APPEAL NO. 002103

Following a contested case hearing held on August 7, 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 appellant (claimant) had disability from November 25, 1999, through December 6, 1999, and that the employer did tender a bona fide offer of employment. The claimant files a request for review, contending the evidence established that he had disability and that the employer did not make a bona fide offer of employment. The respondent (carrier) responds that the hearing officer's decision was sufficiently supported by the evidence.

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 hearing officer summarizes the evidence in her decision and we adopt her rendition of the evidence. We will briefly touch on the evidence germane to the appeal. This includes the fact that the parties stipulated the claimant sustained a compensable injury on _____. The claimant described this injury as taking place when she slipped and fell. The claimant was taken to the emergency room (ER) where she was treated with medications. The claimant returned to the ER and on December 1, 1999, was released to light duty effective December 6, 1999. The claimant saw Dr. M on December 10, 1999. Dr. M placed the claimant on an off-work status. The claimant testified that she was unable to work due to pain since the time of her injury.

Ms. M, who stated she was in charge of light-duty work for the employer, testified that she orally offered the claimant work consistent with her restrictions from the ER and that the claimant agreed to return to work on December 6, 1999. The claimant denies this. The employer confirmed the oral offer by letter of December 9, 1999. The claimant testified that she did not change her treatment to Dr. M to be placed off work but because she was unhappy with the treatment she had been receiving.

The hearing officer's decision included the following findings of fact and conclusions of law:

FINDINGS OF FACT

2. Claimant was seen in the [ER] on November 25, 1999 and taken off work. Claimant returned to the [ER] on December 1, 1999 and was released to light duty as of December 6, 1999 with restrictions on standing and sitting.

3. Claimant was verbally offered light duty on or about December 3, 1999 by [Ms. M]. The jobs offered were well within the restrictions given to Claimant by [the ER]. Claimant was advised of the hours to be worked, the jobs to be performed, the wages she would earn and

the location. A letter was written by [Ms. M] on December 9, 1999 confirming the offer of light duty verbally given and setting out all the details as noted in finding of fact number 3.

4. Claimant indicated that she would return to work light duty on December 6, 1999 but did not show up.

5. Claimant sought to change doctors after discussing her return to work with her employer. Contrary to Claimant's testimony there was evidence that Claimant sought the change in order to obtain a different disability finding.

6. Claimant was taken completely off work by [Dr. M] on December 10, 1999.

* * * *

9. Claimant established that she was unable to obtain and retain employment as a result of a work injury from November 25, 1999 through December 6, 1999.

CONCLUSIONS OF LAW

3. Claimant had disability from the _____ injury from November 25, 1999 through December 6, 1999.

4. Employer did tender a bona fide offer of employment to the Claimant.

There was conflicting evidence about whether or not an oral offer of employment was made. Section 410.165(a) provides that the 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 finding that an oral offer of employment was made.

The claimant argues that the employer's December 9, 1999, letter is insufficient to meet the requirements of a written bona fide offer of employment. Section 408.103(e) and Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 129.5 (Rule 129.5)[1] set forth the requirements for a bona fide offer of employment. Regarding the issue of whether a bona fide offer of employment was made, it is not fatal that all the information requirements for a written bona fide offer are not present where there is also oral communication about the offer that provides the information. Texas Workers' Compensation Commission Appeal No. 92248, decided July 24, 1992. Both the written and oral communication can and should be considered. *See* Texas Workers' Compensation Commission Appeal No. 990627, decided May 12, 1999 (Unpublished). In the present case, the hearing officer found that the oral offer met all the requirements of Rule 129.5 and there was testimony from Ms. M to support this finding.

Disability is a question of fact to be determined by the hearing officer and may be based on the testimony of the claimant alone. Texas Workers' Compensation Commission Appeal No. 93560, decided August 19, 1993. However, the hearing officer is not required to be persuaded by the claimant's testimony. The claimant had the burden of proof to establish disability, and applying our standard of review discussed above, we find no legal error in the hearing officer not finding a greater period of disability in the present case.

The decision and order of the hearing officer are affirmed.

Gary L. Kilgore
Appeals Judge

CONCUR:

Kenneth A. Huchton
Appeals Judge

Judy L. Stephens
Appeals Judge

[1]On December 26, 1999, Rule 129.6 became effective and took the place of Rule 129.5 in describing the requirements of a bona fide offer of employment. In judging the validity of the employer's bona fide offer in the present case we must look to Rule 129.5 that was in effect at the time the offer was made.