APPEAL NO. 000123

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 16, 1999. The issue at the CCH was whether the respondent (claimant) had disability from May 18, 1999, through the date of the CCH resulting from the injury sustained on _____. The hearing officer concluded that the claimant had disability beginning on May 18, 1999, and continuing through the date of the CCH. The appellant (self-insured) files a request for review, arguing that the hearing officer erred in finding that the claimant had disability and in finding that the self-insured failed to make a bona fide offer of employment to the claimant. There is no response from the claimant to the self-insured'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 discusses the evidence in detail and we adopt his statement of the evidence. We will only briefly touch on the evidence germane to the appeal. This includes the fact that the parties stipulated that the claimant suffered a compensable low back injury on _____. The claimant testified that this injury took place when she was working as a custodian supervisor for the self-insured and was pushing a mop in a ringer bucket through a restroom door when she felt a catch in her lower back. The claimant testified that she initially treated with Dr. R, who placed her off work from January 12 to February 26, 1999. On January 30, 1999, the claimant underwent an MRI which showed she had a small disc herniation at L3-4 without neurological significance. The claimant testified that Dr. R referred her to Dr. L, who examined her on February 26, 1999, and released her to return to work on March 1, 1999. The claimant stated that after returning to work she had lower back pain. The claimant stated that she attempted to see Dr. R, but since Dr. R was unavailable she was seen by (Mr. W), who released her to light duty on April 7, 1999. The claimant testified that she returned to work but that her duties were essentially the same as before. The claimant testified that since Dr. R was unavailable, she changed treating doctors to Dr. Li. Dr. Li placed the claimant on an off-work status after his initial examination on May 18, 1999. The parties agreed that the claimant would return to Dr. L for an examination. Dr. L examined the claimant on July 30, 1999, and certified on a Report of Medical Evaluation (TWCC-69) that the claimant had attained maximum medical improvement on that date with a 17% impairment rating. Dr. L also stated in his narrative that the claimant could return to work with restrictions. Dr. Li continued to treat the claimant.

On August 16, 1999, the self-insured presented the claimant and her attorney with a letter offering the claimant return-to-work duties consistent with Dr. Li's restrictions. The self-insured made similar offers in two letters dated October 27, 1999. The self-insured

took the position that a report from Dr. Li dated October 19, 1999, which assessed the claimant's physical condition, constituted a release to return to work. Dr. Li examined the claimant on October 28, 1999, and released her to return to work on October 29, 1999, with restrictions.

Disability is a question of fact to be determined by the hearing officer and may be based on the testimony of the claimant alone. 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).

In the present case, the testimony of the claimant and her husband, as well as medical evidence from Dr. Li, supported the hearing officer's finding of disability. In fact, none of the medical evidence showed the claimant had been released to full-duty work after May 18, 1999. Therefore, the self-insured's assertion on appeal that the evidence showed the claimant had no disability at all is without support. All of the medical and lay evidence admitted at the CCH indicated that the claimant either was entirely unable to work or could only work with restrictions after May 18, 1999.

The self-insured argues that the letters of August 16 and October 27, 1999, constitute bona fide offers of employment. The carrier asserts that the hearing officer failed to state in his decision why these letters were insufficient to constitute bona fide offers of employment. In the section of his decision labeled "Discussion," the hearing officer discusses the requirements of a bona fide offer of employment under Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 129.5 (Rule 129.5). The hearing officer specifically points to language in Rule 129.5(b) which states that a bona fide offer shall "abide by the physical limitations under which the employee or his treating physician have authorized the employee to return to work." The hearing officer makes clear in his decision that since Dr. Li was not the treating doctor, relying on his opinion concerning the claimant's restrictions did not meet the requirements of Rule 129.5. The hearing officer also noted

that at the time the letters from the self-insured offering employment were written, Dr. Li still had the claimant on an off-work status. The self-insured argues that Dr. Li's October 19, 1999, report should be read as release to return to work. While this report certainly discussed the claimant's physical limitations, it was at best ambiguous and it was the province of the hearing officer as finder of fact to resolve those ambiguities. The self-insured also argues that the second offer of employment on October 27, 1999, was consistent with the limitations placed on the claimant by Dr. Li in his release of the claimant to work on October 29, 1999. The hearing officer did not specifically address this, and our review of the documents indicate the point is arguable, as he simply appears not to find the later release to provide a basis for the prior offer. We find no error in this.

The decision and order of the hearing officer are affirmed.

Gary L. Kilgore
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Tommy W. Lueders
Appeals Judge