APPEAL NO. 991834

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On July 20, 1999, a contested case hearing was held. With respect to the issues before him, the hearing officer determined that the Texas Workers' Compensation Commission (Commission) did not abuse its discretion in approving an alternate choice of doctor, that the respondent (claimant) had disability from January 11 until April 26, 1999, and that the appellant (carrier) had not shown by a preponderance of the evidence that it made a bona fide offer of employment. The carrier appeals, challenging these determinations as being contrary to the evidence. The carrier also argues that the hearing officer erred in denying its request for a subpoena of the Commission employee who granted the claimant's request to change treating doctors. 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.

It was stipulated that the carrier accepted liability for a _____, injury to the claimant. The claimant testified that he injured his right hand and wrist while operating a drill when working as a journeyman electrician. The claimant stated that his employer sent him to Dr. R. Dr. R referred the claimant to Dr. W, but the claimant did not see Dr. W because his office was too far away. Dr. R then referred the claimant to Dr. B, who performed surgery on the claimant's wrist on February 17, 1999. The claimant stated he was unhappy with Dr. B's treatment and, based on a television ad, went to see Dr. C on February 26, 1999.

The claimant filed an Employee's Request to Change Treating Doctors (TWCC-53) with the Commission seeking to change treatment from Dr. B to Dr. C. On the TWCC-53 the claimant states the following reason for requesting a change of treating doctors:

> I received appropriate care from this doctor to the extent that he was able to give it. I am now being allowed to receive appropriate medical care. My new doctor is a doctor who understands the system, who can help obtain the correct care.

This request was approved by the Commission. The carrier filed a request with the hearing officer to subpoena the Commission employee who approved the request, arguing that testimony from the approving employee was necessary to establish that the Commission abused its discretion in approving the claimant's request.

The claimant testified that he received some letters from the employer offering him light-duty work. The claimant testified that after receiving these letters he called the employer and was told by a supervisor that he could not return to work as electrician so he

should stay home. Ms. G testified she was a secretary with the employer and handled workers' compensation for the employer. She testified that on February 25, 1999, she called the claimant but was not able to reach him. Ms. G testified that on February 26, 1999, she prepared a letter offering the claimant light-duty clerical work based upon restrictions from Dr. B. Ms. G stated her records showed the claimant received the letter on March 1, 1999, and that the claimant called her on March 1, 1999, and told her he had another doctor. The claimant returned to work on April 26, 1999, after being released to light duty by Dr. C.

The claimant testified concerning his limitations due to his injury between January 11 and April 26, 1999. Medical evidence showed that the claimant had been placed on an off-work status during portions of this period and was released to restricted duty during portions of this period.

The carrier seeks review of the following findings of fact and conclusions of law in the hearing officer's decision:

FINDINGS OF FACT

4. On January 22, 1999, Employer sent Claimant a letter noting it received the restricted duty release and stating it had a position in the Mula Shop within the restrictions established by your doctor. The letter did not give any time to respond. The letter was not signed by anyone at Employer who had authority to make an offer of employment.

6. Claimant was limited from driving at the time of the surgery and its immediate recovery.

7. On February 25, 1999 the Employer sent a letter to Claimant. Claimant received the letter on March 1, 1999, indicating that it received [Dr. B's] February 24, 1999 release to return to work, and listed four restrictions from [Dr. B]. The letter indicates that Claimant was to report to work on February 26, 1999, and said he would be paid his usual wage, until the time that the restrictions were changed. The letter did not give a time to respond other than to report to work, and did not state the duration of the position, and was not signed by a person who was apparently authorized to offer light duty work.

9. Employer did not make an offer of light duty employment to Claimant on either January 22, 1999 or on February 26, 1999.

11. On March 8, 1999 Claimant filed a TWCC-53, with the commission seeking to change to [Dr. C]. Claimant's reason to change can be fairly read as seeking a change because of some dissatisfaction with the care of [Dr. B], and seeking better care with another doctor–a

reason permitted under the [1989] Act and the Rules.

15. Claimant's _____ injury caused him to be unable to obtain and retain employment at wages he earned before _____ from January 11, 1999 until April 26, 1999 when he returned to light duty work.

CONCLUSIONS OF LAW

4. Because the Claimant's choice of [Dr. C] was the first choice of doctor within the meaning of the [1989] Act and Rules, and the commission referred to the appropriate standards in approving the request to change to [Dr. C], the commission did not abuse its discretion in approving a change to [Dr. C].

5. Because Claimant has shown by a preponderance of the evidence that the _____ injury caused him to be unable to obtain and retain employment at wages he earned before _____ from January 11, 1999 until April 26, 1999 he had disability and is entitled to TIBS [temporary income benefits] for such period.

6. Because the Carrier has not shown by a preponderance of the evidence that Employer made a bona fide offer of light duty employment within the meaning of the [1989] Act and Rules, it may not offset liability for TIBS.

The carrier states in its appeal that it is only seeking review of the portions of Findings of Fact Nos. 4 and 7 which state that the offer of employment was not signed by anyone at employer who had the authority to make an offer of employment.

We first address the issue of change of treating doctor. Selection and change of treating doctors is controlled by Section 408.022 and Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 126.9 (Rule 126.9). The carrier argues that the claimant sought to change treating doctors from Dr. B to Dr. C for inappropriate reasons. Section 408.022(d) provides that an employee may not change doctors to secure a new impairment rating or medical report. The hearing officer based his decision that the Commission did not abuse its discretion in allowing the claimant to change treating doctors on Rule 126.9(c), which provides that a doctor to whom the employer refers an injured worker does not become the treating doctor unless the employee continues to receive treatment from the doctor for more than 60 days. It was undisputed that Dr. R was a doctor to whom the employer had referred the claimant. It was also undisputed that Dr. R referred the claimant to Dr. B. The claimant sought a change to Dr. C before he had been treated by Dr. R and Dr. B for 60 days, in fact, making his request for change of treating doctor within 60 days of his injury. The hearing officer's decision that Dr. C was the claimant's first choice of treating doctor finds support in the evidence and we find no basis to overturn this determination. The hearing officer's determination that Dr. C was the claimant's first choice of treating doctor renders harmless

any error in the hearing officer's denial of the carrier's request for subpoena for the Commission employee who approved the claimant's choice of treating doctor.

Section 408.103(e) provides that if an employee receives a bona offer of employment, for purposes of computing TIBS the employee's weekly earnings after the injury are equal to the weekly wage for the position offered. Rule 129.5 deals with the criteria involved in determining whether a bona fide offer of employment has been made. One of these criteria, found in Rule 129.5(a)(2), is the amount of time the offer is kept open. The hearing officer found that the employer did not make an bona offer of employment. This was primarily hinged on his finding that the letters offering the claimant employment were not signed by anyone with authority to make an offer of employment. The letters making employment offers were signed by Ms. G, who testified by telephone at the hearing. She testified that she was a secretary who handled workers' compensation matters. The claimant testified that when he received the offers he called the employer and was told by supervisors not to return. Based upon this evidence the hearing officer, as the finder of fact pursuant to Section 410.165(a), could have reasonably drawn the inference that Ms. G lacked the authority to make an offer of employment, particularly in light of the lack of testimony from Ms. G concerning her authority.

Disability is a question of fact. Texas Workers' Compensation Commission Appeal No. 93560, decided August 19, 1993. 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). Applying this standard, there is sufficient evidence in the testimony of the claimant and the medical records to support the hearing officer's disability determination.

The decision and order of the hearing officer are affirmed.

Gary L. Kilgore
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Alan C. Ernst
Appeals Judge