APPEAL NO. 001791

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 July 11, 2000. The issues at the CCH that were not resolved by stipulation were whether the respondent (claimant) had disability and whether a bona fide job offer had been made to the claimant which entitled the appellant (carrier) to adjust the post-injury weekly earnings for the offered wages.

The hearing officer held that the claimant had disability (in addition to stipulated time periods) for the period from March 17 through 19, 2000, and from March 31, 2000, through the date of the CCH. The hearing officer also found that the job offer made on June 26, 2000, would have required certain functions beyond the claimant's limited-duty release.

The carrier has appealed only the bona fide job offer finding. It argues that the evidence in favor of this determination was no more than a "unilateral" declaration by the claimant that she could not perform the job, which did not overcome the presumptive weight accorded to the offer under Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 129.5 (Rule 129.5 ). There is no response from the claimant.

DECISION

We affirm.

The claimant injured her knee on _____, while employed as a security guard by (employer). The claimant had worked in that capacity for 22 years. She said that she alternated guard duties with temporary supervision (dispatcher) duties. The claimant said that she worked "swing shift" but the time was not specified in testimony; at one point she said that she would "clock in" at 1:30 to 1:45 (a.m. or p.m. not clarified). She stated that she had worked as a guard dispatcher for nine days after her injury but before her April 28, 2000, knee surgery as part of a light-duty job and had been unable to do it.

The claimant repeatedly said that while the job of guard dispatcher was generally a sit down job; on her shift there were supervisory duties that were required as well which involved getting up and down, retrieving keys from a cabinet about one foot from the ground which was four and one-half feet tall, and duties which could vary from day to day. She had been in a wheelchair when she tried to do the job and had to stand to reach the keys and perform other tasks.

The claimant's treating doctor, Dr. A, released her to work in a sedentary desk job with instructions to not climb stairs The claimant was under the impression from a conversation with Dr. A that Dr. A had ascertained from a conversation with Mr. E, employer's employee benefits manager, that the employer had a job the claimant could do. The work status report filled out by Dr. A did not complete the line item assessments of various tasks that are provided on the form.

On June 21, 2000, Mr. H, the safety representative for the employer, filled out a medical restrictions job offer form. The wage and the location were specifically described. The position offered was "security guard" and the physical requirements of the position were described only as "desk type sedentary work." The specific duties were described only as "guard dispatcher." The claimant said that she knew what these duties involved and they were like the ones she had been performing but unable to do previously. The hours or shifts that the claimant was to work were not described on this offer. The offer makes the general statement that the employer will abide by the claimant's restrictions.

Mr. E, testified that he never talked to Dr. A about a job for claimant or her medical condition. He said that the claimant had never come to him to express concerns that she was being asked to perform work beyond her restrictions. Mr. E said that he did not really know the duties of a guard dispatcher. He believed that Mr. H was "sincere" when he said that he would abide by Dr. A's restrictions.

Although the carrier argues that the job offer is presumed to be bona fide under the terms of Rule 129.5, this rule was no longer in effect (concerning bona fide job offers) on the date the offer was made. Rather, the effective rule is now Rule129.6. The provision of that rule which concerns the nature and content of an employer's job offer is Rule 129.6(c):

> An employer's offer of modified duty shall be made to the employee in writing and in the form and manner prescribed by the Commission {Texas Workers' compensation Commission}. A copy of the Work Status Report on which the offer is being based shall be included with the offer as well as the following information:
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> (1) the location at which the employee will be working;
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> (2) the schedule the employee will be working;
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> (3) the wages that the employee will be paid;
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> (4) a description of the physical and time requirements the position will entail; and
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> (5) a statement that the employer will only assign tasks consistent with the employee's physical abilities, knowledge, and skills and will provide training if necessary.

Rule 129.6(d) provides that an employer may deem an offer to be bona fide if it, among other requirements, included all the information required in Rule 129.6(c). Rule 129.6(h) indicates that the Commission "will" find an offer to be bona fide if it conforms to the doctor's restrictions and meets the requirements of Rule 129.6(c).

The information omitted from the job offer was exactly at the heart of the controversy at the hearing. The claimant's inability to perform tasks of the dispatcher job were plainly based upon what her understanding was of the tasks and the shift she was to work. There was nothing in the offer itself to refute the accuracy of the claimant's understanding and recollection of activities she had once performed or that this was the same job she had done before. Because there is no common understanding of what the tasks of a dispatcher involved and no description of the specific duties required, the fact finder was, therefore, left with determining what was offered and whether the claimant could do the job. This was not, as the carrier argues on appeal, a "unilateral" determination that the claimant could not do the job. Obviously, there would have been little room for argument if the job offer had clearly stated, one way or the other, whether the claimant would be required to rise from her chair as she described. The hearing officer obviously believed that the job was not purely sedentary.

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 of 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.). 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); American Motorists Insurance Co. v. Volentine, 867 S.W.2d 170 (Tex. App.- Beaumont 1993, no writ).

The decision of the hearing officer will be set aside only if the evidence supporting the hearing officer's determination is so weak or against the overwhelming weight of the evidence as to be clearly wrong or manifestly unjust. Atlantic Mutual Insurance Company v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.). We do not find this to be the case here and affirm the decision and order.

Susan M. Kelley
Appeals Judge

CONCUR:

Robert E. Lang
Appeals Panel
Manager/Judge

Judy L. Stephens
Appeals Judge