APPEAL NO. 000142

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On January 4, 2000, a contested case hearing (CCH) was held. With respect to the two issues before him, the hearing officer determined that the respondent (claimant) sustained a compensable (left knee and left ankle) injury on _____ (all dates are 1999) and that claimant had disability from June 25th to the date of the CCH.

Appellant (carrier) appeals, contending that claimant "lacks credibility," that she did not fall as alleged, that the medical evidence does not support an injury and that claimant does not have disability because the employer made a bona fide offer of employment accommodating claimant's restrictions. Carrier requests that we reverse the hearing officer's decision and render a decision in its favor. The file does not contain a response from claimant.

DECISION

Affirmed.

Claimant was employed as an "express checking agent" by "an outsource company" (employer) for an international airline. Claimant testified regarding her duties and that she had arrived at work at 5:30 or 6:00 a.m. on _____. Claimant testified that she took a break at about 10:00 a.m. and that on her way back to her workstation from the break she slipped on the wet floor and fell. The mechanics of the fall, whether there was water on the floor and where on the floor (one witness said the puddle of water was 20 or 30 feet away), claimant's reaction whether she was crying or not, whether anyone helped her or not, if she was acting "suspicious," etc., are all in dispute. In any event, claimant asked one of the other workers who came to her assistance to call her husband, who also worked at the airport. Claimant's husband arrived shortly thereafter and in dispute is what he said and his attitude at the time. It is undisputed that he was upset and that he called his supervisor who called an ambulance. After some dispute and controversy over who would pay for the ambulance, claimant was taken to a hospital emergency room (ER). Again in dispute is what might have been said to and/or by the paramedics at the scene.

The ER report history recites that claimant "slipped & twisted (left) knee & leg" without falling down due to some "dripping water." Swelling and tenderness of both the left ankle and left knee was noted. A sprain of the left ankle and knee was diagnosed, the knee was immobilized, claimant was given crutches and she was released. X-rays of the left knee and ankle showed no fracture and were assessed as normal. Claimant subsequently began treating with Dr. C, who in a report of June 29th recited a history of "slipped in some water at work," noted normal x-rays, tenderness and loss of range of motion in the left knee, and diagnosed a sprain/strain of the left knee. In a follow-up report dated July 6th, Dr. C noted "fairly classic signs for torn medial meniscus." The possibility of

"meniscectomy surgery" was noted, and physical therapy was ordered. A report of July 27th notes a discussion "with case manager" regarding arthroscopic surgery. Surgery, in the form of an arthroscopic partial medial meniscectomy, was performed on August 6th. The post-operative diagnosis was a "torn medial meniscus, posterior horn, with flap tear . . . ." In a report dated September 3rd, Dr. C notes a meeting with (presumably carrier's) case manager, that claimant's "claim is now in dispute" and adds as an "addendum": "Patient may now begin light duty of 4 hours per day of office type duties as long as she is able to get up and walk around frequently." This notation is disputed by claimant who testified that Dr. C's physician assistant told her "I cannot do even a sitting job because my knee would be swelling." In evidence is a letter dated September 3rd from the employer to claimant on the subject "Return to Work Notice," which states:

> This letter is to advise you of the availability of a temporary position for you as a Door Guard at the [airport] which complies with restrictions specified by your doctor.

Claimant was given until September 8th to accept the offered position. It is undisputed that claimant did not respond to that letter. At the CCH, claimant several times noted that bona fide offer of employment was not an issue before the hearing officer.

The hearing officer discusses and summarizes the evidence in some detail and makes the following disputed findings:

FINDINGS OF FACT

4. On _____, while Claimant was taking an authorized fifteen minute break from her job duties for Employer, she slipped in water and injured her left knee and left ankle.

5. Claimant's testimony is consistent with the documentary evidence which indicates that Claimant was diagnosed with a left knee injury on _____ and eventually underwent surgery in the form of an arthroscopic partial medial meniscectomy for a torn medial meniscus of her left knee.

