APPEAL NO. 002371

Following a contested case hearing held on September 12, 2000, pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act), the hearing officer resolved the disputed issue by determining that the appellant (claimant herein) had disability from April 1, 2000, to May 11, 2000, and from May 16, 2000, to June 5, 2000. The claimant appeals, arguing that the hearing officer erred in not finding additional periods of disability after June 28, 2000. The respondent (carrier herein) replies that the decision of the hearing officer is 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.

Many of the essential facts of the present case are not in dispute. It was undisputed that the claimant suffered a compensable injury on _____, and this injury took place when a coworker caused a machine to be lowered on the claimant's right foot. While there was varying medical evidence as to when the claimant was released to work, there was no dispute that the claimant was off work because of her compensable injury from April 1, 2000, through May 11, 2000, and returned to work on May 12, 2000. The claimant testified that she was unable to continue working after a few days due to discomfort from a boot the employer required her to wear while working. The claimant was put on an off-work status on May 16, 2000, and did not work until she was again released to work with restrictions. The claimant testified that she was returned to work on June 6, 2000, and that she worked until June 28, 2000, when she was terminated. Much of the evidence at the hearing revolved around the reasons for the claimant's termination. The claimant testified that the termination was due to her taking four cans of soda from one of the employer's machines. The claimant testified that other employees did the same thing, but were not terminated. Mr. M, the claimant's manager until her termination, testified that the claimant was terminated for making a false statement.

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).

Disability is defined as the inability because of a compensable injury to obtain and retain employment at the preinjury wage. Termination for cause does not necessarily preclude disability, but may be considered by the hearing officer in determining why a claimant is unable to earn the preinjury wage. *See* Texas Workers' Compensation Commission Appeal No. 91027, decided October 24, 1991. Thus, disability can continue after termination if a cause of the inability to earn the preinjury wage after termination was the compensable injury. Texas Workers' Compensation Commission Appeal No. 93850, decided November 8, 1993. However, applying the standard of review stated above, we do not find error in the present case in the hearing officer's finding that the claimant's termination was the cause of the claimant's lack of employment after June 28, 2000. *See* Texas Workers' Compensation Commission Appeal No. 000175, decided March 16, 2000.

The decision and order of the hearing officer are affirmed.

Gary L. Kilgore
Appeals Judge

CONCUR:

Robert E. Lang
Appeals Panel
Manager/Judge

Robert W. Potts
Appeals Judge