APPEAL NO. 990183

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on January 11, 1999. Addressing the sole disputed issue, she (hearing officer) determined that the respondent (claimant) had disability as a result of a compensable injury of _____, from July 23, 1998, through the date of the CCH. The appellant (carrier) appeals this determination, arguing that it is against the great weight and preponderance of the evidence. The claimant replies that the decision is correct, supported by sufficient evidence, and should be affirmed.

DECISION

Affirmed.

The claimant worked as a freight checker and loader/unloader for a trucking company. He sustained a compensable right shoulder and arm injury on _____, from pulling on a truck door. He testified that he went to his family doctor at some undisclosed time thereafter, but did not report a work-related injury to his shoulder or right arm because he knew he would not be treated there for a workers' compensation injury and he did not want (even though he asserted he immediately reported the injury to his supervisor) to press the issue of a compensable injury with his employer. He said his family doctor prescribed muscle relaxers. He continued working full time for his preinjury wages, he said, as his condition worsened, until July 23, 1998, and has not worked since.

He next sought medical care for this injury from Dr. M, D.C., on July 28, 1998. Dr. M diagnosed cervical radiculitis and placed him "on disability." Dr. M referred the claimant to Dr. B who, on August 20, 1998, diagnosed a frozen right shoulder with brachial plexopathy and Charcot-Marie-Tooth disease.[1] Dr. B excused the claimant from work until November 3, 1998, when he issued a light-duty work release which included a 20-pound lifting restriction.

Although the fact of the claimant's termination loomed large at the CCH, very little evidence was presented about its circumstances. The claimant speculated he was terminated because the employer believed he "faked" his injury. The date of termination was not in evidence, nor did the carrier present any evidence about the reason for the termination. In any case, the claimant testified that on July 23, 1998, he stopped showing up for work. He further testified that he has not looked for work and did not take Dr. B's light-duty release to his employer. Instead, he said, he gave it to his union business agent to present it to the employer. He further testified that sometime in September or October 1998 he had to go to (state) for a union hearing on whether he could get his job back and that a second hearing with the union would be conducted in (city) two weeks after the CCH to further decide the question of his return to work. At one point in his testimony he said

[1]This degenerative muscle condition was never claimed as part of the compensable injury.

the employer had no light duty and at another point he said he would have returned to work with the employer, but for the termination. A video surveillance tape was also introduced into evidence from which it showed the claimant moving his possessions out of his apartment.

Mr. T, the claimant's supervisor, testified that the claimant did his regular job for his regular pay from _____ until July 23, 1998, and appeared to have no problems. He said he did not even know the claimant was asserting an injury until sometime in November 1998.

Dr. A examined the claimant on October 21, 1998, reviewed the claimant's records and later reviewed the videotape. He concluded in his testimony that he was "unable to state [claimant] is disabled based on the injury." He reached this conclusion, he said, because the claimant demonstrated in the videotape that he was able to perform everyday activities which was inconsistent with a diagnosis of frozen shoulder.

The hearing officer made the following pertinent findings of fact and conclusion of law:

FINDINGS OF FACT

4. Claimant sustained a compensable injury to his right shoulder/arm on _____.

5. Claimant has been unable to obtain or retain employment at wages equivalent to his preinjury wages from July 23, 1998, continuing through the date of this hearing, due to his compensable injury of _____.

CONCLUSION OF LAW

3. Claimant had disability from July 23, 1998, continuing through the date of this hearing.

In its appeal, the carrier asserts error in two evidentiary rulings of the hearing officer and generally challenges the existence of a compensable injury. The first evidentiary challenge is to three pages of documentary evidence, each of which is a short answer to a short question posed to Dr. B by the claimant's attorney. According to the claimant's attorney, she presented the questions to Dr. B on November 20, 1998, within a week of the benefit review conference (BRC), but Dr. B did not respond by fax until January 5, 1999. The attorney said she then faxed the answers to the carrier's attorney on January 6, 1999. The carrier objected to the admission of this evidence on the grounds that Dr. B had been the claimant's treating doctor for some time and that the claimant's attorney was dilatory in not seeking the information sooner to allow its exchange within 15 days of the BRC as provided by Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 142.13(c) (Rule 142.13(c)). The

