APPEAL NO. 001389

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 May 16, 2000. The hearing officer determined that the respondent (claimant) is entitled to lifetime income benefits (LIBs). The appellant (carrier) appealed on the grounds of sufficiency of the evidence and that the hearing officer abused her discretion in allowing the claimant=s treating doctor, Dr. F, to testify regarding the claimant=s loss of function in the upper extremities. The carrier requests reversal on these points of error. The claimant responded that the hearing officer=s decision was supported by sufficient evidence and the hearing officer did not err in allowing Dr. F to testify.

DECISION

Affirmed.

The Decision and Order of the hearing officer adequately and fairly sets forth the evidence. we address the evidentiary point of error asserted by the carrier. The claimant called Dr. F as an expert witness to testify on his behalf that he had lost the use of both of his hands. Dr. F is a medical doctor who assumed the treatment of the claimant and had treated the claimant for depression-related problems associated with the compensable injury of _____. The carrier=s attorney objected contending that the physician was not qualified to testify as to the claimant=s loss of use and function of his upper extremities because he never treated the claimant orthopedically, but rather, treated the claimant solely for depression-related problems. The hearing officer overruled the objection and allowed the testimony. On appeal the carrier asserted the hearing officer erred in allowing the testimony of Dr. F because the testimony could not meet the reliability and qualification standards of America West Airlines v. Tope, 935 S.W.2d 908 (Tex. App.-El Paso 1997, no writ); E.I. du Pont de Nemours & Co., Inc. v. Robinson, 923 S.W.2d 553 (Tex. 1995); and Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579, 591-95, 113 S.Ct. 2786, 125 L.Ed.2d 469, 482-84 (1993).

We have previously addressed these same issues in Texas Workers= Compensation Commission Appeal No. 992040, decided November 3, 1999 (Unpublished), and Texas Workers= Compensation Commission Appeal No. 991964, decided October 25, 1999. In these decisions, we noted that Robinson, *supra,* was not a workers= compensation case and it did not refer to or comment on Section 410.165 of the 1989 Act; likewise, Tope, *supra,* a civil tort case tried in conformity with the Texas Rules of Civil Evidence, dealt with an employee who filed suit for wrongful termination. The employee requested past and future mental anguish damages against the employer who terminated him after he filed for workers= compensation benefits. The rules of evidence do not apply in cases before the Texas Workers= Compensation Commission.

As we noted in Appeal Nos. 992040, *supra,* and 991964, *supra,* Section 410.165(a) specifically requires the hearing officer to Aaccept all written reports signed by a health care provider@ in a workers= compensation dispute resolution proceeding. Consequently, we held that the carrier=s application of Robinson, *supra,* to a workers= compensation CCH to be in direct conflict with Section 410.165 of the 1989 Act. This holding also applies to the testimony of the medical care provider who created the report. The hearing officer may consider the carrier=s assertions regarding the doctor=s qualifications as an expert, whether his testimony was based upon a reasonable degree of medical probability, and whether the testimony was reliable in deciding what weight to give to the testimony. We conclude that there was no abuse of discretion in this case.

The claimant testified that he worked as a mechanic for the employer and on _____, while emptying the gasoline tank of an automobile he sustained burns over his entire body from his waist to his head. The claimant testified that both of his hands were burned, the left worse than the right; that he could not use his left hand at all and he could use his right hand, but not function with it. The claimant testified that he could not find work because there was nothing he could do without the use of his hands. The claimant testified that he could not dress himself or tie his shoes, but that he could hold a fork and spoon and could drive a car to take himself to the doctor. The claimant testified that he could open his medicine bottles, hold a glass, and use a remote control for the television, but not a pen because his hand shakes. The claimant explained that the activities that he could do were done with his right hand because his left hand was completely unusable.

The claimant testified that he could not remember the last time he received medical treatment for his injury and that physical therapy had ended approximately two to three years ago. He stated that Dr. F treated his psychological problems in addition to Ahis nerves, and for my pains as well.@ The claimant testified that he could not remember treating with Dr. H, who had recommended surgery on his left hand.

Dr. F testified that he has been the claimant=s treating doctor since 1994 and that the claimant=s recovery has been stagnant since that time; treatment consisting mainly of pain medication and psychological counseling. Dr. F testified that he had examined the claimant=s shoulders, elbows, wrists and fingers and that the claimant=s left hand was profoundly and severely impaired with extensive nerve damage and reduced grip strength. He characterized the left hand as functionally useless and commented that the claimant would be much better off if his hand had been amputated because he could then use a prosthetic device and achieve some functional ability.

Dr. F described the right arm and hand as substantially injured with deep burn scars across the palm of the wrist and hand causing scar tissue to form, which in turn caused a reduction in the range of motion (ROM) of the hand. Dr. F described the fourth digit of the right hand as fixed and extended which prevented the claimant from clasping. The third through fifth digits were described as having profound loss of sensation. Dr. F testified that the right hand

functional dexterity and sensory ability to discriminate objects were severely impaired and this in turn, caused an inability to work because the claimant was unable to manipulate small objects such as coins. Dr. F admitted that he did not have any ROM test results and to a certain extent relied on testing done by other doctors. The claimant offered a narrative report from Dr. F dated January 31, 2000, to corroborate and support his testimony at the CCH.

In addition to the testimony of Dr. F, both parties offered extensive medical records documenting treatment for the claimant=s injury and other medical conditions, the most pertinent of which were discussed in detail by the hearing officer in her Decision and Order. Impairment ratings for the claimant=s hands and wrists were assessed by Dr. K in 1995 to be 54% for the right hand, 81% for the left hand, 15% for the right wrist and 19% for the left wrist. In the January 16, 1995, report, Dr. K wrote that Athe patient=s left upper extremity is essentially nonfunctional and the right upper extremity is also severely impaired.@

Section 408.161 provides in part that LIBs are paid until the death of the employee for : A(3) loss of both hands at or above the wrist . . .@ and that Athe total and permanent loss of use of a body part is the loss of that body part.@ Total and permanent loss of use and the provisions of pre-1989 Act case law were discussed at length in Texas Workers= Compensation Commission Appeal No. 94689, decided July 8, 1994, affirmed on remand, and Texas Workers= Compensation Commission Appeal No. 941065, decided September 21, 1994. We held that the following definition from the Texas Pattern Jury Charges applied to the 1989 Act: A>Total loss of use= of a member of the body exists whenever by reason of injury such member no longer possesses any substantial utility as a member of the body or the condition of the injured member is such that the worker cannot get and keep employment requiring the use of such member.@ *See* Travelers Insurance Co. v. Seabolt, 361 S.W.2d 204, 206 (Tex. 1962).

The carrier does not challenge the legal standard or definition utilized by the hearing officer but rather challenges the sufficiency of the evidence regarding the claimant=s loss of use of his hands. The carrier argues that since the claimant had some limited ability to utilize his right hand he did not have the total and permanent loss of his right hand at or above the wrist.

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 issue, 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 judgment 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). Only were we to conclude, which we do not in this case, that the hearing officer=s determinations were so against the great weight and preponderance of the evidence as to be manifestly unjust would there be a sound basis to disturb those determinations. 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). It is apparent the hearing officer found the medical evidence offered by the claimant and his testimony to be credible on the issue of whether he could get and keep employment requiring the use of his hands and determined that he could not, citing and applying the proper legal standard to the facts of this case. Accordingly, the decision and order of the hearing officer are affirmed.

Kathleen C. Decker
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Susan M. Kelley
Appeals Judge