

APPEAL NO. 991475

This case returns following our remand in Texas Workers' Compensation Commission Appeal No. 983063, decided February 11, 1999. A hearing on remand was held on April 25, 1999. The attorney for the appellant (claimant) was present at the hearing but neither the claimant nor the attorney for the respondent (carrier) appeared. The claimant's attorney noted on the record that he had been unsuccessful in his attempts to contact his client and did not present further evidence or argument. With respect to the single issue before him, the hearing officer determined that the claimant did not have disability as a result of his compensable injury from August 3, 1998, to November 25, 1998, the date of the original hearing. In his appeal, the claimant argues that that determination is against the great weight of the evidence. In its response, the carrier urges affirmance.

DECISION

Affirmed.

Because only the disability issue is before us, our factual recitation will be limited to those facts most germane to that issue. It is undisputed that the claimant sustained an injury in the course and scope of his employment as a corrections officer with (employer), which operates a private jail facility. The claimant testified that he was injured in a struggle with an inmate who did not want to go to bed. The claimant testified that after the incident, he completed some paperwork and then he went home. He stated that he woke up later in the day of his injury and was stiff and sore in his shoulder and back, that he felt like he had "been run over by a car," and that his right knee was swollen to the size of a baseball. He stated that he went to work that evening (his shift was from 10:30 p.m. to 6:00 a.m.) and told his supervisor that he was not able to work. He testified that his supervisor asked him to stay at work anyway because they were short-handed. The claimant stated that it was difficult for him to perform his duties, but he continued to work until July 17, 1998, when his employment was terminated. The carrier introduced records from the employer stating that the claimant was terminated for inappropriate use of force. The claimant testified that, although he was in pain while he was working after the incident, he would have continued to work at the jail had his employment not been terminated. There is also an August 8, 1998, letter in evidence addressed to the claimant from the vice president of human relations for Management & Training Corporation, the employer who was taking over the management of the jail where the claimant was working at the time of his injury. In that letter, the claimant's offer of employment is rescinded because of his involuntary termination from the employer where he was injured.

The claimant first sought medical treatment with Dr. D on July 13, 1998. In progress notes from the claimant's initial visit, Dr. D states that the claimant injured his right shoulder in the altercation at work. In an Initial Medical Report (TWCC-61) of August 19, 1998, Dr. D lists September 1, 1998, as the date the claimant can return to both limited type work and full-time work. In his July 31, 1998, progress notes, Dr. D recorded complaints of right knee and low back pain, as well as, right shoulder and neck pain. The record also contains

various off-work slips from Dr. D. In his July 13, 1998, certificate, Dr. D states that the claimant can return to work on July 15, 1998; however, certificates of August 3rd and August 8th state that it is "undetermined" when the claimant can return to work. The claimant's August 28, 1998, MRI of his right knee demonstrates a medial meniscus tear and a torn anterior cruciate ligament. A lumbar MRI of the same date reveals a five-to-six-millimeter symmetric disc bulge and desiccation at L3-4 and a five-to- six-millimeter "central discal substance protrusion or herniation" at L5-S1.

The hearing officer determined that the claimant did not have disability from his compensable injury from August 3 through November 25, 1998, the date of the initial hearing. That issue presented a question of fact for the hearing officer. Generally, disability can be established by the claimant's testimony alone, if it is believed by the hearing officer. Gee v. Liberty Mut. Fire Ins. Co., 765 S.W.2d 394 (Tex. 1989). The hearing officer was not required to accept the claimant's testimony; rather, it created an issue of fact for him to resolve. Texas Employers Ins. Ass'n v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). The hearing officer is the sole judge of the weight, credibility, relevance, and materiality of the evidence. Section 410.165. He resolves conflicts and inconsistencies in the evidence and decides what facts have been established. *Id.* In his decision on remand, the hearing officer found that the claimant "was not unable to obtain or retain employment at wages equivalent to his preinjury wage because he was engaged in activities consistent with his job activities prior to his termination." In addition, the hearing officer found that "due to the claimed injury Claimant was not unable to obtain or retain employment a [sic] at wages equivalent to his preinjury wage because he was able to perform all his duties for Employer that he performed until his termination on August 3, 1998." Those findings demonstrate that the hearing officer credited the claimant's testimony that he would have continued to work for the employer had he not been terminated and discounted his testimony that he was not able to perform his normal duties in the period of time he worked following his injury and prior to his termination. The hearing officer was acting within his province as the fact finder in so doing. Our review of the record does not demonstrate that the hearing officer's disability determination is so against the great weight of the evidence as to be clearly wrong or manifestly unjust. Therefore, no sound basis exists for us to reverse it on appeal.

The hearing officer's decision and order are affirmed.

Elaine M. Chaney
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Tommy W. Lueders
Appeals Judge