had disability during a specific period of time. Thus, other than the short period when the two periods under consideration overlap, the hearing officer had jurisdiction to hear the issue before her. Further, her decision regarding the period of overlap is consistent with the decision at the prior CCH and thus may be considered applying that decision rather than reconsidering it.

Disability is a question of fact. Texas Workers' Compensation Commission Appeal No. 93550, decided August 12, 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).

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. However, the hearing officer is not required to rely on the claimant's testimony and the claimant has the burden of proof regarding disability. In light of this and our standard of review, we do not find the hearing officer erred as a matter of law in finding that the claimant did not have disability from October 15, 1997, through February 26, 1998.

The decision and order of the hearing officer are affirmed.

_____
Gary L. Kilgore
Appeals Judge

CONCUR:

_____
Joe Sebesta
Appeals Judge

_____
Judy L. Stephens
Appeals Judge