APPEAL NO. 991151

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 May 7, 1999. She (hearing officer) determined that the appellant (claimant) had disability as a result of a compensable injury on _____, "for fewer than eight days," and that the claimant reached maximum medical improvement (MMI) on June 13, 1998, with a zero percent impairment rating (IR) as certified by Dr. T, the designated doctor selected by the Texas Workers' Compensation Commission (Commission). The claimant appeals these determinations, expressing his disagreement with them. The respondent (carrier) replies that the decision is correct, supported by sufficient evidence, and should be affirmed.

DECISION

Affirmed.

The claimant's job involved removing pressure relief valves. On _____, when he broke down a valve, it blew benzene gas over his face and spilled liquid benzene on the ground for, he estimated, 10 to 15 minutes until he closed the valve. He then went to lunch and, afterwards, experienced burning eyes and tightness in his lungs. He said when he returned to the work site, he was told to remain in the area for over an hour in the presence of benzene gas while it dissipated. On the way home from work, he said, he felt dizzy, his nose was running, his eyes were blurry, his lungs were tight, and he had chemical burns on the left side of his face. The carrier parties stipulated to a compensable injury on _____, without further defining what the injury consisted of.

The employer referred the claimant to Dr. P, who saw him on the date of the injury. He diagnosed benzene exposure to the skin, ears, eyes and neck area, but noted no blisters. He considered the claimant "unfit for duty" and scheduled him for reevaluation the next day. Dr. P testified that he released the claimant to restricted duty on March 13, 1998. He said that the exposure was "light" with no objective signs after a few days. On March 23, 1998, the claimant was again seen, apparently by Dr. P, who diagnosed rhinosinusitis and a viral infection and did not believe that his symptoms were related to a benzene exposure. Apparently, the claimant was asked to return for further tests the next day, but failed to do so. On April 8, 1998, the claimant saw Dr. A, an ophthalmologist, who diagnosed keratitis. On April 22, 1998, Dr. P completed a Report of Medical Evaluation (TWCC-69) in which he certified MMI on March 24, 1998, and assigned a zero percent IR. Dr. P testified that as of the last time he saw the claimant, he was able to work. Unfortunately, it was not clarified when this was or whether Dr. P was referring to full or restricted duty.

The claimant then began treatment with Dr. K on May 1, 1998. Claimant was admitted to the hospital on August 13, 1998, for, among other things, chest pains. The discharge diagnoses included chest pain, probably secondary to erosive gastritis, possible atherosclerotic cardiovascular disease, abnormal pulmonary function tests, depression with

anxiety, and possible airway sensitivity from chemical exposure, including a history of direct benzene and trace chemical exposure. The claimant has apparently not worked since the day after the injury and contends he is still unable to work because of it. Dr. K placed him in a nonwork status.

Dr. T, the designated doctor, completed a TWCC-69 on August 3, 1998, as a result of an examination on June 13, 1998. His diagnosis was toxic effect of benzene. He certified the claimant reached MMI on June 13, 1998, and assigned a zero percent IR. He stated that he found no objective evidence in the medical records "upon which to base an [IR]." On October 2, 1998, a benefit review officer wrote Dr. T with "additional information" and asked if this changed his certification. On November 2, 1998, Dr. T responded that the additional information did change his opinion and that he believed the claimant was not at MMI. On March 24, 1999, Dr. T again completed a TWCC-69 in which he certified June 13, 1998, the original date, as the date of MMI and again assigned a zero percent IR. He explained the reversion back to his original determination as follows:

> I was influenced by [Dr. K's] advocacy on [claimant's] behalf. All else being equal, I give weight to a treating doctor's opinion, especially when that doctor is willing to take a stand. But I must admit that in this case the big city specialist is most convincing, and I should like to revert to my original report in which I agreed that [claimant] had reached MMI, with an [IR] of 0%.

