APPEAL NO. 94133

This appeal is brought pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on January 6, 1994, in (city), Texas, with (hearing officer presiding as hearing officer. The issues at the hearing were whether the appellant (claimant), as a result of an (date of injury), compensable injury suffered disability from January 29 to February 4, 1993; from February 22 to March 14, 1993; and from April 19, 1993, to the date of the hearing and whether the claimant's current medical condition is a result of his compensable injury of (date of injury). The hearing officer determined that the claimant suffered disability only for the period from October 1, 1993, to the date of the hearing and not for any other period claimed and that the claimant's current medical condition is a result of his compensable injury of (date of injury). The claimant appeals only that part of the decision denying his disability for all the periods claimed asserting primarily that he could have better supported his claim of disability with current medical evidence if he had the money to pay for this care. He also comments on the evidence introduced at the hearing and seeks to have the Appeals Panel consider new evidence not made part of the record of the contested case hearing. The respondent (carrier) replies that the decision is supported by the evidence and that the claimant failed to carry his burden of proving disability for all the periods claimed. Neither party appeals the determination of the hearing officer that the claimant's current medical condition causing his back pain is a result of his compensable injury of (date of injury), or that he suffered disability from October 1, 1993, through January 6, 1994, the date of the hearing.

DECISION

Finding the evidence sufficient to support the decision and order of the hearing officer, we affirm.

It was not disputed that the claimant suffered a back injury in the course and scope of his employment in a motor vehicle accident on (date of injury). At the time of the accident, the claimant worked as an insurance agent for (employer). His duties involved travel to potential clients both to sell insurance and collect premiums.

The claimant was first treated for injuries connected with the motor vehicle accident by (Dr. G) on August 12, 1992. He complained of generalized back and leg pain. X-rays taken on October 10, 1992, revealed no fractures. An MRI in November 1992 disclosed some minimal degenerative spurring changes of the lumbar spine as well as a "small central herniated nucleous polpus (sic)" at L4-L5. On December 12, 1992, Dr. G stated that the claimant "could return to work with restrictions of no lifting nor bending and should be able to get up and move around as needed."

The claimant continued working at a reduced level and for reduced pay with his employer until approximately December 31, 1992, when, according to his testimony, he was asked to resign. During the last three months of 1992, the claimant testified he also worked for a used car dealership to supplement his decreased income. Although no disability was claimed for any time in 1992, he said he was terminated from his salesman position because

he had difficulty getting to work on time due to the problems he had getting out of bed and his inability to straighten his back. In addition, he had to spend time at physical therapy prescribed by Dr. G. In mid-January 1993 he was employed by a convenience store primarily as a cashier. According to his testimony, he also did some stocking of shelves when not at the cash register. He did not report his back pain to this employer because, he stated, he needed the income. He stated that he worked at the convenience store for approximately three weeks until the long hours of standing and stocking activities became impossible for him to do. He said that the convenience store refused to return him to work until he received a work release from a doctor. On February 10, 1993, he returned to Dr. G complaining of lumbo-sacral pain. Dr. G excused the claimant from work from February 5 through February 21, 1993, and released him to return to work without limitations on February 22, 1993. The claimant then worked as a salesman at a new car dealership from March 18th through approximately April 15, 1993. The claimant testified that he was unable to continue working at the new car dealership because his back pain precluded him from showing up for work on some occasions and from accompanying customers to the sales yard. He would sometimes, because of his pain, let other salesman deal with the customers while he did sales closings.

The claimant testified that he had no other work release from Dr. G because he could not afford a return visit until August 12, 1993, after the carrier reinstated medical benefits. By letter of October 1, 1993, Dr. G stated that in his opinion the claimant had not reached maximum medical improvement (MMI) "due to the time he was without medical help . . . . It is my opinion that he will need to be off work for a period of time . . . ." In a letter of October 19, 1993, Dr. G, further stated that the claimant had back problems when he went to work at [the convenience store] and has not improved." On December 22, 1993, (Dr. K) examined the claimant at the carrier's request. Dr. K believed that the claimant had reached MMI and stated that he found no reason why he could not continue working as an insurance agent.

The carrier's position at the hearing on the disability issue was that the claimant "basically quit going to work" after December 1992. According to the carrier that is why he lost his jobs at the convenience store and new car dealership.

