APPEAL NO. 990729

This appeal is considered in accordance with the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On March 4, 1999, a contested case hearing (CCH) was held. The issues disputed at the CCH were whether the appellant/cross- respondent, who is the claimant, had disability from an injury that was sustained on _____, and the amount of his average weekly wage (AWW).

The hearing officer held that claimant's AWW included a $30 per day payment that was called "per diem," and that he had disability from his compensable injury from June 23 through December 7, 1998, but not thereafter. Both parties have appealed the aspects of the decision that are not favorable, with the respondent/cross-appellant (carrier) appealing any finding of disability, and the claimant appealing the cessation of the disability period on December 7, 1998.

DECISION

Affirmed.

The hearing officer has done a good job of summarizing essential facts and we incorporate her statement of the evidence into this decision. Succinctly, claimant was employed as a welder by (employer). He was working on a scaffold on _____, when it collapsed and he fell, injuring various regions of his body. There was no indication that any surgery was required. Claimant did receive some psychological treatment and pain management therapy.

Almost no evidence was developed concerning the claimant's work status prior to an attempted return to light-duty work in June 1998. We can surmise from references in medical records that claimant may have been out of work until the first week in June 1998, when he was released back to light duty by his treating doctor, Dr. M. Notwithstanding the broad wording of the issue, the period of time prior to June 8, 1998, was apparently not in dispute.

The claimant said he returned to his welding job on June 8, 1998, and was required to climb and perform work which caused pain. Claimant maintained he was excited to return to work and wanted to do so, but was unable to continue working beyond June 18th or 19th. Mr. K, on behalf of the employer, testified that claimant was never required to do anything he could not do, and that the employer stated to him that he should only attempt what he felt comfortable doing, even if it was sitting in the shade on "fire watch." While a July 13, 1998, bona fide job offer is in evidence, there was no issue concerning an adjustment under Section 408.103(e).

The claimant changed his treating doctor from Dr. M (who had released him back to work) to Dr. T, who testified at the CCH. While the claimant was not directly responsive to many questions as to the reason for the change, he indicated that he understood from a

receptionist at Dr. M's office that she could no longer treat him after his release, so he sought the assistance of Dr. T, whom he had once before seen on referral from Dr. M. for pain management.

The emphasis in claimant's testimony was that he felt that he could not work until he could work again as a welder, and that he feared risking reinjury if he returned to work. He agreed that he had gone back to school for a limited time each week sometime in August or September 1998, and that he had been to a job fair seeking other employment two months prior to the CCH (although he made no other efforts to seek other employment).

Dr. T testified that a functional capacity evaluation (FCE) would not necessarily reflect the effect of medication or chronic pain on abilities to work over an eight-hour day. Dr. T said that claimant was unable to return to welding, which was a primary reason he considered him to be disabled.

On the dispute over AWW, which focused on a $30 per day amount called "per diem," both Mr. K and claimant agreed that he was paid $30 each day and did not have to turn in any accounting or receipts. Mr. K said that the business involved worksite pipe construction at various customer locations and the extra amount was paid to get the welders hired to travel. Mr. K said this amount, not subject to withholding, was paid to all workers in the same amount regardless of their actual expenses, except for permanent shop employees assigned exclusively to the home office. The claimant said he lived only seven miles form the job site where he worked.

An FCE performed April 28, 1998, concurred that claimant could not return to welding work, but that he did have some ability to work in the light-medium capacity. Dr. M wrote on June 23, 1998, that she felt there had been a lack of cooperation with recommended therapy from the carrier, and that claimant was motivated to return to work. A doctor for the carrier, Dr. S, examined the claimant on December 8, 1998. He found no significant remaining pathology requiring further work hardening or pain management. Dr. S also found temporomandibular joint pain (but no restricted range of motion in the jaw), spinal discomfort of a non-radicular nature, and minimal discomfort and range of motion deficits in the right shoulder. Correspondence from Dr. T in the fall of 1998 indicated his appeal of the carrier's denial of pain management therapy.

There were investigative reports and videotapes submitted showing the claimant going about various activities. Dr. T testified that he had seen the tape and they would not change his opinion about claimant's ability to work. Most of the tapes were made in July 1998, a period for which the hearing officer nevertheless agreed that claimant had disability. The December 15, 1998, video shows claimant moving around freely and bending deeply from the waist with no apparent pain or limitation.

The hearing officer is the sole judge of the relevance, 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). 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); American Motorists Insurance Co. v. Volentine, 867 S.W.2d 170 (Tex. App.-Beaumont 1993, no writ).

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." Whether one can return to one's previous job or occupation is not the primary determinant of entitlement to temporary income benefits. Texas Workers' Compensation Commission Appeal No. 92083, decided April 16, 1992. In any case, Mr. K indicated that claimant could have been accommodated if he sought to return to welding. We find the hearing officer's decision on the period of disability fully supported by the record. She took into account the claimant's attempt to return to work and his restricted abilities assessed by Dr. T and the FCE, but then believed that by the time of Dr. S's report, the continuing effects of the injury no longer accounted for his remaining off work. She could consider the claimant's demeanor at the CCH, as well as his concern that it was the prospect of reinjury, rather than necessarily the continuing effects of his _____ injury, that caused him to fail to obtain and retain work. The observations of claimant's activities on videotape could persuade her that he was not unable to obtain or retain employment due to his injury. We cannot agree with the claimant that the hearing officer has imposed a new standard of "employability" on claimant.

Concerning the "per diem," it was plain that the employer paid this amount to most of its welders, regardless of the expense of, or even the need for, food, lodging, and travel. As stated in Texas Workers' Compensation Commission Appeal No. 941044, decided September 16, 1994, it is the substance of such payments, not the label applied thereto, which will govern whether additional amounts of this nature are "remuneration for personal services" and therefore part of the AWW. The hearing officer properly applied Texas Workers' Compensation Commission Appeal No. 941532, decided December 30, 1994, to this case in holding that the $30 a day was part of the claimant's AWW. Our decision in Texas Workers' Compensation Commission Appeal No. 982577, decided December 16, 1998, likewise supports the reasoning of the hearing officer.

The decision of the hearing officer will be set aside only if the evidence supporting the hearing officer's determination is so weak or against the overwhelming weight of the evidence as to be clearly wrong or manifestly unjust. Atlantic Mutual Insurance Company v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.).

_____
Susan M. Kelley
Appeals Judge

CONCUR:

_____
Stark O. Sanders, Jr.
Chief Appeals Judge

_____
Tommy W. Lueders
Appeals Judge