APPEAL NO. 031739
FILED AUGUST 22, 2003

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 10, 2003. The hearing officer decided that the respondent (claimant herein) had disability from March 29, 2001, continuing through July 17, 2002. The appellant (self-insured herein) files a request for review in which it argues that the decision of the hearing officer is contrary to the evidence. There is no response from the claimant to the self-insured's request for review.

DECISION

Affirmed in part; reversed and rendered in part.

The sole issue before the hearing officer was whether the claimant had disability from an injury sustained on _____, and, if so for what period(s). In regard to disability, the hearing officer made the following Finding of Fact No. 5:

> Due to the injury, the Claimant was unable to obtain or retain employment at wages equivalent to the Claimant's preinjury wage beginning on March 29, 2001 and continuing through the date of this hearing.

The self-insured argues that this factual finding was contrary to the evidence, pointing to medical evidence which it argued showed the claimant could have returned to work. 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 no legal basis to overturn the

hearing officer's factual finding concerning disability as this finding was supported both by the claimant's testimony and medical evidence.

However, since disability has been placed in issue in this appeal, we feel compelled to correct the legal error in the hearing officer's disability determination. In his Conclusion of Law No. 3, the hearing officer states as follows:

> The claimant did have disability from March 29, 2001 and continuing through July 17, 2002.

The hearing officer apparently bases Conclusion of Law No. 3 on his Finding of Fact No. 6 in which he found as follows:

> The Claimant was determined to have reach maximum medical improvement [MMI] on July 17, 2002.

We faced this same situation in Texas Workers' Compensation Commission Appeal No. 982923, decided January 29, 1999, and in that case we stated as followed:

> Lastly, we consider the hearing officer's determination that the claimant did not have disability in this case because Dr. JP's MMI date became final. As we have stated on numerous occasions, MMI and disability are different questions. Although, a claimant cannot receive TIBS after reaching MMI, Sections 408.101 and 408.102, it does not follow that the claimant can no longer have disability, the inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage, simply because she has reached MMI. In finding that the claimant did not have disability after January 16, 1998, the hearing officer fails to recognize the distinction between whether TIBS are payable and whether the claimant has disability. In his discussion section, the hearing officer states that "[i]f the Claimant's first certification of [MMI] had not become final because of the Claimant's failure to timely dispute it, she would have disability from June 9, 1998, through the date of the Contested Case Hearing . . . . However, the first certification of [MMI] and [IR] has become final and a claimant may not have disability after [MMI] becomes final." As noted above, this statement is erroneous. Accordingly, we reverse the hearing officer's determination that "[t]he Claimant did not sustain additional disability after January 16, 1998, as a result of the compensable injury of _____" and render a new decision that the claimant had disability from June 9, 1998, through the date of the hearing, November 18, 1998.

Applying this same logic, we must reverse the decision of the hearing officer to end disability on the date the claimant attained MMI. Thus, while we affirm the hearing officer's determination that the claimant had disability from the _____, injury, we reverse his decision as to the ending date of disability and render a decision

that the claimant had disability from March 29, 2001, continuing through the date of the CCH.

We also note that although it appears that the hearing officer made a legal error in how he considered a bonafide offer affects disability, there was no reversible error in this regard. The law in this area is explained in Texas Workers' Compensation Commission Appeal No. 000454, decided April 14, 2000.

The self-insured states that the true corporate name of the insurance carrier is **A SELF-INSURED THROUGH EAST TEXAS EDUCATIONAL ASSOCIATION AND CLAIMS ADMINISTRATION SERVICES, TPA** and the name and address of its registered agent for service of process is

SUPERINTENDENT
(ADDRESS)
(CITY), TEXAS (ZIP CODE).

_____
Gary L. Kilgore
Appeals Judge

CONCUR:

_____
Judy L. S. Barnes
Appeals Judge

_____
Margaret L. Turner
Appeals Judge