APPEAL NO. 991393

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On June 10, 1999, a contested case hearing (CCH) was held. Initially the issue at the CCH was whether the employer tendered a bona fide offer of employment to the appellant (claimant herein). By unanimous agreement of the parties, and upon finding good cause, the hearing officer added the issue of whether the claimant had disability beginning January 19, 1999, and continuing through the date of the CCH. The hearing officer concluded that the employer did not tender a bona fide offer of employment to the claimant and that the claimant did not have disability resulting from the injury sustained on _____. The claimant appeals the hearing officer's resolution of the disability issue, contending that the evidence established that the claimant had disability from January 19, 1999, continuing through the date of the CCH. The respondent (carrier herein) replies that there was sufficient evidence to support the hearing officer's finding of no disability. Neither party appealed the hearing officer's finding that the employer did not tender a bona fide offer of employment and this finding has become final pursuant to Section 410.169.

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 summarizes the evidence in her decision and we adopt her statement of the evidence. We will only touch on the evidence germane to the appeal. This includes the fact that the parties stipulated that the claimant sustained a compensable injury on _____. The claimant described his injury as an injury to his left shoulder and neck which took place when a forklift he was driving fell in a hole causing the forklift to tip to the left. The claimant was placed off work for three days by the company doctor and returned to light-duty work for approximately one month. The claimant then resumed his regular job which he performed for about six months. The claimant began treating with Dr. P in November 19, 1998. The claimant was off work for a period in January 1999, but was released to return to work on January 19, 1999. The claimant testified that he was told there were no light-duty positions available. The claimant was later put on an off-work status by Dr. P. The carrier put into evidence a surveillance film of the claimant.

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).

A finding of disability may be based upon the testimony of the claimant alone. Gee v. Liberty Mutual Fire Insurance Company, 765 S.W.2d 394 (Tex. 1989). However, as an interested party the claimant's testimony only raises an issue of fact for the hearing officer to resolve. Escamilla v. Liberty Mutual Insurance Company, 499 S.W.2d 758 (Tex. Civ. App.-Amarillo 1973, no writ). In the present case, the hearing officer found no disability contrary to the testimony of the claimant which was supported by some medical evidence. The hearing officer, in her decision, stated that she found the testimony of the claimant and the medical reports of Dr. P unpersuasive. In regard to the claimant, she pointed to what she viewed as contradictions in his testimony and she stated that Dr. P's opinion in his diagnoses was not supported by the objective testing. The claimant had the burden to prove he had disability. Texas Workers' Compensation Commission Appeal No. 93953, decided December 7, 1993. We cannot say that the hearing officer erred as a matter of law in finding that the claimant failed to meet this burden. This is so even though, were we fact finders, we 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.).

The decision and order of the hearing officer are affirmed.

Gary L. Kilgore
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Judy L. Stephens
Appeals Judge