APPEAL NO. 931185

This appeal is considered in accordance with the Texas Workers' Compensation Act (1989 Act), TEX. LAB. CODE ANN. § 401.001 *et seq.* (formerly TEX. REV. CIV. STAT. ANN. Article 8308-1.01 *et seq.*). On November 15, 1993, a contested case hearing was held in (city), Texas, with (hearing officer) presiding, to determine whether claimant CM, who is the appellant, had disability as a result of a compensable back strain injury of (date of injury). At the time of his injury, the claimant worked as a salesman for (employer).

The hearing officer determined that claimant did not have disability as a result of his injury. This was based largely in part on his finding that claimant began working for his own business shortly after his injury, even though in an unpaid status.

The claimant has appealed; the extent of the appeal is to enumerate certain findings of facts and conclusions of law and ask for review because they are incorrect. The carrier responds by pointing out facts it believes are in its favor, and asking that the hearing officer's decision be affirmed.

DECISION

We affirm the hearing officer's decision.

Claimant injured his back on (date of injury), as he pushed a display case (along with his store manager) across the floor. Claimant stated that this was not his usual job, because he was a salesman in the electronics department and any physical labor would generally be limited. Claimant's store manager, (Mr. A), verified the pushing incident but stated that claimant did not appear to be hurt at the time, although he reported an injury the next day. Mr. A stated that claimant had been informed about two weeks earlier to begin looking for another job as there were plans to stop carrying electronics and eliminate his job. The job did not actually get eliminated and Mr. A testified that but for the injury, claimant could still be working in it. Mr. A said that claimant would work about a half hour a day doing things that would be considered as physical labor, such as lifting and carrying appliances. The claimant's last day of work for the employer was April 23, 1993.

According to claimant, it was coincidental that this month a deal came through that he had been working on to acquire a partnership interest in an ongoing auto repair business owned by a relative. Claimant asserted that he had no idea, when he sought to acquire this interest, how much money the business made, and he simply acted on faith. Documents in the record indicate that within the week following his injury, he filed documents relating to the business, specifically a Certificate of Ownership For An Unincorporated Business or Profession, and Application For Designation As An Official Vehicle Inspection Station. The name of the business is (employer). Claimant indicated that the business was able to start within two days or so of filing paperwork which transferred the business to his name.

The record is not as clear as it could be on the actual date claimant began working

at the auto center. He testified that by July he bought out the other partners and was the full owner. He also worked as the business manager, and employed two mechanics. Claimant stated that he did not feel that he could delegate supervision of operations to another, so he tried to be on the premises all six days of the week that the business was open. He said that doing repair estimates was primarily his job. He also drove customers to and from their homes or places of employment when they left cars at his business. He did company paperwork and product orders and generally supervised the work of his mechanics, although he did not do mechanic work himself. He handled transactions and deposits at the bank personally. The claimant said he was actually at the business location four hours a day. He had a cellular telephone so that he could be contacted when he was not actually at the business.

Claimant did not consider that he was gainfully employed because he did not pay himself a wage, and that if he had, his business would have lost money. He agreed, based upon business records he produced, that his company realized a net profit of close to $6,000 in the months from May through September 1993. Nevertheless, he predicted that it would have lost money by the end of the year. The value he put on his services was between $1,000 and $2,000 a month.

Claimant's assessment of what he could do after his injury was that he could drive and walk with no problem, but could not bend. His back pain was greatest in the morning. A videotape taken by an investigator for the carrier shows the claimant walking around his work premises, bending forward from the waist to talk to persons sitting in the drivers' seat of vehicles, lifting overhead doors (which he stated did not require much effort), and picking up something from the ground.

Claimant was treated by (Dr. N), who diagnosed thoracic and lumbosacral strain and took him off work for most of the period after his injury, according to claimant. One "off work" slip in the record was completed April 23, 1993, and indicates that the next appointment will be June 2, 1993. Dr. N's Initial Medical Report (TWCC-61) indicated an estimated date of return to limited work of August 30, 1993. Dr. N certified that claimant reached MMI October 19, 1993. Claimant actually was paid temporary income benefits through July 1, 1993.

Temporary income benefits are due when an injured worker has not reached maximum medical improvement and has disability. Section 408.101 (a). Section 401.011 (16) defines "disability" as: " . . . the inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage."

Notwithstanding the considerable amount of evidence elicited about the profitability of the claimant's business, and whether he was capable of "physical labor" as opposed to performing work which did not require lifting, we think the issue in this case boils down to whether the compensable injury claimant sustained resulted in him being unable to obtain and retain employment at the pre-injury wage. Whether he did, or did not, derive income from a business he owned does not conclusively answer the question. We have noted in

another context that one who derives income from a business he owns is not being paid "wages" as an employee. *See* Texas Workers' Compensation Commission Appeal No. 92021, decided March 9, 1992 (and cases cited therein).

More to the point in this case is that, notwithstanding claimant's assertions he could not work, or Dr. N's "off work" slips, the evidence strongly supports a conclusion that claimant's injury did not prevent him from engaging in wage-earning activities, and performing services. His injury did not cause an "inability" to obtain and retain employment, even if he was not actually paid in his chosen endeavor. As a business owner, claimant would arguably have no reason, and no time, to go out into the job market at large. That does not mean, however, that the hearing officer could not consider whether his injury would have an adverse impact on his ability to do just that.

The hearing officer is the sole judge of the relevance, the materiality, weight, and credibility of the evidence presented at the hearing. Section 410.165(a). The decision should not be set aside because different inferences and conclusions may be drawn upon review, even if the record contains evidence that would lend itself to different inferences. Garza v. Commercial Insurance Co. of Newark, N.J., 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). A trier of fact is not required to accept a claimant's testimony at face value, even if not specifically contradicted by other evidence. Bullard v. Universal Underwriters' Insurance Co., 609 S.W.2d 621 (Tex. Civ. App.-Amarillo 1980, no writ). Nor is the hearing officer bound by medical opinions. Hood v. Texas Indemnity Insurance Co., 209 S.W.2d 345 (Tex. 1948).

Finding sufficient support in the record for the findings and conclusions of the hearing officer, we affirm his decision.

Susan M. Kelley
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Alan C. Ernst
Appeals Judge