APPEAL NO. 93818

On June 30, 1993, a contested case hearing was held in (city), Texas, with the record being closed on August 25, 1993. (hearing officer) presided as the hearing officer. The hearing was held under the provisions of 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*.). The issue at the hearing was whether the appellant (claimant) had disability from January 19, 1993, to the present. The hearing officer determined that the claimant did not have disability at any time from January 19, 1993, to the date the hearing was closed on August 25, 1993. The claimant disagrees with the hearing officer's decision. The respondent, a self-insured political subdivision of this State (employer), responds that the decision is supported by the evidence and requests affirmance.

DECISION

The decision of the hearing officer is affirmed.

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. Section 408.101 provides that an employee is entitled to temporary income benefits if the employee has a disability and has not attained maximum medical improvement.

There was no dispute as to the claimant having sustained an injury in the course and scope of his employment on (date of injury). The claimant testifed that on that day he was moving tree limbs and logs at work when he felt a sharp pain in his back and felt something "shift" in his back. The claimant said that (Dr. B) took him off work for one week, he returned to work the next week, and then Dr. B took him off work for another week. The claimant said he then returned to work and was promoted to a truck driver and worked until about June 4, 1992, when he tested positive for marijuana in a drug test and was terminated. On or about July 8, 1992, the claimant was rehired by the employer as a truck driver and he worked until about November 16, 1992, when he voluntarily resigned. At the time of his resignation, the employer had requested the claimant to take another drug test. The claimant said he resigned because "my back was hurting and I didn't want to take another drug screen." The claimant said that riding in the truck aggravated his back injury. The claimant testified that prior to resigning he had planned to quit working for the employer in the summer of 1993 because he was tired of working for the employer and wanted to try different employment.

The claimant acknowledged that after he resigned he applied for unemployment compensation benefits in November 1992 and held himself out as being ready, willing and able to work, however, benefits were denied because he had voluntarily resigned from the employer. The claimant said that in December 1992 he worked with (DJ) for about two weeks doing some carpeting and sheetrocking. The claimant said he cut carpet, hammered tack strips, and lifted sheetrock with the help of DJ. The claimant testified that it was difficult for him to do the carpeting and sheetrocking because the bending and stooping involved in that type of work caused him pain. The claimant further testified that

sometime in December 1992 he wanted to start up a construction business with DJ for home repair and carpentry work so he had business cards printed up and ran an advertisement in a newspaper once a week for four weeks during January 1993. He said the advertisement resulted in no calls. Copies of the business card and advertisements were in evidence and indicate that the claimant and DJ advertised to do all types of home repair, remodeling, roofing, painting, fence building, and concrete work.

The claimant also said that on January 19, 1993, he saw (Dr. G) and that Dr. G advised him "I did not need to be working with this type of injury that I had sustained." The claimant said he reapplied for unemployment benefits in February 1993 but didn't receive any because he was under a doctor's care. In March 1993, the claimant said he and DJ got one home repair job, but that the extent of his own work was to price labor and materials and go to the store for materials while DJ did the actual work. The claimant denied doing any roofing work since he resigned in November 1992. The claimant said that Dr. G refused to give him a work release because Dr. G was concerned that he would "injure myself worse than I am." The claimant further testified that he has not been paid any kind of "wages" for doing any kind of work since January 19, 1993. The claimant said that for the last six or seven months he has tended to lose his balance when he stands for a long period of time and has used a cane for about the last month.

DJ testified that in June 1992, when the claimant was terminated from the employer for about a month, the claimant helped him roof one house and that the claimant complained of back pain. In regard to the carpeting and sheetrocking in December 1992, DJ said that the claimant put down some carpet and drove a few "floor spikes" and that the claimant may have helped with a few pieces of sheetrock. Concerning the home repair job in March 1993, DJ said that he did all the work on that job and that the claimant only picked up material for the job but did not load the material because the seller's employees did the loading. The owner of the home that was worked on said in a written statement that while he saw DJ work on the house, he did not see the claimant do any work other than go to pick up materials. DJ said he paid the claimant for time spent in picking up the materials. DJ said he took the business cards when the claimant said he could not work.

In written statements, the claimant's wife and several of the claimant's friends stated that the claimant has complained of back pain since his (month year) injury and that he is unable to work.

