APPEAL NO. 93953

This appeal is brought pursuant to 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*.). A contested case hearing was held on September 9, 1993, in (city), Texas, with (hearing officer) presiding as hearing officer. The sole issue at the hearing was whether the respondent (claimant) "continues with disability resulting from injuries sustained on (date of injury)." The hearing officer determined that the appellant (carrier) had the burden of proof on this issue and that the claimant did have continuing disability, with the exception of one day, from January 16, 1993, through the date of the hearing. Carrier appeals these determinations and certain supporting findings of fact.

For purposes of this appeal and the resolution of the issue of continuing disability, the parties agreed that the claimant sustained a compensable injury on (date of injury), and that the date of maximum medical improvement (MMI) and its possible effect on the payment of benefits under the 1989 Act was not presently an issue for resolution. For this reason, the hearing officer specifically declined to determine for what period temporary income benefits (TIBS) are to be paid.

DECISION

We affirm the decision of the hearing officer.

The claimant worked as a ramp agent (baggage handler) for the airline employer at an airport location. His duties during a typical eight hour shift involved lifting and moving up to 500 pieces of baggage or freight of varying sizes up to approximately 70 pounds in weight and placing them on various conveyances. He stated that on (date of injury), he hurt his back lifting a large piece of luggage. The next day was his day off. On his return to work on January 16, 1993, he left early because of his pain. He has not returned to work for the employer except for one day (April 5, 1993).

The claimant first sought medical attention on January 16, 1993, at a local clinic where he was diagnosed as having acute back sprain and myofasciitis and was taken off work pending further evaluation. At the carrier's suggestion he next saw (Dr. M) who, after reviewing x-rays of the lumbar spine, diagnosed "postural abnormality of [claimant's] back including scoliosis and lordosis and . . . a sprain superimposed upon this. There is no evidence of nerve root compression and I do not feel that he is seriously injured." Dr. M referred the claimant to a rehabilitation and conditioning program, and, in a letter of March 24, 1993, to the carrier, anticipated that the claimant will be able to return to his former occupation "without residual disability." According to a Report of Medical Evaluation (TWCC-69) introduced at the hearing by the carrier, Dr. M certified that the claimant reached MMI on March 19, 1993, with a zero percent impairment rating.[1] The report referenced in this TWCC-69 was not attached or otherwise identified, but the TWCC-69 bore the

[1]As noted above, the effect of this TWCC-69 on claimant's eligibility for benefits under the 1989 Act was not an issue at the hearing.

statement "can return to work without residual disability."

The claimant next saw (Dr. F), an orthopedic surgeon, on March 23, 1993, again at the suggestion of the carrier. Dr. F's examination showed full range of motion with tenderness in the soft tissue muscles of the low back. He believed the claimant had a soft tissue injury consistent with a low back strain and sprain and was not yet able to return to his "regular tasks." He found no surgical lesion. Dr. F also referred the claimant to physical therapy where the claimant complained of increased pain and decreased range of motion. On March 31, 1993, the claimant again saw Dr. F who reported "no objective ongoing neuromuscular dysfunction." Dr. F considered the claimant's complaint to be an "unverifiable soft tissue injury." He again found no surgical lesion and recommended his return to work on April 5, 1993. The claimant returned to work, but only for a day and a half because of his continuing pain.

Not satisfied with Dr. F, the claimant on April 9, 1993, next saw (Dr. B), a chiropractor, who, according to the claimant, was his first choice of treating doctors. Dr. B took claimant off work for an indefinite time. By letter of May 24, 1993, to the employer, Dr. B stated that claimant had "herniation" at L5-S1 and advised that because his duties as a ramp agent would intensify his pain and aggravate his condition, he should be moved to a different department.

Apparently not convinced that the claimant had disability and suspicious that the claimant was running a car repair business, the carrier undertook video surveillance of the claimant from June 11 to June 15, 1993. Approximately 18 minutes of a more than two hour video tape of the claimant's activities on these days was admitted into evidence at the hearing. This tape shows the claimant picking up various auto parts, getting into and out of vehicles without seeming difficulty, giving repair estimates to a customer and generally running his business. In a memorandum of a phone conversation with the claimant on June 9, 1993, the claimant's supervisor, (JM), reported that the claimant expressed an interest in returning to work and talked of lifting a lawn mower and going jet-skiing. In the background JM heard what he inferred was sanding work in an auto body repair shop. JM told the claimant that he could not come to work before he was certified at MMI. In a subsequent phone conversation, JM reported that the claimant mentioned to him that he was in the car repair business, but was making "little money." The claimant sought to be transferred to a different department with the employer because of his back condition. JM again pointed out that nothing could be done until he got a disability rating.