Other medical evidence included the report of Dr. F, who conducted a records review of the claimant's medical treatment at the request of the carrier. He noted that Dr. K was "not credentialed in toxicology." In his opinion, "[m]ultiple laboratory studies have failed to demonstrate objective evidence of benzene exposure." He described the claimant's "bizarre set of symptoms which are unrelated to benzene exposure." In his opinion, the "objective data suggests that [claimant] should have returned to work on or about March 13, 1998," and there was no objective evidence for systemic toxicity from benzene.

We address the disability issue first. Section 401.011(16) defines disability as the "inability to obtain and retain employment at wages equivalent to the preinjury wage." A claimant who has disability is entitled to temporary income benefits (TIBS) until MMI is reached. Section 408.101(a). Whether disability exists is a question of fact for the hearing officer to decide and disability can be found based on the claimant's testimony alone if found credible. Texas Workers' Compensation Commission Appeal No. 93560, decided August 19, 1993. A claimant has the burden of proof on the issue of disability. Generally, a return to light duty does not end disability unless the claimant actually returns to work and earns preinjury wages. Texas Workers' Compensation Commission Appeal No. 93953, decided December 7, 1993. In this case, both the claimant and Dr. K provided evidence that the claimant was unable to work since his injury. Dr. P placed the claimant in a light-duty status as of March 13, 1998, two days after the injury. He testified that he believed the claimant could return to work, presumably at full duty, on some unspecified date. Dr. F's report could be read to support the conclusion that the claimant could return to full duty as

of March 13, 1998. Although the concepts of disability and TIBS entitlement are distinct, the overriding concern to the parties in regard to disability was TIBS. It is, nonetheless, unfortunate that the hearing officer apparently allowed the concept of TIBS entitlement to drive her disability determination in this case in that she found no period of disability other than to say it was less than eight days. As fact finder, the hearing officer was the sole judge of the weight and credibility of the evidence. Section 410.165(a). 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). The hearing officer simply did not find the claimant or his evidence credible on the issue of disability beyond a brief period of time. Under our standard of review, we affirm that determination. We are confident that any future questions about the precise dates of disability can be resolved by agreement of the parties.

With regard to the issues of MMI and IR, Sections 408.122(c) and 408.125(e) provide that the report of a Commission-selected designated doctor is entitled to presumptive weight and the Commission shall base its determination of MMI and IR on this report unless it is contrary to the great weight of the other medical evidence. IR is determined with reference to the date of MMI. The claimant testified that he continued to improve and thus was not at MMI as of any of Dr. T's certifications and could not yet be assigned an IR. The designated doctor has special status under the 1989 Act and only medical evidence, not the claimant's lay opinion, can be weighed against the report of the designated doctor. Texas Workers' Compensation Commission Appeal No. 92412, decided September 28, 1992. To the extent that Dr. K also believed the claimant was not at MMI, this constituted medical evidence that could be weighed against Dr. T's report. The claimant had the burden of proving that the great weight of the other medical evidence was contrary to Dr. T's report. Whether the great weight was contrary is, in turn, a question of fact for the hearing officer to decide. Texas Workers' Compensation Commission Appeal No. 93459, decided July 15, 1993. The claimant argues in his appeal that Dr. T "was swayed" by the carrier's "non-cooperation;" that Dr. T did not have enough information on which to certify MMI and IR; and that what Dr. F wrote was "untrue" and not to be believed because he never examined the claimant. The claimant also argues that a bone marrow test should be done before anyone certifies MMI or IR. Again, we stress that the claimant's opinion is not medical evidence required by the 1989 Act to overcome the report of the designated doctor. Clearly, Dr. F's and Dr. P's opinions are consistent with the report of Dr. T. The opinion of Dr. K could be considered by the hearing officer to represent no more than a professional disagreement that did not rise to the level of the great weight of the other medical evidence. Under our standard of review, we find the evidence sufficient to support the determination of the hearing officer that the claimant reached MMI on June 13, 1998, and has a zero percent IR, as certified by Dr. T, the designated doctor.

For the foregoing reasons, we affirm the decision and order of the hearing officer.

_____
Alan C. Ernst
Appeals Judge

CONCUR:

_____
Joe Sebesta
Appeals Judge

_____
Philip F. O'Neill
Appeals Judge