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." The claimant in a workers' compensation case has the burden to prove by a preponderance of the evidence that he sustained disability as a result of a compensable injury in the course and scope of his employment. Garcia v. Aetna Casualty and Surety Company, 542 S.W.2d 477 (Tex. Civ. App.-Tyler 1976, no writ); Texas Workers' Compensation Commission Appeal No. 93951, decided December 7, 1993. Whether disability exists as a result of a compensable injury is a question of fact. Texas Workers' Compensation Commission Appeal No. 93854, decided November 9, 1993. The testimony of a claimant alone, if found credible by the hearing officer, may be sufficient to establish disability. Texas Workers' Compensation Commission Appeal No. 93901, decided November 19, 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 testimony of a claimant as an interested party raises only an issue of fact for the hearing officer to resolve. Burelsmith v. Liberty Mutual Insurance Company, 568 S.W.2d 695 (Tex. Civ. App.-Amarillo 1978, no writ). We will reverse a decision of the hearing officer 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).

In the case under appeal, the hearing officer was unwilling to find that the claimant met his burden of proving disability before October 1, 1993, as claimed, based solely on the testimony of the claimant without additional supporting medical or other evidence that would enhance the credibility of the claimant's account of why he could no longer obtain and retain employment at wages equivalent to his preinjury wage. The evidence introduced by the claimant was ambiguous and inconsistent. The claimant contended both at the hearing and on appeal, that had the carrier paid for more visits to Dr. G, he could have provided medical evidence of disability. However, when he went to Dr. G in February 1993 for further medical evaluation, Dr. G gave him only a temporary, not an open ended or indefinite excuse from work, which expired on February 22, 1993. As the hearing officer pointed out, there was no evidence, other than from the claimant, as to why he terminated his employment with the new car dealership. He stated that he was unable to accompany potential customers to the car lot, but, according to his own testimony, he was accommodated by other salesman and was able, based on his past experience, to do the title work for the dealership. (No evidence was introduced comparing pre- and post-injury wages.) The hearing officer also noted that the claimant failed to provide documentation from either the convenience store or new car dealership that would show the conditions of his employment or the terms of his departure. In his appeal, the claimant references "verbal knowledge" from two insurance sources about his ability to work, particularly for the convenience store. There is no indication that the claimant was unaware of this information at the time of the hearing. He took no steps to secure this evidence either in written form or through live testimony at the hearing. Our review on appeal is limited to the record below. Section 410.203(a). We will not consider new evidence for the first time on appeal absent some indication that it was not available at the hearing. Texas Workers' Compensation Commission Appeal No. 93970, decided December 9, 1993. Having reviewed the hearing record in this case we believe the evidence was sufficient to support the hearing officer's determination that the claimant did not establish disability arising out the (date of injury), injury before October 1, 1993, and that the decision was not so against the great weight and preponderance of the evidence as to be clearly wrong and unjust.

Finally, we note the claimant in his otherwise timely supplemental request for review maintains that Dr. K's report of December 22, 1993, assigning him a 10% impairment rating (IR) is contrary to the decision of the hearing officer on the issue of disability and asks how he could have disability over one year after the injury, but not between the date of the injury and October 1, 1993. Disability, as defined above, is the inability to obtain and retain employment at equivalent preinjury wages. Disability need not be a continuing status from the date of the injury, but can occur any time after the injury, provided the inability to obtain and retain employment at the pre-injury wage is caused by the injury. A claimant can have

succeeding periods of disability interrupted by nondisability. *See generally* Texas Workers' Compensation Commission Appeal No. 91053, decided December 5, 1991. However, a claimant is entitled to temporary income benefits if he has disability and has not reached MMI. An IR is defined by the 1989 Act as the percentage of permanent impairment of the whole body resulting from a compensable injury, Section 401.011(24), and is dependent on the claimant having reached maximum medical improvement. While an IR may be reflective of why a person had disability, an IR in itself does not establish disability.

The decision and order of the hearing officer are affirmed.

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Alan C. Ernst
Appeals Judge

CONCUR:

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Stark O. Sanders, Jr.
Chief Appeals Judge

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Robert W. Potts
Appeals Judge