On August 20, 1993, the claimant was seen by (Dr. W) who reviewed the claimant's medical history and an MRI, apparently done before the claimant sought treatment with Dr. B and nowhere else mentioned in medical reports. Dr. W confirmed a diagnosis of herniated disc and considers the claimant a candidate for surgery. He further points out that the claimant has spasms and low back pain, weakness, and an antalgic limp. He further stated that the claimant had not reached MMI and did not release him back to work.

At the hearing, the claimant testified, and such testimony was not refuted, that

beginning before his injury he owned and operated a car repair business at which he made no money and which was no longer in operation. He did not know what his gross receipts were for the first half of 1993. He denied that he ever pushed a stalled truck while supposedly unable to work because of disability, but said he was only steering it and admitted that he went jet-skiing once in the summer of 1993. He asserted that because of his injury he is not able to return to work as a ramp agent. He insisted that he never made any money from his car repair business and was shutting it down when, unbeknownst to him, he was being surreptitiously videotaped. He has made no effort to find other work since he stopped working for employer and has been trying to return to work since May 24, 1993.

JM testified that he first found out about the claimant's herniated disc on May 24, 1993. To his knowledge, there were no ramp agents (which he considered synonymous with baggage handlers) working with herniated discs. He said there was a 70 pound lift requirement for ramp agents. In his opinion, from what he saw on the video,[2] the claimant can perform the duties of a ramp agent. He advised the claimant there were no light duties available for a ramp agent and claimant would need a TWCC-69 establishing MMI and impairment rating (IR) satisfactory to the carrier before he could return to work.

(PE), the private investigator responsible for the video, testified that in his (undercover) conversations with the claimant, the claimant admitted to him that his car repair business was good and that he was in the process of moving to a new location. He saw the claimant do what, in his opinion, was hard work, loading and unloading auto parts and pushing a truck.

Section 401.011(16) of the 1989 Act defines disability as " the inability because of a compensable injury to obtain and retain employment at wages equivalent to the pre-injury wage."

At the hearing, the carrier took the position that whatever disability the claimant had ended on June 11, 1993, the first day of the videotaping of the claimant. Carrier also confirmed that it was paying TIBS through the date of the hearing. Over the objection of the carrier, renewed on appeal, the hearing officer declared that, because the disputed issue as framed presupposed the claimant had or has disability, "the burden of proof was on the Carrier to show Claimant's disability had ended." Consequently, the hearing officer required the carrier to proceed first with its evidence. However, the hearing officer then stated in his decision and order that the question of who had the burden of proof was "not significant because Claimant by substantially more than the preponderance of the evidence has established . . . that he had disability . . . ." In support of its position that the claimant had the burden of proof in this case to establish the continuation of disability, the carrier cites Dueberry v. Texas Pacific Indemnity Company, 478 S.W.2d 606, 609 (Tex. Civ. App.-Ft. Worth 1972, writ ref'd n.r.e.).

[2]JM testified that he saw on the video the claimant carrying a 10-15 gallon water bucket and pouring it into a car radiator. This was not on the edited portion of the video offered and admitted into evidence.

It is axiomatic that in a workers' compensation case a claimant has the burden of proving by a preponderance of the evidence that he or she sustained disability as a result of a compensable injury. *See* Garcia v. Aetna Casualty and Surety Company, 542, S.W.2d 477 (Tex. Civ. App.-Tyler 1976, no writ); Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ); Texas Workers' Compensation Commission Appeal No. 93142, decided April 9, 1993. Clearly, the claimant has the burden of proving when a period of disability begins. Since disability is not necessarily a continuing status, a claimant may have intermittent or recurring periods of disability. In such a case, the claimant has the burden of proving when each period or recurring disability is reestablished. Texas Workers' Compensation Commission Appeal No. 91122, decided February 6, 1992; Texas Workers' Compensation Commission Appeal No. 92158, decided June 5, 1992; Texas Workers' Compensation Commission Appeal No. 92641, decided January 4, 1993. The Appeals Panel has also held that when an employee is no longer employed by the employer, the employee has the burden to show disability continues after the termination of employment. Texas Workers' Compensation Commission Appeal No. 92030, decided March 12, 1993. Although, neither a conditional nor unconditional work release in itself ends disability, an employee under a conditional work release does not have the burden of proving inability to work. Texas Workers' Compensation Commission Appeal No. 93449, decided July 21, 1993. However, "[w]here the evidence establishes an unconditional medical release to return to full duty status of the employee, the employee has the burden to show that disability is continuing." Texas Workers' Compensation Commission Appeal No.91045, decided November 21, 1991.

