APPEAL NO. 001147

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 April 28, 2000. The hearing officer determined that the respondent (claimant) did not receive a bona fide offer of employment subsequent to August 24, 1999, and that the claimant's disability resumed on August 24, 1999. The appellant (carrier) appeals, arguing that the hearing officer's decision is absurd in light of the great weight of the evidence, showing that the claimant clearly had abilities to work, certainly within the minimal requirements of the jobs he was offered. There is no response from the claimant.

DECISION

We affirm.

The claimant, who said he was 45 years old at the time of the CCH, was injured on _____, while employed by (employer), a temporary services company. He injured his lower back and neck while pulling some packaged plastic material from a can. His doctor, Dr. M, took him off work on July 8, 1999.

The claimant agreed that his employer made a bona fide offer of employment on August 20, 1999, and that he complied with it. The job was elevator surveyor, which involved counting people going in and out of an elevator by making slash marks on a piece of paper. This was to be an eight-hour-per-day job, but the claimant worked only one and one-half days.

In explanation of why he left this job, he said he had stopped taking his pain medication because it made him drowsy. He said that the first day went well and then on the second day "all this bobbing my head up and down" started causing neck pain which became unbearable. The claimant agreed that he could sit in a chair to do his job and move around as needed. He went to see Dr. M who again took him off work. The letter that did this stated that the "repetitive nature" of the claimant's work caused an exacerbation of his injuries and he was, thus, off work until a surgical consultation.

A July 13, 1999, lumbar MRI reported degenerative disease and herniation at the L5-S1 level. A July 22, 1999, cervical MRI reported degenerative disc disease with herniation and nerve root compression at C5-6 and C6-7. On August 31, 1999, Dr. M's report diagnosed segmental dysfunctions in three levels of the spine, muscle spasm, and cervical and lumbar IVD with (cervical) and without (lumbar) myelopathy. Dr. M released the claimant to restricted duty on April 12, 2000.

The claimant said that he never found out about a second job offer, made to his doctor, until February 2000. The parties stipulated at the CCH that this did not constitute a bona fide offer of employment as it was not made personally to the claimant and consisted of a job description sent to Dr. M for comment. He said that while he was willing

to do this job, he had been told by his employer in April 2000, when he called, that they did not have light duty available and he should apply for unemployment. The claimant said that Dr. M had released him again for light duty. Dr. M told the claimant that he had released him only under "pressure" from the insurance company and told him that the carrier was out to "get" him.

The claimant had applied for unemployment benefits in April 2000 but by the time of the CCH had not heard any response on his application. The claimant said that low back surgery was pending. He said he had reviewed surveillance videos and one involved light raking of mulch in his yard (in March 2000), another loading a very light type of lawn chair into his truck (in September 1999), and a third lifting a 20-pound bag of dog food (in July 1999), which he said did not hurt his back.

Ms. J, a co-owner of the franchise for the employer, testified as to the job offers made to the claimant. She said the claimant had returned to work for three weeks beginning in mid-June 1999 doing general office work, prior to changing treating doctors to Dr. M. Ms. J said that Dr. M did not respond until late December 1999 to a request the employer made on October 15, 1999, about the claimant's ability to work listening to the radio. She agreed that when the claimant contacted her in early April 2000 about this job, there were no light-duty jobs available.

The existence of a bona fide job offer does not eliminate disability. Rather, the wages offered in a bona fide offer that is not accepted are considered as earnings received after the injury for purposes of computing the amount of temporary income benefits. Section 408.103(e). The offered position must be one that the employee is reasonably capable of performing given the employee's physical condition and geographical accessibility. Factors to consider in whether an offer was bona fide are set out in Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE §129.5 (Rule 129.5).

The August 20, 1999, written offer in evidence here was agreed upon by the parties to be a bona fide job offer. In this case, there was no doubt that the elevator counting job was, at the time accepted by the claimant, within his reasonable physical capabilities. Thus, the question before the hearing officer was whether the job remained one which the claimant could reasonably do. While another fact finder may have questioned how repetitive the elevator counting job was, and what aggravation was thereby created, the record does contain objective evidence of herniations in both the neck and lumbar area which encroach upon nerves and support the claimant's testimony of resulting pain.

Concerning whether the claimant had disability as defined by Section 401.011(16), a claimant's testimony alone may establish that an injury has occurred and that disability has resulted from it. Houston Independent School District v. Harrison, 744 S.W.2d 298, 299 (Tex. App.-Houston [1st Dist.] 1987, no writ). The hearing officer is the sole judge of the relevance, materiality, weight, and credibility of the evidence presented at the hearing. Section 410.165(a). The decision should not be set aside because different inferences and conclusions may be drawn upon review, even when

the record, as in this case, contains evidence that would lend itself to different inferences. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ).

It was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence. Garza. This is equally true of medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286, 290 (Tex. App.-Houston [14th Dist.] 1984, no writ). The hearing officer could believe that disability and the claimant's ability to perform certain household tasks were not at odds in this case.

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); American Motorists Insurance Co. v. Volentine, 867 S.W.2d 170 (Tex. App.-Beaumont 1993, no writ).

The decision of the hearing officer will be set aside only if the evidence supporting the hearing officer's determination is so weak or against the overwhelming weight of the evidence as to be clearly wrong or manifestly unjust. Atlantic Mutual Insurance Company v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.). While a different conclusion could have been reached, and supported, as to the disability issue, we cannot agree that the record compels a reversal and rendering of this contrary conclusion. We affirm the hearing officer's decision and order based upon our standard of review.

Susan M. Kelley
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Judy L. Stephens
Appeals Judge