APPEAL NO. 001463

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 June 5, 2000. The appellant (carrier) and the respondent (claimant) stipulated that the claimant sustained a compensable injury on _____, and that she had disability from that day through March 6, 2000. The hearing officer determined that the claimant had disability beginning March 7, 2000, through the date of the CCH. The carrier appealed, urged that the decision of the hearing officer is so against the overwhelming weight of the evidence as to be clearly wrong and manifestly unjust, and requested that the Appeals Panel reverse the decision of the hearing officer and render a decision that the claimant did not have disability for the period claimed. A response from the claimant has not been received.

DECISION

We affirm.

The claimant testified that when she was injured she was managing three stores, was working 70 or 80 hours a week, needed to be on her feet most of the time, and was told by her doctor that she could no longer do that type of work and needed to find another career. She said that she is a friend of Ms. L; that Ms. L owns a store that sells western antiques; that she, the claimant, had antiques in Ms. L's store to be sold on a consignment basis; that she went to Ms. L's store; that she talked with people in the store and answered questions they may have had; that she did not work in Ms. L's store and was not paid by Ms. L; that Ms. L loaned her money; and that sometimes she repaid some of the money loaned to her when an item she had on consignment in the store was sold. She said that a video taken on March 17, 2000, showed her driving a car and carrying a light pot and that a video taken on March 18, 2000, showed her at an open house at the store owned by Ms. L; that the open house lasted from about 6:00 to 10:00 p.m.; and that she talked with persons in the store, helped with sales, was not working in the store, and did not get paid. The claimant stated that in March 2000 her treating doctor released her to return to work at light duty for five hours a day, that she was to do no twisting or bending, and that she was not to lift over 10 pounds. She testified that she contacted her employer, told the person she spoke with of her restrictions, and was told that the employer did not have anything for her. The testimony of Ms. L is consistent with that of the claimant. In a written statement, the manager of the store said that the claimant spends time in the store, has antiques in the store, has birds in the store, cares for the birds, and is not an employee of the store.

In a report dated November 30, 1999, Dr. R said that the claimant had radiofrequency rhizotomy at L3-4 and L4-5 on November 17, 1999. In a follow-up progress note dated March 21, 2000, Dr. R complained that physical therapy (PT) had not been approved and stated that the claimant needed to have PT to get physically fit, that she was not able to return to managing a lady's store, and that she could return to a light- duty

position. In a report dated May 2, 2000, Dr. R said that he did not want the claimant working more than five hours a day, lifting over 7 to 10 pounds, lifting anything from the floor, twisting, or bending.

The private investigator who took the video filed a report in which he stated that on March 17, 2000, he went into the store owned by Ms. L; that he was greeted by the claimant; that she showed him around the store; and that he obtained a store business card that the claimant signed. He said that on March 18, 2000, from 6:50 to 10:30 p.m., he observed the claimant at the open house of the store; that he observed her bending, standing, and extending her arms above her head with ease; and that he learned that the claimant worked Monday through Thursday from 10:00 a.m. to 6:00 p.m. and on Friday and Saturday from 11:00 a. m. to 6:00 p.m.

"Disability" is defined as "the inability because of a compensable injury to obtain or retain employment at wages equivalent to the preinjury wage." A finding that a claimant had disability may be based solely on the testimony of the claimant. Texas Workers' Compensation Commission Appeal No. 94198, decided April 1, 1994. A claimant under a conditional medical release does not have to show that work is not available or that she is unable to work in the absence of a bona fide offer of light-duty work made by the employer or a showing that work was reasonably available. Texas Workers' Compensation Commission Appeal No. 950568, decided May 16, 1995. In the case before us, the record does not indicate what the claimant's preinjury wage was or what she was being paid for the alleged work at the store.

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 because the finder of fact judges the credibility of each and every witness, determines the weight to assign to each witness's testimony, and resolves conflicts and inconsistencies in the 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. In the statement of the evidence in her Decision and Order, the hearing officer said that she found the claimant and Ms. L to be credible. 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 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). The determination of the hearing officer that the claimant had disability beginning March 7, 2000, through the date of the CCH 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, 244 S.W.2d 660 (1951); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986).

We affirm the decision and order of the hearing officer.

Tommy W. Lueders
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Judy L. Stephens
Appeals Judge