(GP), who works for the employer, testified that about two weeks after the claimant resigned in November 1992, he saw the claimant on top of a roof bending down using a pitchfork to scrape off old roofing material. He said the location of the job was on (City A) and that DJ was working with the claimant. GP did not mention a street address or the name of the owner of the house. GP further testified that at the time he saw the claimant on the roof he talked to the claimant and the claimant told him he "had to make a living somehow." GP further testified that when the claimant resigned the claimant told him that he thought the employer was picking on him by requesting another drug test and that he "wasn't going to take one; that he was just going to resign." The claimant denied doing any

roofing work after he resigned and DJ said he didn't remember doing any roofing job on Street. In a sworn statement submitted into evidence by the claimant, (MP) said he resides at Street in City A and that the claimant never roofed his house. MP added that it had been several years since his house was roofed.

The claimant's supervisor, (LC), testified that when the claimant was rehired in July 1992, the claimant said he needed to get out of the truck he drove and walk around every few hours. However, LC said that the claimant was able to do the driving job without problems and that as far as he could tell the claimant was physically able to do everything that he was asked to do. (MM), the employer's manager, testifed that the claimant refused to take the drug test in November 1992 and resigned from employment.

Dr. B's medical reports were not in evidence. In a report dated November 10, 1992, (Dr. M) indicated that he saw the claimant on October 29, 1992, for complaints of pain in the lower back, hips, and legs. Dr. M diagnosed facet syndrome, radiculitis, cervical myofascitis, and "burning sensation." Dr. M did not indicate whether the claimant was able to work. He referred the claimant to Dr. G whom the claimant first saw on January 19, 1993.

On January 27, 1993, the claimant underwent a myelogram which showed spondylolisthesis at L5-S1. A CAT scan of the lumbar spine done on the same day also revealed spondylolisthesis at L5-S1 with no evidence of a herniated disc or spinal stenosis. In a letter dated February 22, 1993, Dr. G diagnosed the claimant as having an "unstable lumbar spine with spondylosis of L5 with Grade 1 spondylolisthesis of L5-S1 and sciatica in S1 distribution." Dr. G stated that in his opinion, based on reasonable medical probability, "[claimant] is disabled from his employment because of the above-mentioned medical conditions. This disability has been present since at least January 19, 1993 and continues indefinitely." On April 1, 1993, Dr. G reported that the claimant was about the same as he was on his initial visit, and on May 11, 1993, Dr. G wrote that the claimant was having muscle spasms in his left buttocks, hip, and upper leg and recommended that the claimant exercise and wear a corset. On June 17, 1993, Dr. G noted that the claimant was having back pain and muscle spasms and recommended exercise and physical therapy. Records from a physical therapy clinic indicate that from May 19, 1993 to at least July 17, 1993, the claimant had physical therapy sessions three times a week.

At the request of the employer, claimant was examined by (Dr. S) on March 23, 1993. Dr. S reported that the claimant's chief complaint was lower back pain with radiation to the knee. Dr. S said that examination of the back revealed no clinical abnormalities, deviation of the spine, or structural abnormalities, but that x-rays revealed a Grade 1 spondylolisthesis of L5-S1. Dr. S opined that the claimant had two options: 1) strengthen his back with an aggressive exercise program, use a corset, and modify his activities because he, Dr. S, was certain that if the claimant did heavy lifting, bending or stooping the claimant would have some pain; or 2) surgical intervention consisting of an L5-S1 fusion. Dr. S noted that if the claimant chose surgery "he would continue to be disabled from the work force for at least a period of one year."

The claimant requests that we reverse the following findings of fact and conclusions of law:

FINDINGS OF FACT

No. 4. Any lost time from work by [claimant] from January 19, 1993, through the date this Benefit Contested Case Hearing was closed on August 25, 1993, was the result of something other than the injury sustained while [claimant] was working for the [employer].

No. 6. The inability of [claimant] to obtain and retain employment at wages equivalent to the preinjury wages from January 19, 1993, through the date this Benefit Contested Case Hearing was closed on August 25, 1993, was the result of something other than the injury sustained while [claimant] was working for the [employer].

CONCLUSION OF LAW

No. 2. From January 19, 1993, through the date this Benefit Contested Case Hearing was closed on August 25, 1993, claimant did not have disability.

