APPEAL NO. 001143

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 convened on January 24, 2000. The issues were whether the respondent (claimant) sustained a compensable injury in the form of a partial tear of the anterior aspect of the supraspinatus musculotendinous junction of the left shoulder, in addition to the lumbar area, on _____, and whether the claimant had disability and, if so, for what period. At the request of the appellant (carrier), the hearing officer granted a continuance and directed the claimant to produce documents related to his rental property. The CCH was reconvened on April 7, 2000. The parties stipulated that the compensable injury extends to and includes the left shoulder as claimed by the claimant. The hearing officer determined that the claimant had disability from January 6, 1999, through April 7, 2000, the day the CCH was completed. The carrier appealed, stated evidence favorable to its position that the claimant did not have disability, urged that the evidence is insufficient to support the decision that the claimant had disability, and requested that the Appeals Panel reverse the decision of the hearing officer and render a decision that the claimant did not have disability. The claimant responded, stated evidence favorable to his position, urged that the decision of the hearing officer is not so against the great weight of the evidence as to be clearly unjust, and requested that it be affirmed.

DECISION

We affirm.

The claimant testified that he was injured when the wind blew a door against him and he fell; that he had medical problems before the injury, but was able to do his job; that he went to a doctor and was taken off work; that the doctor has not returned him to work; and that he could not do the work that he was doing at the time that he was injured. Records of Dr. L indicate that the claimant was taken off work on January 14, 1999; that the conditions resulting from the compensable injury prevent him from performing work of any kind; and that on January 6, 2000, the claimant was unable to work and the date he could return to work was undetermined. Dr. O examined the claimant at the request of the carrier. In a letter dated September 27, 1999, Dr. O stated that the claimant was not at maximum medical improvement, primarily because of his left shoulder; that surgery will be required to improve the shoulder; that he has other medical problems including bypass heart surgery, carotid artery surgery, and use of anticoagulation medication that will have to be considered in making a decision on shoulder surgery; and, if shoulder surgery was performed, he would again evaluate the claimant. The chief executive officer of the employer testified that he did not know the claimant's restrictions, but if he was advised of them he would provide a job for the claimant that would meet those restrictions. A videotape of the claimant shows the claimant performing some activities. The claimant testified that he has had rental properties for about 25 years; that he did not obtain additional rental property after the compensable injury; that before the compensable injury, he performed work on rental property; that after the compensable injury, he has not

performed work on rental property; and that he performs some work, such as placing advertisements for, and keeping records on, rental property.

Disability is defined as the inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage. Section 401.011(16). The burden is on the claimant to prove by a preponderance of the evidence that he has disability. Texas Workers' Compensation Commission Appeal No. 93953, decided December 7, 1993. The claimant has the burden of proving that his unemployment or employment at wages less than the preinjury wages emanates from the compensable injury and not for other reasons. Texas Workers' Compensation Commission Appeal No. 941689, decided February 1, 1995. The compensable injury need not be the only cause of the inability to obtain and retain wages at the preinjury wages, but must be a contributing cause. Texas Workers' Compensation Commission Appeal No. 950264, decided April 3, 1995; Texas Workers' Compensation Commission Appeal No. 960318, decided March 27, 1996. The carrier has the burden of proving that something other than the compensable injury is the sole cause of the inability to obtain and retain employment at wages equivalent to the preinjury wage. Texas Workers' Compensation Commission Appeal No. 992822, decided January 31, 2000. In Texas Workers' Compensation Commission Appeal No. 990827, decided May 19, 1999, and Texas Workers' Compensation Commission Appeal No. 991474, decided August 12, 1999, the claimant had a veterinary practice at the time he was injured; continued his veterinary practice after the injury; and testified that the veterinary practice work was lighter than the work in the job in which he was injured. The Appeals Panel held that the income from the veterinary practice did not have to be reported to the employer under the provisions of Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 129.3(2) (Rule 129.3(2)) and, after a remand, reversed the decision of the hearing officer and rendered a decision that the claimant had disability. While a claimant's testimony alone may be sufficient to prove disability, the testimony of a claimant is not conclusive but only raises a factual issue for the trier of fact. Texas Workers' Compensation Commission Appeal No. 91065, decided December 16, 1991; Texas Workers' Compensation Commission Appeal No. 94198, decided April 1, 1994. Evidence in a videotape may be sufficient to support a finding of no disability. Texas Workers' Compensation Commission Appeal No. 92146, decided May 27, 1992.

A bona fide offer of employment was not an issue at the CCH. In addition, the record does not contain a release to return to work with restrictions by the claimant's treating doctor or testimony of the claimant of his restrictions that could be the basis for offering the claimant a job that would comply with those restrictions. Texas Workers' Compensation Commission Appeal No. 960223, decided March 8, 1996. The chief executive officer of the employer testified that he did not know what the claimant's restrictions were. A bona fide offer of employment and disability are separate issues. Even if there had been a finding of a bona fide offer of employment, a bona fide offer does not result in the end of disability but only a determination of weekly wage for determining entitlement to temporary income benefits. Section 408.103 and Texas Workers' Compensation Commission Appeal No. 000035, decided February 18, 2000.

The hearing officer is the trier of fact and is the sole judge of the relevance and materiality of the evidence and of the weight and credibility to be given to the evidence. Section 410.165(a). The trier of fact may believe all, part, or none of any witness's testimony. Taylor v. Lewis, 553 S.W.2d 153 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.); Texas Workers' Compensation Commission Appeal No. 93426, decided July 5, 1993. 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). In a case such as the one before us where both parties presented evidence on the disputed issues, the hearing officer must look at all of the relevant evidence to make factual determinations and the Appeals Panel must consider all of the relevant evidence to determine whether the factual determinations of the hearing officer are so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. Texas Workers' Compensation Commission Appeal No. 941291, decided November 8, 1994. An appeals level body is not a fact finder and it does not normally pass upon the credibility of witnesses or substitute its own judgement for that of the trier of fact even if the evidence could 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). That a different factual determination could have been made based upon the same evidence is not a sufficient basis to overturn a factual determination of a hearing officer. Texas Workers' Compensation Commission Appeal No. 94466, decided May 25, 1994. The hearing officer commented on the medical evidence in the record and stated that the videotape of the claimant was not conclusive as to the claimant's ability to work. She properly applied the law to the facts. Her determination that the claimant had disability from January 6, 1999, to April 7, 2000, the date the CCH was concluded, is not so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. In re King's Estate, 150 Tex. 662, 224 S.W.2d 660 (1951); Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986). Since we find the evidence sufficient to support the determination of the hearing officer, we will not substitute our judgement for hers. Texas Workers' Compensation Commission Appeal No. 94044, decided February 17, 1994.

We affirm the decision and order of the hearing officer.

Tommy W. Lueders
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Robert E. Lang
Appeals Panel
Section Manager