APPEAL NO. 001942

Following a contested case hearing (CCH) held on July 11, 2000, pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act), the hearing officer, resolved the disputed issues by determining that the respondent (claimant herein) had disability from August 11, 1999, through the date of the CCH as well as from January 1, 1999, to August 10, 1999, and that the claimant's average weekly wage (AWW) was $1,067.00. The carrier appeals both the disability and the AWW determination. The carrier argues that the evidence did not support the disability determination and that the hearing officer did not use the correct method to calculate the claimant's AWW. The claimant responds that the hearing officer's decision was supported by the evidence and is correct.

DECISION

Finding sufficient evidence to support the decision of the hearing officer and no reversible error in the record, we affirm the decision and order of the hearing officer.

The parties stipulated that the claimant sustained a compensable injury on _____. The claimant's injury was to her right upper extremity. It was not disputed that the claimant sustained disability from January 1, 1999, to August 10, 1999. Dr. O, the surgeon who had operated on her, returned the claimant to work without restrictions on August 11, 1999. Dr. F, who had also been treating the claimant, expressed the opinion in a report of October 15, 1999, that it was inappropriate for Dr. O to release the claimant to work. In a May 5, 2000, medical report Dr. B expressed the opinion that the claimant had been unable to work since he began seeing her on October 13, 1999. The claimant testified that she was unable to work as a result of her injury from August 11, 1999, through the date of the CCH.

As far as AWW is concerned, the carrier put into evidence two different Employer's Wage Statements (TWCC-3). Neither was signed by an employer representative. The claimant put into evidence records from the Texas Workforce Commission (TWC) which showed her wages during the two quarters preceding her injury.

We initially address the disability determination. Disability is a question of fact to be determined by the hearing officer. Texas Workers' Compensation Commission Appeal No. 93560, decided August 19, 1993. Section 410.165(a) provides that the contested case hearing officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence as well as of 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, 702 (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, 290 (Tex. App.-Houston [14th Dist.] 1984, no writ). The trier

of fact may believe all, part, or none of the testimony of any witness. Taylor v. Lewis, 553 S.W.2d 153, 161 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.); Aetna Insurance Co. v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ). 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). When reviewing a hearing officer's decision for factual sufficiency of the evidence we should reverse such decision only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986).

Applying this standard, we find sufficient evidence to support the hearing officer's disability determination. The carrier argues that Dr. O released the claimant to return to work. However, there was contrary medical evidence from Dr. F, throwing into question the validity of this release. Also, disability can be established by a claimant's testimony alone, even if contradictory of medical testimony. Texas Workers' Compensation Commission Appeal No. 92285, decided August 14, 1992; Texas Workers' Compensation Commission Appeal No. 92167, decided June 11, 1992.

Section 408.041(a) provides as follows:

> Except as otherwise provided by this subtitle, the average weekly wage of an employee who has worked for the employer for at least the 13 consecutive weeks immediately preceding an injury is computed by dividing the sum of the wages paid in the13 consecutive weeks immediately preceding the date of the injury by 13.

Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 128.3(d) (Rule 128.3(d)) provides as follows:

> If an employee has worked for 13 weeks or more prior to the date of injury, or if the wage at time of injury has not been fixed or cannot be determined, the wages paid to the employee for 13 weeks immediately preceding the injury are added together and divided by 13. The quotient is the average weekly wage for that employee.

Rule 128.2 requires that an employer file a TWCC-3 reflecting a claimant's wages. This rules sets out the deadline for filing the TWCC-3, the requirement that it be signed and dated and the information that it should include.

It was undisputed that the claimant worked for the carrier more than 13 weeks prior to her injury. The carrier put two TWCC-3's into evidence. The carrier argues that under these circumstances the hearing officer was bound to use the TWCC-3's in

calculating the claimant's AWW. We find no authority for the proposition that the trier of fact is bound to blindly follow even the most suspect TWCC-3.

The hearing officer explained his reasoning for relying on the TWC records in determining the claimant's wages for the 13 weeks prior to her injury rather than either of the two TWCC-3's. He states as follows in his decision:

> Regarding the [AWW] issue, the Employer did provide a wage statement, but that wage statement is suspect. First there are two wage statements, one done in a bi-monthly [sic, should be semimonthly] manner, and another one done in a weekly manner. (See Carrier Exhibit #3). The hours and amounts are difficult to differentiate, but they do not seem to match up. Moreover, neither one of those wage statements has been signed by an employer representative, which leads me to look at them unfavorably.
>
> On the other hand, there is a [TWC] document (See Claimant Exhibit #7), which lists the last quarter of 1998, and wages reported to the TWC by the employer. In the fourth quarter of 1998, the Claimant earned a total of $12, 698.20. I place great weight upon that document. This is also corroborated by the Claimant's statement that she worked a lot of over-time during this quarter. Based on that TWC document, I find that the Claimant's average wage is $1,067.84, which I arrived at by taking the total amount for the fourth quarter of 1998 which covers about 11 weeks of Claimant's work as reported to the TWC, $12,698.20, and adding in two weeks of the average weekly pay for the third quarter of 1998, again using the TWC documents. The average weekly amount in third quarter of 1998 was approximately $592.00. I therefore find that, Claimant's [AWW] was approximately $1,067.00, and I find this as the Claimant's [AWW].

Obviously in most cases the calculation of what a claimant was paid who worked for an employer for 13 weeks prior to the claimant's injury will be based on a TWCC-3. This does not mean, and we do not read the relevant rules to say, that a hearing officer must rely exclusively on a TWCC-3 if the hearing officer, as the finder of fact, does not find it credible. In this instance, there was other documentary evidence which the hearing officer found to be more credible than the TWCC-3s in evidence. Under these circumstances, we find no error in the hearing officer's relying on this evidence to determine the claimant's earnings during the 13 weeks prior to her injury.

The decision and order of the hearing officer are affirmed.

Gary L. Kilgore
Appeals Judge

CONCUR:

Kenneth A. Huchton
Appeals Judge

Robert W. Potts
Appeals Judge