APPEAL NO. 991947

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On August 17, 1999, a contested case hearing (CCH) was held. The issue before the hearing officer was:

> Does the Claimant [respondent] have disability from April 14, 1999 through the present resulting from the injury sustained on _____?

In response to that issue, the hearing officer determined that claimant had disability from April 14, 1999 (all dates are 1999 unless otherwise noted), through June 27 (in that claimant returned to work on June 28th).

The appellant (self-insured) appealed, asserting that claimant had been released to return to work at full duty without restrictions a number of times, both before and after April 14th by claimant's treating doctor, a referral doctor, and the self-insured's independent medical examination (IME) doctor, and that a surveillance video showed claimant performing a number of activities inconsistent with his claimed disability. The self-insured cites a number of Appeals Panel decisions which purportedly support its position. The self-insured requests that we reverse the hearing officer's decision and render a decision in its favor. The file does not contain a response from the claimant.

DECISION

Affirmed.

Claimant testified through a translator and many times his answers were not responsive. Also, it appeared that both the self-insured's attorney and claimant's ombudsman understood Spanish because, on occasion, they would clarify some wording or suggest that claimant had actually said something in addition to what was translated.

It is undisputed that claimant was employed by the self-insured city sanitation department in a heavy labor job. Claimant testified that his job frequently required lifting and carrying items weighing up to 70 pounds. The parties stipulated that claimant sustained a compensable injury on _____. Claimant testified that on that date he was in a motor vehicle which was struck from behind by another vehicle and that he sustained injuries to his neck, right arm and shoulder and upper back. It appears undisputed that claimant was seen in a hospital emergency room on _____, subsequently returned to work on January 4th, and that Dr. R became claimant's treating doctor. Although much of the testimony at the CCH dealt with why claimant stopped working on January 28th, and doctor's releases in February, the issue before the hearing officer, and the decision we address, is the period of time beginning April 14th.

Dr. R, in an Initial Medical Report (TWCC-61) of _____, diagnosed a cervical strain, contusion of the right hand and tendinitis of the right hand. Claimant apparently had intermittent periods of disability, not at issue here. In evidence is a form note dated March 29th returning claimant to "full duty" on "4/12/98" from a diagnosis of "pain." Also in evidence is a report dated April 14th from Dr. K, the self-insured's IME doctor, stating "that the maximum medical improvement should be left open until June 29, 1999" and that claimant could "return to full work activities without restrictions." Claimant testified that he did not return to work at that time because he still had severe neck pain and that he did not think he could do his preinjury job. Claimant apparently returned to Dr. R on April 16th and in evidence is another off-work slip indicating claimant was "out 4/12–4/16" and again releasing claimant to full duty April 19th. Claimant apparently again returned to Dr. R, who, in a note dated April 22nd, stated "[e]xcuse 4/19–4/25" and no work until claimant was "eval. [by] [Dr. H]." Dr. H, on a form dated May 12th, took claimant off work for four weeks and scheduled another appointment for June 9th. In a note dated June 9th, Dr. H returned claimant to work effective June 28th. In a report dated June 24th, Dr. H stated:

> I first saw [claimant] on 05/12/99 for his work-related neck injury. At this time, the patient was having marked pain. It was his first visit in my office and I referred him for an MRI examination of the cervical spine, as well as some massage treatments. At that time, I recommended the patient remain off work.
>
> * * * *
>
> The patient subsequently made improvement and I released him back to work as of 06/28/99; so therefore from my standpoint he was off work for that approximate six weeks period.

Claimant testified that he did not believe that he was able to work at his heavy labor job between April 14th and June 28th; that Dr. R had told him that if he returned to work and felt that he could not do the work he could come back to Dr. R. Claimant testified that he attempted to go back to work, and worked a full 10-hour shift on April 26th, but was unable to continue the following day and that the self-insured required a full-duty release from Dr. H.

The self-insured, through its workers' compensation representative, Ms. DH, said that Dr. R had expressed his frustration regarding claimant's refusal to return to work after he had been released. However, when the hearing officer asked for documentation of that contention, Ms. DH was unable to provide any. Claimant's ombudsman pointed out the benefit review officer had asked the same question at the benefit review conference and the self-insured had failed to provide any documentation to that effect. The self-insured also submitted a surveillance videotape purportedly showing claimant "carrying small children while pumping gas, jogging and kicking a soccer ball." The hearing officer addressed the video, stating:

> The video submitted by the Carrier does depict the Claimant performing physical activities, however, the Claimant's job duties entail heavy lifting and strenuous activities involving the Claimant's upper body. The video does not depict the Claimant performing heavy lifting. Based on the evidence and testimony presented, the Claimant did meet his burden of establishing that his inability to obtain and retain employment at wages equivalent to his pre-injury wage was a result of his _____ compensable neck injury.

Our review of the video does not disclose that the hearing officer's interpretation was incorrect or against the great weight and preponderance of the evidence.

Basically, the self-insured's complaint is that whenever Dr. R released claimant to return to full duty, claimant would return to the doctor a few days later, tell the doctor he could not do the work and ask for another off-duty slip, and that Dr. R eventually got frustrated and referred claimant to Dr. H. The self-insured cited a half dozen Appeals Panel decisions in support of propositions that claimant had the burden of showing disability, that the Appeals Panel "did not believe the 1989 Act intended to be a shield for an employee to continue receiving TIBS [temporary income benefits]–where . . . he is capable of employment," and several fact-specific cases.

Disability is defined in Section 401.011(16) as the inability because of a compensable injury to obtain and retain employment at the preinjury wage. Generally, the extent and existence of disability is a factual determination for the hearing officer to resolve. Texas Workers' Compensation Commission Appeal No. 972073, decided November 25, 1997 (Unpublished). We have also frequently noted that the hearing officer, as the fact finder, can find disability, based on claimant's testimony alone, if considered credible. Gee v. Liberty Mutual Fire Insurance Company, 765 S.W.2d 394 (Tex. 1989). In this case, the hearing officer was fully cognizant of the inconsistencies in the various off-duty slips, of the self-insured's arguments that claimant was imposing on his doctors to take him off work and the claimant's testimony why he had not gone to work. The 1989 Act provides that the hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). Where there are conflicts in the evidence, the hearing officer resolves the conflicts and determines what facts the evidence has established. As an appeals body, we will not substitute our judgment for that of the hearing officer when the determination is not so against the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Texas Workers' Compensation Commission Appeal No. 950456, decided May 9, 1995.

Upon review of the record submitted, we find no reversible error and we will not disturb the hearing officer's determinations unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). We do not so find and, consequently, the decision and order of the hearing officer are affirmed.

_____
Thomas A. Knapp
Appeals Judge

CONCUR:

_____
Gary L. Kilgore
Appeals Judge

_____
Judy L. Stephens
Appeals Judge