Consistently running through these decisions, explicitly or implicitly, *see* Texas Workers' Compensation Commission Appeal No. 92146, decided May 27, 1992, is the requirement that the claimant establish by a preponderance of the evidence the precise duration of the claimed disability from inception to termination. *See also* Dueberry, *supra*. The carrier has no duty to affirmatively prove (as opposed to coming forward with evidence of a changed condition which may give rise to an issue) that a claimant is not entitled to benefits. To defeat a claim for benefits, the carrier can either rely on the claimant's inability to prove his or her case, or offer evidence that, if believed, will cause the fact finder to determine that the claimant did not establish his or her case by a preponderance of the evidence.

We are thus compelled to agree with the carrier in this case that the hearing officer improperly placed on it the burden of proving when the claimant's disability stopped. However, we consider such error harmless because it produced only the procedural anomaly of having the carrier open and close on the issue of disability. The hearing officer stated in his decision, and we find ample support in the record for this determination, that whoever bore the ultimate burden of proof, the claimant, by a preponderance of the evidence established that his disability continued through the date of the hearing. This assessment of the evidence rendered harmless the hearing officer's error in allocating the burden of proof.

The carrier also argues on appeal that the evidence was insufficient to support the hearing officer's finding of fact that the claimant was unable to obtain and retain employment at wages equivalent to his pre-injury wage due to his injury through the date of the hearing (with one exception not here relevant) and his finding of fact that the claimant's job as ramp agent was "far, far more physically demanding than his work while running his auto repair business." The existence of disability in the sense of ability to obtain and retain employment is a question of fact to be determined from all the available evidence including medical evidence and that given by the claimant. Texas Workers' Compensation Commission Appeal No. 92147, decided May 5, 1992; Texas Workers' Compensation Commission Appeal No. 91024, decided October 23, 1991. A finding of disability may be based on the claimant's testimony alone. Texas Workers' Compensation Appeal No. 93858, decided November 9, 1993.

The hearing officer, as the finder of fact, is the sole judge of the relevance and materiality of the evidence and of its weight and credibility. Section 410.165. The hearing officer resolves conflicts and inconsistencies in the medical evidence and judges the weight to be given to expert medical testimony. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). To this end, the hearing officer as fact finder may believe all, part or none of the testimony of any witness. The testimony of a claimant as an interested party raises only an issue of fact for the hearing officer to resolve. Campos, *supra*; Burelsmith v. Liberty Mutual Insurance Company, 568 S.W.2d 695 (Tex. Civ. App.-Amarillo 1978, 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 we will 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 Company, 715 S.W.2d 629 (Tex. 1986).

The carrier in this case relied heavily on the videotape of the claimant's activity in running a car repair shop to show that he was no longer disabled. The hearing officer viewed that tape and the nature of the activities being performed by the claimant. He concluded that these activities were significantly less physically demanding than the duties of a ramp agent which were variously described by JM and the claimant as involving the picking up, carrying and putting in place of up to 500 pieces of baggage and cargo weighing up to 70 pounds. In addition, the hearing officer had evidence from Dr. W that the claimant had a herniated disc, a diagnosis based on a MRI, but not mentioned by any other physician. While this record could support contrary inferences, we cannot say that the determinations of the hearing officer are subject to reversal because they are without sufficient evidence or that these determinations are contrary to the great weight of the evidence.

The decision of the hearing officer is affirmed.

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Philip F. O'Neill
Appeals Judge

CONCUR:

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Stark O. Sanders, Jr.
Chief Appeals Judge

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Joe Sebesta
Appeals Judge