APPEAL NO. 991359

On May 10 and 11, 1999, a contested case hearing (CCH) was held. The CCH was held under the provisions of the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). The issues at the CCH were: (1) whether appellant (claimant) sustained a compensable injury on _____; and (2) whether claimant has had disability, and, if so, for what periods. The hearing officer decided that claimant sustained a compensable injury on _____, and that claimant had disability from November 10 to November 16, 1998; from November 20 to December 16, 1998; and from January 22 to February 1, 1999. Claimant requests that we reverse the hearing officer's decision that she did not have disability from March 30, 1999, through the date of the CCH and that we render a decision that she did have disability for that period of time. Respondent (carrier) requests affirmance of the hearing officer's decision on the disability issue. There is no appeal of the hearing officer's decision that claimant sustained a compensable injury on _____.

DECISION

Affirmed.

Claimant worked as a community service worker for the (employer). On _____, claimant was bending over in her car when a coworker got in the car and accidentally hit claimant's head with her back side. At the time of the accident, claimant and the coworker were at the coworker's house to retrieve the coworker's pager with the permission of a supervisor. There is no appeal of the hearing officer's decision that claimant sustained a compensable injury on _____. Since November 1998, claimant has been seen by Dr. Z, D.C. three times a week. Dr. Z diagnosed claimant as having cervical, thoracic, and lumbar sprain/strain and segmental dysfunction syndrome. It is undisputed on appeal that claimant had disability from November 10 to November 16, 1998; from November 20 to December 16, 1998; and from January 22 to February 1, 1999. Claimant contends that she also had disability from March 30, 1999, through the date of the CCH.

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." Claimant had the burden to prove she had disability as defined by the 1989 Act. Texas Workers' Compensation Commission Appeal No. 93953, decided December 7, 1993. There is much conflicting evidence on the disability issue. Dr. Z released claimant to return to sedentary work with restrictions, including, among others, no lifting over 10 pounds, in February 1999. Carrier presented evidence that claimant was offered a light-duty assignment in February 1999 that met Dr. Z's restrictions; that the light-duty assignment was a supervisory position; that claimant worked the light-duty job without complaints of physical problems from February through March 1999; that claimant was not interested in keeping the light-duty job and wanted to return to her regular job; that employer could not allow her to return to her regular job because she did not have a full-duty release; that if claimant had continued to work for employer past April 2, 1999, the date the light-duty job

was originally to end based on what claimant told employer about Dr. Z's estimate of when claimant could return to full-duty work, claimant could have continued working the light-duty job after April 2nd until she could obtain a release to full duty; that claimant was told that she could continue to work the light-duty job; that claimant had said that her attorney told her not to go back to work; and that in May 1999 Dr. C, who examined claimant at carrier's request in April 1999, reported that claimant could perform a light-duty job. There was no evidence that the light-duty position claimant worked at was for less than her preinjury wage.

Claimant gave testimony that contradicted much of carrier's evidence. She testified that the light-duty job did not meet Dr. Z's restrictions; that while working the light-duty job she also had to do the paperwork for her regular job; that she did not tell her supervisor that her attorney told her not to work; that in early April 1999 employer told her that she had to get a full-duty release or she would not be welcome at work; that on March 30, 1999, she complained to her supervisor that she was having problems doing the light-duty job; that on April 7, 1999, Dr. Z suggested that she not continue to work because of pain she had while doing the light-duty work; that she told her employer that Dr. Z took her off work because of her pain and because the light-duty job did not meet Dr. Z's restrictions; and that she stopped work in April 1999 to attend a work conditioning program. Claimant said that the work conditioning program was scheduled to begin the day of the CCH. The coworker that hit claimant's head testified that claimant did complain of pain to her supervisor when working after the injury. No off-work slip taking claimant off work on or after March 30, 1999, was in evidence.

In the Statement of the Evidence portion of his decision, the hearing officer notes that claimant was able to work light duty until March 30, 1999; questions why she was unable to work after that; and states that the evidence was not sufficient to establish disability beyond "March 30, 1998 [sic]." It is obvious that the March 30, 1998, date is a typographical error and should be March 30, 1999, as stated in another portion of the hearing officer's decision. The hearing officer decided that claimant had disability from November 10 to November 16, 1998; from November 20 to December 16, 1998; and from January 22 to February 1, 1999.

The 1989 Act makes the hearing officer the sole judge of the relevance and materiality of the evidence offered and of the weight and credibility to be given to the evidence. Section 410.165(a). As the finder of fact, the hearing officer resolves conflicts in the evidence and may believe all, part, or none of the testimony of any witness. Texas Workers' Compensation Commission Appeal No. 950084, decided February 28, 1995. Claimant cites Appeals Panel decisions for the proposition that her testimony alone can prove disability. Generally, disability may be proven by the testimony of a claimant alone, if it is believed by the hearing officer. However, the testimony of a claimant as an interested party raises only an issue of fact for the hearing officer to resolve.

Claimant also cites several Appeals Panel decisions for the propositions that where there is no full-duty release, disability continues, and that a claimant under a conditional

work release does not have the burden of proving inability to work. In the cited cases, a light-duty release was given, but there was no light-duty work available at the time of the release. Thus, the instant case is distinguishable from the decisions cited by claimant because, in the instant case, there is evidence that claimant was able to work and did work in a light-duty assignment when she was released to return to work with restrictions, and, although claimant contended that the light-duty work did not meet her doctor's restrictions, she did not contend nor is there is any evidence that she worked at less than her preinjury wage. As noted, the conflicting evidence was for the hearing officer to resolve. In Texas Workers' Compensation Commission Appeal No. 91045, decided November 21, 1991, the Appeals Panel noted that where a medical release is conditional and not a return to full duty because of the compensable injury, disability has not ended unless the employee is able to obtain and retain employment at wages equivalent to his preinjury wage.

An appellate level body is not a fact finder and does not normally pass upon the credibility of the witnesses or substitute its judgment for that of the trier of fact. Appeal No. 950084, *supra*. When reviewing a hearing officer's decision to determine the factual sufficiency of the evidence, we should set aside the decision only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Appeal No. 950084. We conclude that the hearing officer's decision on the disability issue is supported by sufficient evidence and that it is not so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986).

Claimant attached to her appeal a letter from employer to her dated May 21, 1999, in which employer notified claimant of her termination from employment for her failure to comply with attendance and call-in policies. Claimant contends that that letter is newly discovered evidence. The standard for newly discovered evidence is discussed in Jackson v. Van Winkle, 660 S.W.2d 807 (Tex. 1983). Since the termination occurred after the CCH, we do not see how the letter could produce a different result on the issue of disability, which is generally determined for periods up to the date of the CCH, if it were to be considered, and thus do not consider it to be newly discovered evidence under the standard stated in the Jackson case.

The hearing officer's decision and order are affirmed.

_____
Robert W. Potts
Appeals Judge

CONCUR:

_____
Thomas A. Knapp
Appeals Judge

_____
Dorian E. Ramirez
Appeals Judge