APPEAL NO. 031638
FILED AUGUST 13, 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 was held on May 28, 2003. With respect to the issues before her, the hearing officer determined that the respondent (claimant) had disability resulting from the compensable injury sustained on _____, from February 4, 2003, through the date of the hearing; that the employer did not tender a bona fide offer of employment (BFOE) to the claimant; and that Dr. M is the claimant's initial choice of treating doctor. The appellant (carrier) argues that the great weight of evidence supports a determination that Dr. P and not Dr. M is the claimant's initial choice of treating doctor and that it was error for the Texas Workers' Compensation Commission (Commission) to approve the claimant's request to change treating doctors. The carrier further argues that the claimant is entitled to "partial disability" and not "full disability" as determined by the hearing officer because the claimant returned to work for one week at a reduced 6 hours a day schedule. The hearing officer's determination that the employer did not tender a BFOE to the claimant was not appealed and is now final pursuant to Section 410.169.

DECISION

Affirmed.

The carrier contends that the hearing officer erred in determining that Dr. M and not Dr. P was the claimant's initial choice of treating doctor. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 126.9(c)(1) through (3) (Rule 126.9(c)(1) through (3)) specify three circumstances in which the first doctor providing health care does not constitute the initial choice of treating doctor. Rule 126.9(c)(3) provides that a doctor providing emergency care will not become the initial treating doctor "unless the injured employee receives treatment from the doctor for other than follow-up care related to the emergency treatment." The hearing officer found that Dr. P provided emergency room care to the claimant by performing surgery on the claimant's hand on November 27, 2002, to reattach the portion of the claimant's finger that had been amputated in the compensable injury and that the claimant only received follow–up care from Dr. P thereafter. The claimant testified that he submitted an Employee's Request to Change Treating Doctors (TWCC-53) on January 23, 2003, at the direction of the carrier. The hearing officer determined that Dr. P was not the claimant's initial choice of a treating doctor and that the claimant began treating with Dr. M, the claimant's initial choice of a treating doctor on December 30, 2002. 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 Ins. Co. v. Soto, 819 S.W.2d 619 (Tex. App.-El Paso 1991, writ denied). When reviewing a hearing officer's decision for factual sufficiency of the evidence, we will reverse such decision only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175

(Tex. 1986). Applying this standard, we find that the evidence sufficiently supports the hearing officer's determination that the claimant's initial choice of treating doctor for workers' compensation purposes was Dr. M. Having affirmed the hearing officer determination that Dr. M is the claimant's initial choice of a treating doctor, we need not address the issue of whether the Commission erred in approving the changing of treating doctors from Dr. P to Dr. M as no such approval was required.

The carrier argues that the claimant is entitled to "partial disability" instead of "full disability" as determined by the hearing officer. The evidence indicates that the claimant attempted to return to work from January 28 to February 4, 2003 in a light-duty position for six hours per day instead of eight. In an argument that seems to confuse the existence of disability with the carrier's potential liability for temporary income benefits (TIBs), the carrier argues that the claimant's return to work demonstrates that the claimant only had "partial" disability based upon an apparent misapprehension that it would be entitled to consider the wages the claimant would have earned in that position, in spite of its acknowledgment that the employer did not extend a BFOE to the claimant, and thus would only be responsible for the difference in preinjury and post injury earnings. However, the hearing officer obviously credited the claimant's testimony that he was unable to perform the light-duty work because of his compensable injury. That is, the hearing officer determined that the claimant had to discontinue working in the light-duty position because he was unable to perform the job duties due to his compensable injury. Thus, she further determined that the claimant had disability from February 4, 2003, through the date of the hearing. That decision is supported by sufficient evidence and is not so against the great weight of the evidence as to compel its reversal on appeal. Cain, *supra*. Accordingly, the carrier is liable for full TIBs.

The hearing officer's decision and order are affirmed.

The true corporate name of the insurance carrier is **ROYAL INDEMNITY COMPANY** and the name and address of its registered agent for service of process is

CORPORATION SERVICE COMPANY
800 BRAZOS, COMMODORE 1, SUITE 750
AUSTIN, TEXAS 78701.

_____
Elaine M. Chaney
Appeals Judge

CONCUR:

_____
Judy L. S. Barnes
Appeals Judge

_____
Thomas A. Knapp
Appeals Judge