APPEAL NO. 93806

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act) (formerly V.A.C.S. Article 8308.1.01 *et seq*.). On July 20, 1993, a contested case hearing (CCH) was held in (city), Texas, with (hearing officer) presiding as hearing officer. The issues presented and agreed upon were:

1.Whether the claimant, IG, had disability resulting from the injury of (date of injury);

2.Should the Carrier be allowed to take contribution for the prior on-the-job injuries of September 7, 1990, and June 28, 1988.

The hearing officer determined that the claimant had not suffered disability as a result of his alleged injury occurring on (date of injury), and he further determined that contribution would not apply.

Appellant, claimant herein, contends that the hearing officer erred in determining he did not have disability based on claimant's testimony and requests that we reverse the hearing officer's decision and render a decision in his favor. The hearing officer's disposition of the contribution issue is not an appealed issue. Respondent, carrier herein, responds that the decision is supported by the evidence and requests that we affirm the decision.

DECISION

The decision of the hearing officer is affirmed.

Claimant testified that on (date of injury), he was a manager trainee at the (employer), employer, when he went into the storage room, slipped on the slick floor, fell backward and injured his lower back. He went to a medical clinic and subsequently was seen by (Dr. S). Claimant testified he was involved in an automobile accident on August 18, 1992, when a car driven by his brother hit a concrete abutment. Dr. S also treated claimant for injuries incurred in that accident. Claimant testified he received physical therapy due to the August 1992, accident for only a couple of weeks, however, the medical records indicate he received over two months of therapy, although claimant denies therapy was for that long. On cross-examination claimant conceded he had a workers' compensation accident in (month, year) when he fell off a truck injuring his back and shoulder. Claimant stated he was off work for 18 months and received an $11,000.00 settlement. Claimant conceded he was also involved in a December 11, 1989 car accident. Subsequently, he worked for a security service and was injured when his car was rear-ended on September 7, 1990. Claimant is vague about this accident but records offered by the carrier indicate a workers' compensation claim was filed for neck, low back and shoulder injuries, claimant was off work nine months and eventually settled his case for $3,500.00. Until he was employed by the employer in this matter, claimant testified he worked at construction and "on his own." Claimant was employed by the employer on June 1, 1992, and four days later suffered the injury at issue in the present case. As recited earlier, claimant was subsequently involved

in an August 1992 auto accident. Claimant also testified that since August 1992, he was in another auto accident in early 1993, when he was driving a pickup truck and got "rear-ended on the side." Claimant's testimony was that he underwent two weeks of therapy for that accident, filed suit for injuries and has settled that lawsuit for $3,200.00.

An October 30, 1992 progress note from Dr. S records "significant lower back pain. . . . Difficulty bending, stooping and lifting." The note indicates claimant ". . .is undergoing physical therapy." In another progress note dated November 18, 1992, Dr. S notes "[claimant] states his pain has exacerbated, myospasms have increased. He has difficulty bending, stooping and lifting." In a letter dated February 2, 1992 (sic-should be 1993), Dr. S writes:

> This is to verify that [claimant's] auto accident dated August of 1992, in which he injured his shoulder has nothing to do with his worker's compensation injury dated (date of injury), in which he injured his lower back.

Claimant has not seen Dr. S since picking up the February 2, 1993, letter.

None of the medical reports submitted for the (date) accident contain any other diagnosis than recited above and claimant is no more specific about his injuries than a vague complaint of pain in his lower back. Claimant alternately testified that he is attempting to rehabilitate himself by doing push-ups and sit-ups. Claimant testified he currently is unable to do the type of work he was doing for the employer but concedes he could do some type of security guard service which does not require too strenuous activity. Claimant testified that his wife works and that presently he is taking care of their four young children. Claimant also testified he has been employed for about six weeks part time for a security service, working two evenings a week on four hour shifts at $5.00 an hour.

The hearing officer notes that claimant's demeanor and his history suggest that claimant is not a credible witness. The carrier argued that even if claimant had disability at some point that it would not be due to the compensable injury while he was receiving physical therapy and recovering from his two subsequent non-compensable auto accidents.

The hearing officer in pertinent part determined:

FINDINGS OF FACT

> 6.Claimant can describe no symptoms or diagnosis of the injury which he alleges occurred on (date of injury) and which he further alleges has made him unable to obtain and retain employment since that time, except occasional pain in his lower back.

7.There are no objective clinical findings which suggest that Claimant is unable to obtain or retain employment at his pre-injury wage because of a compensable injury.

CONCLUSION OF LAW

2.Claimant did not suffer disability as a result of his alleged injury occurring on (date of injury) at the (employer).

Claimant contends that his testimony, Dr. S's notations, the fact no doctor has certified he has reached maximum medical improvement (MMI), and "records" show that he is unable to "do the same job duties prior to my injury."

Disability is defined in Section 401.011(16) (formerly Article 8308-1.03(16)) to mean ". . .the inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage." We note that none of Dr. S's notations indicate claimant is unable to work, or is unable to obtain or retain employment. They merely state that claimant complains of pain and has difficulty bending, stooping and lifting. The fact that a doctor has not certified claimant has reached MMI does not automatically mean that claimant has disability. Claimant is entitled to temporary income benefits (TIBS) while claimant has disability and has not reached MMI. Texas Workers' Compensation Commission Appeal No. 93415, decided July 8, 1993. Consequently it is quite possible for an employee to not have disability and still not have reached MMI, which would be the case with minor injuries which continue to be treated by a doctor but does not prevent the employee from working. We are unaware of what "records" claimant is referring to when he states "records" will show he is unable to obtain or retain employment.

The claimant had the burden to prove that he was unable to obtain and retain employment at his preinjury wages. That claimant has only his own testimony to support his contention does not automatically defeat his claim and his testimony may be believed by the trier of fact. As announced at the beginning of the CCH, the hearing officer is the sole judge of the relevance and materiality of the evidence offered and of the weight and credibility to be given to the evidence. Section 410.165(a). The claimant's testimony is that of an interested party and his testimony only raises an issue of fact for the trier of fact. Escamilla v. Liberty Mutual Insurance Co., 499 S.W.2d 758 (Tex. Civ. App.-Amarillo 1973, no writ). The hearing officer has the responsibility to judge the credibility of the claimant and the weight to be given to his testimony in light of the other testimony in the record. Burelsmith v. Liberty Mutual Insurance Co., 568 S.W.2d 695 (Tex. Civ. App.-Amarillo 1978, no writ). In this case the hearing officer had an opportunity to hear the claimant, observe his demeanor and having done so clearly found the testimony lacking in credibility. Although objective clinical evidence is not necessary for a finding of disability, the hearing officer noted that the medical evidence did not appear to support claimant's contention of

disability. We would note that the hearing officer's decision is supported in part by claimant's own admissions that he was able to work part-time as a security guard, took care of their four young children while his wife worked, and as noted by the carrier, even if claimant had disability during a portion of the period in question, that disability (inability to obtain and retain employment) was due to injuries he sustained in two non work-related car wrecks subsequent to (date of injury). The hearing officer's determinations are supported by sufficient evidence.

In sum, we find the hearing officer's decision was based on sufficient evidence and the challenged findings were not so weak or so against the great weight and preponderance of the evidence as to be manifestly erroneous or unjust to warrant our disturbing the decision. INA of Texas v. Howeth, 755 S.W.2d 534 (Tex. App.-Houston [1st Dist.] 1988, no writ); In re King's Estate, 244 S.W.2d 660 (Tex. 1951). We affirm the hearing officer's decision.

Thomas A. Knapp
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Philip F. O'Neill
Appeals Judge