APPEAL NO. 992962

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 2, 1999. The issues at the CCH were whether the appellant (claimant) had disability from August 18, 1999, to the date of CCH resulting from the injury she sustained on _____, and whether the claimant had earnings after her injury and, if so, in what amount. The hearing officer determined that the claimant did not have disability from August 18, 1999, to the date of the CCH and that the claimant had earnings in the amount of $75.00 per week from December 13, 1998, through about October 2, 1999. The claimant appeals, contending that the hearing officer's resolution of the disability issue was contrary to the great weight and preponderance of the evidence and that the hearing officer erred as a matter of law in finding that the claimant earned wages. The respondent (carrier) replies that there was sufficient evidence to support the hearing officer's resolution of the disability issue and that the hearing officer did not err in finding the claimant had earnings.

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:

> [The claimant] said she was a packer for Employer on _____ when she hurt her left knee. She had knee surgery. Her doctor told her she needs to walk but she is only able to walk for short distances. [The claimant] said she has not worked since _____. She said she lived at the church for a while and did some housekeeping there. [The claimant] said she lived with her daughter until she moved in with [Ms. G]. [The claimant] said she did not pay any room or board and was there to help prevent [Ms. G] from falling. She said she was not related to [Ms. G]. She said she helped [Ms. G] in the activities of daily life, and was reimbursed for expenses she incurred for [Ms. G]. [The claimant] said she began living with her daughter again later.
>
> [Ms. F] said she is an investigative coordinator for (company). She did not perform a surveillance of [the claimant]. [Ms. F] said she called a (city) real estate agent, and looked in one day's advertisements of the (city) Chronicle and on the Internet to find out the cost of renting a room in (city). She said she estimated renting a room in a private house cost from $300.00 to $500.00 a month.

The claimant argues that the hearing officer did not discuss and therefore did not consider the medical evidence on the issue of disability. We note that the hearing officer stated in his decision that even though all the evidence presented was not discussed, it was

considered. We have previously stated that there is no requirement that the hearing officer discuss all the evidence. *See* Texas Workers' Compensation Commission Appeal No. 91076, decided December 31, 1991; Texas Workers' Compensation Commission Appeal No. 92185, decided June 18, 1992. We note that there was conflicting medical evidence concerning the claimant's ability to work. Dr. F, the claimant's treating doctor, expressed the opinion that the claimant could not work. Dr. H, the designated doctor selected by the Texas Workers' Compensation Commission, stated in an April 29, 1999, report that the claimant was not at maximum medical improvement and was in need of rehabilitation therapy to be followed by "a work conditioning/hardening program." Dr. P, the carrier's medical examination order doctor, stated in a January 21, 1999, report that the claimant could return to work.

The hearing officer's findings of fact and conclusions of law included the following:

FINDINGS OF FACT

4. From December 13, 1998, to about October 2, 1999, Claimant lived in the house of [Ms. G]. Claimant was not a guest in the house and was not related to [Ms. G]. Claimant assisted [Ms. G] in the activities of daily living on a full time basis. Claimant did not pay rent or board, and received a room with utilities. The arrangement was barter, with Claimant receiving lodging for the personal services of assisting [Ms. G]. The earning for those services can be measured as the fair market value of lodging.

5. Claimant's earning for personal services from December 13, 1998 through about October 2, 1999 amounted to no more than $75.00 a week calculated on the estimated value of lodging.

* * * *

9. Claimant's _____ injury has not prevented Claimant from earning wages equivalent to those earned before _____ from August 18, 1999 until the date of the hearing on December 2, 1999.

CONCLUSIONS OF LAW

5. Because Claimant has not shown by a preponderance of the evidence that the _____ injury caused her to be unable to obtain and retain employment at wages she earned on December 2, 1999 she does not have disability for such period and is not entitled to TIBS [temporary income benefits].

6. Claimant has earnings in the amount of $75.00 a week from December 13, 1998 until she left [Ms. G's] house within the meaning

of '408.103 and Rule 129.4 [Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE ' .129.4].

Disability is a question of fact. Texas Workers' Compensation Commission Appeal No. 93560, decided August 19, 1993. 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, 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). 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).

Here, there was conflicting evidence as to whether or not the claimant had disability. While there was evidence from the claimant, as well as medical evidence, which supported disability, there was conflicting medical evidence as to whether the claimant suffered disability during the period in question. Applying the standard of review set out above, we cannot say the hearing officer erred in finding that the claimant did not have disability from August 18, 1999, through the date of the CCH.

Section 408.103 provides as follows in relevant part:

(a) Subject to Sections 408.061 and 408.062, the amount of [TIBS] is equal to:

(1) 70 percent of the amount computed by subtracting the employee's weekly earnings after the injury from the employee's average weekly wage; or

(2) for the first 26 weeks, 75 percent of the amount computed by subtracting the employee's weekly earnings after the injury from the employee's average weekly wage if the employee earns less than $8.50 an hour.

Rule 129.4 provides as follows in relevant part:

(a) The insurance carrier shall adjust the weekly amount of [TIBS] paid to the injured employee as necessary to match the fluctuations in the employee's weekly earnings after the injury.

* * * *

(d) If the employee is no longer employed by the employer, the employee is responsible to provide information to the insurance carrier about the existence or amount of any earnings, or any offers of employment. The employee may use Form TWCC 6, Supplemental Report of Injury for this purpose.

The crux of the claimant's argument is that she did not earn wages after her injury, as the definition of wages in Section 401.011(43) states that wages are "received from the employer" and Ms. G was not an employer as defined Section 401.011(18). The hearing officer concluded that Ms. G was not an employer within the meaning of Section 401.011(18), but the claimant received earnings as defined in Section 408.103 and Rule 129.4. Under the particular facts of this case, we do not find error in the hearing officer so doing.

The decision and order of the hearing officer are affirmed.

_____
Gary L. Kilgore
Appeals Judge

CONCUR:

_____
Joe Sebesta
Appeals Judge

DISSENTING OPINION:

I would reverse and remand on the disability issue because I regard the decision as essentially indecipherable on this issue. I realize that a hearing officer does not have to recite every bit of evidence before him; however, I believe decisions, as a matter of procedural due process, should reasonably give notice to a party of the evidence that was

considered relevant in the operative findings, and there should be fact findings (not just recitations of statutory language) that a party can meaningfully appeal. I read this decision and am left in the dark, as I suspect claimant was, as to what evidence was considered probative of a lack of disability for the period in issue, which spans August through December 1999. Such evidence can not be Dr. P's January 1998 opinion that claimant could work which, as a presurgical opinion more than eight months prior to the period in question, should have been given no weight at all. I would remand for what I regard as an essential finding on the amount of average weekly wage and for more detailed findings on (and reconsideration of) the evidence concerning the claimant's disability.

_____

Susan M. Kelley
Appeals Judge