hearing officer admitted this evidence, commenting that no continuance was requested by the carrier and seemingly because she believed the claimant had no control over when Dr. B would respond. We review evidentiary rulings by hearing officers under an abuse of discretion standard, that is, whether the hearing officer acted without reference to guiding principals or rules. Texas Workers' Compensation Commission Appeal No. 941414, decided December 6, 1994. We have further noted that even if evidence was erroneously admitted, the decision of the hearing officer is not subject to reversal unless the error was prejudicial, that is, outcome determinative. *See* Hernandez v. Hernandez, 611 S.W.2d 732 (Tex. Civ. App.-San Antonio 1981, no writ). In this case, the claimant's attorney did not represent that she made any efforts to obtain the information from Dr. B earlier than January 5, 1999, even though she knew the CCH was set for January 11, 1999. We assume from this lack of evidence that the attorney did nothing to secure a quicker response to what was a fairly simple request for information. With this unexplained inaction, we are unwilling to conclude that the hearing officer did not abuse her discretion in admitting the evidence. However, we cannot conclude that any such error was prejudicial. The first question simply asked Dr. B to state where in his records "there is proof of a frozen shoulder." Dr. B's answer identified the document by date, description and page. The second question asked if a frozen shoulder meant that the claimant was unable to move at all. Dr. B responded that most patients with a frozen shoulder "have moderate" range of motion. The third question asked what diagnoses were work related. In response, Dr. B reiterated the diagnoses contained in his other, timely exchanged reports. At most, this evidence seems simply cumulative and we cannot perceive prejudice to the carrier in its admission. We therefore find no merit in this point of error.

The second evidentiary ruling challenged by the carrier on appeal concerned Dr. A's telephone testimony at the hearing. The claimant objected to the testimony on the basis that Dr. A's report was already in evidence. We find no merit in this objection. The hearing officer resolved the objection by declaring that Dr. A would only be allowed to testify about matters not contained in his report and so cautioned him. When the hearing officer announced this decision, the carrier's attorney responded: "That's fine." Under these circumstances, we conclude that any error in this procedure was waived for lack of timely objection by the carrier.

As a final preliminary matter, we note that the carrier challenged at the hearing, and again on appeal, the existence of a compensable injury, including timely notice of the injury, even though the only issue presented to the hearing officer was disability. This was done on the theory that the claimant had no credibility. One may speculate that the effect of the carrier's acceptance of a compensable injury served to bolster credibility. In any case, we will not address in this decision matters not in issue at the CCH.

Disability is defined as the "inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wages." Section 401.011(16). The claimant has the burden of proving disability. Texas Workers' Compensation Commission Appeal No. 941566, decided January 4, 1995. Whether disability exists is a question of fact for the hearing officer to decide and can be proved by the testimony of the claimant alone if

found credible. Texas Workers' Compensation Commission Appeal No. 93560, decided August 19, 1993. A conditional or light-duty release is evidence that disability continues and a claimant under a light-duty release does not have the obligation to look for work or to show that work was not available. *See* Texas Workers' Compensation Commission Appeal No. 970597, decided May 19, 1997. The claimant need only prove that the compensable injury is a cause of the disability. Texas Workers' Compensation Commission Appeal No. 960054, decided February 21, 1996. A carrier, however, who asserts that something other than the compensable injury is the sole cause of the disability has the burden of proof of the sole cause. Texas Workers' Compensation Commission Appeal No. 94844, decided August 15, 1994. We have also observed that termination from employment, with or without cause, does not in itself, as a matter of law, end disability, but is a proper consideration for the hearing officer in resolving the disability issue. *See* Texas Workers' Compensation Commission Appeal No. 980003, decided February 11, 1998, for an extensive discussion of the case law.

In the case we now consider, the claimant relies primarily on Dr. M's full-duty excuse and Dr. B's light-duty release effective November 3, 1998, as probative evidence of disability. The hearing officer stated that she found the claimant credible and determined that he had disability as claimed. In its appeal, the carrier provides a detailed review of the evidence and points to reasons in the record why it believes the claimant was not credible, particularly in his assertions of pain and what he could or could not do with his left arm. A fair characterization of the claimant's testimony is that it was evasive and full of "I don't remember" responses to important questions like "when were you terminated." The carrier also contends that the claimant was working and would continue to work if he had not been terminated. The hearing officer was the sole judge of the weight and credibility of the evidence. Section 410.165(a). As noted above, once the claimant received a light-duty release, he was under no obligation to seek employment consistent with that light-duty release. What is disturbing in this case is that the claimant appears to suggest that he could return to work, but did nothing but enter into a seemingly lengthy negotiation with his union about whether he could return to work, not because of his compensable injury, but because of the circumstances of his termination. However, we have no information about the circumstances of the termination or what was involved under the union labor agreement for his return to work. And even Dr. A in his report suggested that the claimant had work restrictions from his compensable injury. Dr. A's testimony also raised questions about his understanding of the concept of disability in the 1989 Act. We will reverse a factual determination of a hearing officer only if that determination is so against the great

weight and preponderance 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, 635 (Tex. 1986). Applying this standard of review to the record of this case, we decline to substitute our opinion of the credibility of the evidence for that of the hearing officer. Rather, we find the testimony of the claimant together with the duty excuses of Dr. M and Dr. B, deemed credible by the hearing officer, sufficient to support her finding of disability. For the foregoing reasons, we affirm the decision and order of the hearing officer.

_____
Alan C. Ernst
Appeals Judge

CONCUR IN THE RESULT:

_____
Gary L. Kilgore
Appeals Judge

CONCUR IN THE RESULT:

_____
Elaine M. Chaney
Appeals Judge