In requesting reversal of the foregoing findings and conclusion the claimant requests that we "impeach" the testimony of GP. This we decline to do inasmuch as 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). Contrary to the claimant's recitation of GP's testimony, the record reflects that GP never said that he saw the claimant working at a house at Street. Rather, he said he saw the claimant working on a house on 17th Street. Whether the house number was 401 or some other number is not disclosed by GP's testimony. Thus, it can not be shown from the record that MP's written statement that the claimant did not roof his house at Street in any way contradicts the testimony of GP. If there was a conflict in the evidence on this matter, such conflict would be for the hearing officer to resolve. McGalliard v. Kuhlmann, 722 S.W.2d 694 (Tex. 1987).

In deciding an issue of disability, the hearing officer may consider medical evidence as well as lay testimony. *See* Texas Workers' Compensation Commission Appeal No. 92209, decided July 13, 1992. However, the testimony of the claimant, as an interested witness, does no more than raise a fact issue for the hearing officer. Highlands Insurance Company v. Baugh, 605 S.W.2d 314 (Tex. Civ. App.-Eastland 1980, no writ). As previously noted, the hearing officer judges the weight and credibility of the evidence. The hearing officer stated in his decision that he gave limited weight and credibility to the claimant's testimony. In addition, the opinion evidence of expert medical witnesses is but evidentiary and is never binding on the trier of fact. Hood v. Texas Indemnity Insurance Company, 209

S.W.2d 345 (Tex. 1948). While Dr. G opined that the claimant is "disabled from his employment," there is evidence from which the hearing officer could reasonably infer, notwithstanding some evidence to the contrary, that the claimant was able to perform his truck driving job with the employer; that he resigned rather than take a second drug test; that he held himself out as being ready, willing, and able to work after his resignation; that he performed demanding physical work in roofing a house after his resignation; that he engaged in work-related physical activities in carpeting and sheetrocking after his resignation; and that he engaged in paying work activities involving his construction business after January 19, 1993. Having reviewed all the evidence of record, both in support of and contrary to the disputed findings of fact and conclusion of law, we conclude that the disputed findings and conclusion are sufficiently supported by the evidence and are not so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust. In re King's Estate, 150 Tex. 662, 224 S.W.2d 660 (1951).

The claimant's reliance on Najera v. Great Atlantic & Pacific Tea Co., 207 S.W.2d 365 (Tex. 1948) is misplaced because that case dealt with the standard of review employed by the Supreme Court of Texas in reviewing a holding of the Court of Civil Appeals that the district court had erred in failing to direct a verdict for the defendant where the case had been submitted to a jury which answered special issues in favor of the plaintiff. Under those circumstances, the court held that the evidence must be viewed most favorably to the plaintiff's version of events, because unless the evidence was of such a character that there was no room for reasonable minds to differ as to the conclusions to be drawn from it, the district court would not have been warranted in peremptorily directing a verdict. In the instant case, we are not concerned with the propriety of a directed verdict inasmuch as such a procedure is not involved in this case. Instead we have considered all of the evidence, both in support of and contrary to the disputed findings to determine whether the findings are against the great weight and preponderance of the evidence, and have determined that they are not. In re King's Estate, *supra*.

Claimant also directs our attention to the case of Shelton v. Standard Insurance Company, 389 S.W.2d 290 (Tex. 1965) for the proposition that the "Workmen's Compensation Act must be given a liberal construction to carry out its evident purpose." The doctrine or rule of liberal construction is discussed in Jackson v. U.S. Fidelity and Guaranty Co., 689 S.W.2d 408 (Tex. 1985). In Jackson, the claimant urged that the trial court had violated the rule of liberal construction in favor of the claimant. In responding to the claimant's argument, the Supreme Court of Texas stated, "[t]his case, however, involves a determination of the facts, rather than the law." The court went on to state "[t]herefore, the act itself offers nothing to resolve this case, and the rule of liberal construction certainly does not authorize liberally construing ambiguous fact findings in favor of the claimant." In the instant case, interpretation of provisions of the 1989 Act is not the issue. Rather, the case involved a determination of the facts from conflicting evidence, which does not involve the doctrine of liberal construction. *See* Texas Workers' Compensation Commission Appeal No. 93057, decided February 25, 1993, wherein we stated "[w]e do not believe the weight of authority extends "liberal interpretation" to questions of fact."

The decision of the hearing officer is affirmed.

Robert W. Potts
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Philip F. O'Neill
Appeals Judge