APPEAL NO. 990116

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on November 18, 1998. The issue before the hearing officer involved whether the appellant, who is the claimant, had disability as a result of her compensable injury of _____.

The hearing officer held that the claimant had disability, but only for the periods from March 28 through April 6, 1998, and from April 6 until April 28, 1998.

The claimant appeals and argues essentially that she has had disability after the date found by the hearing officer. She argues that she was terminated from her employment because of diminished performance brought about by her compensable injury. The respondent (carrier) responds that the decision is correct, although it files a limited disagreement with the decision, pointing out that there was no evidence to support disability for the period between April 6 and April 15, 1998, in that the claimant returned to work.

DECISION

Affirmed, with a correction of a typographical error in the conclusions of law with respect to the disability periods.

The hearing officer's decision contains an excellent and full description of the facts, and is incorporated herein by reference; our summary will be succinct by comparison. The claimant worked as an assembler for (employer). As part of her job as of _____, she had to direct wires into a small hole to test them. She said that on the date in question she felt a pop in her right wrist while working and was subsequently diagnosed with a ganglion. Claimant missed one day of work and returned on July 28, 1997, and there was a considerable gap in medical treatment (October 1997 through early March 1998) while she continued to work, but on March 23, 1998, the claimant had her ganglion removed. She said she missed work from March 28th through April 6th, at which time she returned to work. Claimant said she returned to work too soon, and went off work again April 15th through the 28th. She returned to light duty after that date. Claimant disputed that this was actually light duty, although her specific duties as described by her were not the same and were generally different from her job prior to her surgery.

There was conflicting testimony about the reasons the claimant was terminated on July 2, 1998. Claimant contended that she was terminated in part for absences that related to her injury. The human resources director testified that sick leave or excused absences played no part in the decision, and noted that she had been counseled prior to her surgery about unexcused absences or leaving early. Claimant agreed that the last occasion of absence before her termination related to a family emergency. In any case, both the human resources director and claimant's overall supervisor testified that notations regarding poor performance were in the nature of a rating and not the basis for termination. Her supervisor indicated that had it not been for violation of the absence policy of the

employer, claimant would still be working, notwithstanding performance problems meeting production levels.

There are medical records and a psychological evaluation in late July 1998 which observe that there may be a strong psychological component to the claimant's complaints of pain and dysfunction for the time period after she was terminated. Claimant testified that she had only recently begun recommended work hardening therapy. The claimant changed doctors during the course of the claim because she felt that the doctor to whom she was referred for pain management, Dr. L, who was the doctor who referred her to the psychologist, was not treating the injury aggressively enough. Her treating doctor at the time of the hearing was Dr. H, who had taken her off work in September 1998 during the pendency of her therapy.

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 when the record contains evidence that would lend itself to different inferences. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). The trier of fact may believe all, part, or none of the testimony of any witness. Taylor v. Lewis, 553 S.W.2d 153, 161 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.). 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."

While the light-duty status of the claimant was a matter for the hearing officer to consider, and could indicate that an injured worker remains under the effects of his or her injury, the hearing officer is not compelled to find that a person working light duty but loses employment for other reasons is necessarily unemployed due to the effects of the preinjury wage. He may also consider the nature of the injury, the existence of other factors that may be affecting a return to unrestricted employment, and the credibility of the claimant. He could believe that she was working a job at the time of her termination that was within her restrictions and did not involve the prospect of further injury to her right hand. We are not prepared to say that his decision on disability was so against the great weight and preponderance of the evidence as to be manifestly unfair or unjust.

It does appear that the conclusion of law regarding the period of disability contains a typographical error. Within his decision, and in his findings of fact, the hearing officer noted that claimant was off work from the effects of her surgery from March 28 through April 6, 1998, and from April 15 through 28, 1998. This was consistent with the testimony from claimant as well as other evidence. The conclusion of law and the "decision" paragraph concerning the two "different" periods of disability, however, state that the second period of disability also began on April 6th. This appears to be a typographical error, and we correct

the conclusion of law and the decision clerically to read that the second period of disability ran "from April 15, 1998, until April 28, 1998."

The decision, as corrected, and order are affirmed along with this correction.

_____
Susan M. Kelley
Appeals Judge

CONCUR:

_____
Alan C. Ernst
Appeals Judge

_____
Tommy W. Lueders
Appeals Judge