6. Due to her _____ injury, Claimant has been unable to obtain and retain employment at her preinjury wage beginning on June 25, 1999 and continuing through the date of the benefit [CCH].

7. The September 3, 1999 letter from [employer] does not constitute a bona fide offer of employment because it mentions a temporary position as a door guard but does not state the duties of the position, the maximum physical requirements of the job, or the wage.

8. It is reasonable to assume that the job duties of a door guard could potentially include restraining persons from using a door, an activity which would appear to be beyond the abilities of a person with a torn medical [sic] meniscus of the knee.

Carrier appeals those findings, asserting first that claimant was not credible, citing one witness' testimony that claimant's alleged fall was 30 feet from the wet spot and that claimant "helped herself up from her fall with no assistance, was not crying, and to witnesses [that witness], did not appear injured in any way." In contrast, there is a statement in evidence from (DE), a worker at a nearby baggage counter who stated:

> The next thing you know, out of the corner of my eye, I saw [claimant] hitting the ground. At that point me and [Mr. W] looked up and wondered what happened. I ran around the side, and we both helped pick her up. We took her back to the chair. She was weeping, you know, crying.

Claimant testified that two men had helped her up and that she was crying. Carrier, in its appeal, points to other evidence and testimony to support its contention but as the cited discrepancies in testimony indicate most of the facts on the mechanics of the fall, who said what, and whether claimant "looked suspicious" are in dispute. In any event, 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 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 (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 (Tex. App.-Houston [14th Dist.] 1984, no writ). The trier of fact may believe all, part, or none of the testimony of any witness. Aetna Insurance Company v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ).

Carrier next contends that there is no medical evidence that claimant sustained an injury, citing the x-rays taken on _____ which were normal and showed no fractures. Without going into detail of whether an x-ray can show swelling and/or a torn meniscus we will only note that argument was made to the hearing officer and the hearing officer is the sole judge of the weight and credibility of the evidence, including the medical evidence. The hearing officer found claimant sustained a torn meniscus in her fall and that finding is supported by Dr. C's reports, the medical records and the operative report.

Carrier further contends that claimant does not have disability, as defined in Section 401.011(16) (no compensable injury, no disability) or in the alternative if she had disability that disability ended on September 3rd, when Dr. C released claimant to light duty four hours a day (there is some dispute whether Dr. C actually told claimant that or whether that addendum was added after claimant left Dr. C's office). Although clamant protested at the CCH that bona fide offer of employment was not an issue before the hearing officer, the hearing officer nonetheless appears to have made findings on that matter in addition to

findings on disability. We would note that while bona fide offer of employment may affect the payment of temporary income benefits, that is an entirely different concept than disability; however, the hearing officer did make a finding on disability (*see* Finding of Fact No. 6). Addressing the bona fide offer of employment, Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 129.5 (Rule 129.5) provides that a written offer of employment "shall be presumed to be a bona fide offer" if it clearly states the position offered, the duties of the position, the maximum physical requirements of the position, that they meet the claimant's physical limitations, the wage and the location of the employment. The hearing officer, in his Finding of Fact No. 7, specified why he did not find that the employer's September 3rd letter was a written bona fide offer of employment and we hold that finding to be supported by the evidence.

On the issue of disability, we have frequently noted that the question of whether claimant has had disability is a question of fact for the hearing officer to resolve. Generally, injury and disability can be established based upon the claimant's testimony alone, if it is believed by the hearing officer. Gee v. Liberty Mutual Fire Insurance Company, 765 S.W.2d 394 (Tex. 1989). In this case, the findings on disability are supported not only by claimant's testimony but also by the medical records of Dr. C. In that we are affirming the hearing officer's decision on injury, we also affirm the decision on disability. As an appeals body, we will not substitute our judgment for that of the hearing officer when the determination is not so against the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Texas Workers' Compensation Commission Appeal No. 950456, decided May 9, 1995. We do not so find.

Accordingly, the hearing officer's decision and order are affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Elaine M. Chaney
Appeals Judge