APPEAL NO. 032725
FILED DECEMBER 8, 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 September 17, 2003. The hearing officer decided that the respondent's (claimant herein) compensable injury of _____, does include cervical spine MRI findings dated May 8, 2003 (left central disc herniation protrusion C5-6 with significant indentation and deformity of the spinal cord and central disc spinal canal stenosis); that the employer did not make a bona fide offer of employment (BFOE) to the claimant; and that the claimant had disability from April 23, 2003, continuing through the date of the CCH. The appellant (carrier herein) files a request for review in which it argues that these determinations are contrary to the evidence. There is no response from the claimant to the carrier's request for review in the record.

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.

We have held that the question of the extent of an injury is a question of fact for the hearing officer. Texas Workers' Compensation Commission Appeal No. 93613, decided August 24, 1993. Section 410.165(a) provides that the 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 to 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 there was sufficient evidence in the record to support the hearing officer's extent-of-injury finding. While the carrier contends that the mechanism of injury and the passage of time between the injury and the MRI argue

against the hearing officer's resolution of the extent of injury, it was up to the hearing officer to determine what weight to give these factors. The hearing officer chose to give greater weight to the testimony of the claimant and the medical evidence supporting the claimant's position regarding the extent of injury and this was within her province as the finder of fact.

As far as BFOE is concerned, the carrier argues that the offer of employment made by the employer met all the requirements of Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 129.6(b) (Rule 129.6(b)). This argument does not address that the hearing officer found that the employer's offer was not a BFOE because it failed to meet several of the requirements of Rule 129.6(b) in that it failed to state the location at which the claimant would be working, failed to give the schedule the claimant would be working, failed to provide a description of the physical and time requirements of the position offered, and failed to provide a statement that the employer would only assign tasks consistent with the employee's physical abilities, knowledge, and skills and would provide training if necessary. The carrier appears to argue that the employer is exempted from meeting the requirements of Rule 129.6(c) because the employer is in the business of providing day labor. While we certainly recognize that it might be difficult for a business which provides day laborers to others to meet the requirements of Rule 129.6(c), we are unaware of any provision in the 1989 Act or the rules of the Texas Workers' Compensation Commission that exempts businesses providing day labor from the requirements of Rule 129.6(c). Therefore, the carrier has failed to provide any basis to reverse the decision of the hearing officer that the employer did not tender a BFOE to the claimant.

As far as disability is concerned, the carrier argues that since the claimant worked for six months after the compensable injury, the hearing officer should not have found disability after the six-month period. It is axiomatic, and too often stated to require citation, that a claimant can go in and out of disability. Whether or not a claimant has disability during a particular period of time is a question of fact. Applying the standard of review set out above, the hearing officer's finding regarding disability was clearly supported by the evidence. This is particularly true considering that disability can be established by a claimant's testimony alone, even if contradictory of medical testimony. Texas Workers' Compensation Commission Appeal No. 92285, decided August 14, 1992; Texas Workers' Compensation Commission Appeal No. 92167, decided June 11, 1992.

The decision and order of the hearing officer are affirmed.

The true corporate name of the insurance carrier is **AMERICAN MANUFACTURERS MUTUAL INSURANCE COMPANY** and the name and address of its registered agent for service of process is

CORPORATION SERVICE COMPANY
800 BRAZOS
AUSTIN, TEXAS 78701.

_____
Gary L. Kilgore
Appeals Judge

CONCUR:

_____
Elaine M. Chaney
Appeals Judge

_____
Robert W. Potts
Appeals Judge