APPEAL NO. 002200

Following a contested case hearing held on August 21, 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) suffered a compensable injury in the form of an occupational disease on _____; that the claimant timely reported the injury to the employer; and that the claimant sustained various periods of disability. The appellant (carrier) files a request for review arguing that the hearing officer's finding of injury was contrary to the evidence and that the claimant did not establish disability. The carrier further argues that the hearing officer erred by cutting off its examination of the claimant concerning his ability to work. The claimant responds that the evidence established he suffered a compensable injury. The claimant also argues that the hearing officer did not err in cutting short the carrier's questioning of him concerning whether he was able to seek, or sought, other employment after he had been released to work with restrictions.

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 claimant testified that he worked in a shingle manufacturing plant and was exposed to various chemicals in his work, including tar, oil, granules, diesel fuel and fiberglass. He stated that as a result he developed rashes over various parts of his body. The claimant presented medical evidence relating his rashes to his employment. He also testified that he was unable to work during various periods due to these rashes and also presented medical evidence to this effect. The carrier questioned the claimant concerning whether once he was released to work with restrictions he had sought other employment or was able to do other types of work. The hearing officer indicated that this line of questioning was not relevant to disability.

The question of whether an injury occurred is one of fact. Texas Workers' Compensation Commission Appeal No. 93854, decided November 9, 1993; Texas Workers' Compensation Commission Appeal No. 93449, decided July 21, 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 of review, we find sufficient evidence in the claimant's testimony and the medical evidence to support the hearing officer's finding of injury.

As defined in the statute, disability is the inability to obtain and retain employment at the preinjury wage due to the compensable injury. While the claimant has the burden of proving he has disability as defined, case law has established that a claimant may prove disability based on his testimony alone, if believed. Houston General Insurance Company v. Pegues, 514 S.W.2d 492 (Tex. Civ. App.-Texarkana 1974, writ ref'd n.r.e.); Texas Workers' Compensation Commission Appeal No. 93560, decided August 19, 1993. Whether disability exists is generally a question of fact for the hearing officer to resolve. A conditional or light-duty release is evidence that disability continues and a claimant under a light-duty release does not have the obligation to look for work or to show that work was not available. *See* Texas Workers' Compensation Commission Appeal No. 970597, decided May 19, 1997. Further, the claimant need only prove that the compensable injury was a cause of the disability. We find sufficient evidence to support the hearing officer's finding of disability and no error in the hearing officer's finding the questioning dealing with whether the claimant sought employment or not was not relevant when the claimant had only been released to restricted duty.

The decision and order of the hearing officer are affirmed.

Gary L. Kilgore
Appeals Judge

CONCUR:

Robert E. Lang
Appeals Panel
Manager/Judge

CONCURRING/DISSENTING OPINION:

I concur on the finding of injury, but dissent from the period of disability found by the hearing officer, and I would reverse. It is incredible to me that inability to obtain and retain employment can be found when the nature of the injury is a contact dermatitis and even medical evidence favorable to the claimant states removal from the substance and treatment with topical substances results in lessening or resolution of the condition. While a hearing officer can believe just about any evidence, such belief, and our affirmance of such, is not warranted when a decision is absurd in terms of common sense and experience. The essence of the definition of disability under the 1989 Act, supported by treatises and the Joint Select Committee on Workers' Compensation report, is that it was to be a departure from analyzing inability to work solely in terms of whether one could return to the previous employment.

As stated very early on by the Appeals Panel in Texas Workers' Compensation Commission Appeal No. 91045, decided November 21, 1991:

> We do not perceive the intent and purpose of the 1989 Act to impose on the injured worker the requirement to engage in new employment while still suffering some lingering effects of his injury unless such employment is reasonably available and fully compatible with his physical condition and generally within the parameters of his training, experience and qualifications. On the other hand, we do not believe the 1989 Act is intended to be a shield for an employee to continue receiving temporary income benefits where, taking into account all the effects of his injury, he is capable of employment but chooses not to avail himself of reasonable opportunities or, where necessary, a bona fide offer.

The off-work statements in the record plainly go to the claimant's ability to return to his previous employment. His condition is such that it essentially resolves when not around the problematic substances. There is contrary medical evidence, in this case the great weight, that the condition does not preclude the ability to earn preinjury average weekly wage from any type of work. I cannot affirm a period of disability for a skin rash that exceeds many surgical back injuries that come before the Texas Workers' Compensation Commission.

Susan M. Kelley
Appeals Judge