APPEAL NO. 000214

This appeal is considered in accordance with the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On January 3, 2000, a contested case hearing (CCH) was held. At issue was whether the appellant, who is the claimant, had disability (the inability to obtain and retain employment equivalent to his preinjury average weekly wage (AWW) due to his compensable injury).

The hearing officer found that the claimant did not have disability for the period of time in question.

The claimant has appealed, arguing that the evidence proved disability. He states that it was error to admit a drug test result tendered by the respondent (carrier). He argues that three other exhibits were not relevant to the issues at hand. He argues that evidence indicating he could have worked light duty for his employer are irrelevant because he did not actually know about this at the time. The carrier responds by reciting evidence that it believes supports the hearing officer's decision.

DECISION

Affirmed.

There was no stipulation on the occurrence of a compensable injury because that matter is apparently still being disputed by the carrier in court. A decision finding a compensable injury had been affirmed in Texas Workers' Compensation Commission Appeal No. 990037, decided February 23, 1999 (Unpublished). The claimant was in his early 20s at the time of the CCH. It was the claimant's assertion that he injured his back on _____, while employed by (employer). At the CCH, he testified that the injury happened as he was pulling on a dolly, loaded with "the product," that had become stopped against a curb. He twisted his back. A deposition from a witness agreed that the dolly turned over and spilled "the product," but that claimant did not try to stop it, nor did he fall. The claimant said his injury involved two herniated thoracic discs, which caused severe pain. He took one medication, Hydrocodone, which he said had no side effects. Claimant's treating doctor was Dr. M, although he was first seen by Dr. P on September 11, 1998. Claimant did not seek medical treatment between this date and the date in January that he first saw Dr. M. The claimant first testified that he saw Dr. M every month for the period from December 1998 through October 1999. He asserted that Dr. M told him he could get worse and might end up in a wheelchair. However, he agreed on cross-examination that he had seen the doctor only three times for a period from September 1998 through May 1999 (as stated in his answers to requests for admission).

The claimant resigned from the employer on September 15, 1998; this was the day that results came back positive from a drug test he had been given. He stated that there was no link, and that he resigned due to his inability to keep performing the job. (The

carrier agreed, however, that an intoxication defense had not been asserted.) When it was brought out that the employer had a light-duty program, claimant stated that he had not known about that at the time. On November 20, 1998, the claimant's father, an owner of an awning and construction company, wrote that his son was assisting around the shop and going out with some of the workers on jobs, but that he was not on the payroll. Claimant's father further stated that he was helping the claimant with his rent and utility payments. In an excerpt from a deposition he gave on May 19, 1999, the claimant said that such assistance amounted to about $425.00 a month, and that it stopped when he began getting temporary income benefits in late December 1998.

The claimant portrayed his activities for his father's company as light duty in nature, and it was what he opted to do in lieu of physical therapy, pursuant to Dr. M's instructions to be active and move around. He did faxing and filing, went out on some jobs, and did light sweeping and cleaning around the warehouse. He said that the activities he did for his father's company were within the 10- to 15-pound lifting limit Dr. M had given him. The claimant and another statement from his father indicated that he began working full time for his father's company, on the payroll, on November 18, 1999. Claimant said he was paid $7.00 an hour for 40 hours a week. When asked if he had helped out at his father's business prior to that date for as much as 40 hours a week, he indicated it was "a possibility," although he then said he would have been there about 20 hours a week.

When Dr. M saw claimant on January 14, 1999, he recorded his understanding of the incident as involving a fall by claimant onto his left side when the dolly became stuck. The claimant was evaluated by a doctor for the carrier, Dr. S, on August 12, 1999. Dr. S noted that claimant was working part time for his father. (The claimant said that Dr. S has blown out of proportion what he had told him about merely helping his father out.) Dr. S opined that the claimant had reached maximum medical improvement (MMI) on March 9, 1999, with a three percent impairment rating (IR). On October 13, 1999, claimant was examined by a designated doctor, Dr. K, who assessed an 11% IR, and certified that claimant was at MMI on that date. Dr. M wrote that he believed claimant had reached MMI on September 13, 1999. Claimant was released by Dr. M to work effective mid November 1999, and said he was restricted to lifting 45-50 pounds and was told to refrain from repetitive bending and twisting.

A videotape taken in October 1999 showed claimant riding around in a truck with another man, loading a cooler, an apparently heavy duffle bag, and large and small bags of ice into the back of the pickup truck, and bending down to pick up ice bags from the ground where he had thrown them down to break up the ice. Claimant's movements do not seem restricted (or apparently painful) in this tape.

At the beginning of the CCH, the claimant objected to the relevance of several documents. One document was excluded. Other records were admitted, which largely related to the earlier dispute over claimant's injury (consisting of the depositions and statements of others working with claimant the day of his injury, and the positive drug test).

Claimant was asked on direct examination to compare what he currently made in his father's company ($7.00 per hour, 40 hours a week) with what he made for the employer. He stated that he worked a 50-hour week so what he was currently paid was less than he made for the employer. However, it was brought out on cross-examination that he had in fact worked for the employer for five days, none of which included any overtime. He was paid $7.00 per hour by the employer.

Ms. R, who had been hired in November 1999 by the claimant's father's company, said she had worked there as an office manager/trainee for four months and understood claimant to be a full-time employee of the company. She had nothing to do with payroll, however, so could not say if he had been paid. She understood he was on a list of the company's employees that was maintained. Ms. R said she was testifying under subpoena, not voluntarily.

The hearing officer, who is the sole judge of weight and credibility, and has the chance to personally observe the testimony of witnesses, stated that he found claimant not to be credible. Credibility of claimant was not enhanced, frankly, by (for example) asserting a higher preinjury AWW than he currently made, only to admit on cross-examination that he had worked for the employer for five days at the time of his injury and was still in training, so had not actually worked any overtime. Such discrepancies can cause the trier of fact to doubt the accuracy of recollections about other matters as well. We have reviewed the record and cannot agree that there is not support for the hearing officer's determination that the claimant failed to meet his burden of proving disability.

As to whether the hearing officer erred in the admission of evidence concerning the occurrence of the injury, we do not agree that this evidence was not in some respects relevant. An analysis of whether a compensable injury has resulted in disability requires some understanding of what the injury was and how it occurred. However, it does not appear that the hearing officer gave much weight to such evidence, as opposed to the testimony at the CCH.

In summary, the hearing officer is the sole judge of the relevance, the 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). The trier of fact may believe all, part, or none of the testimony of any witness. Taylor v. Lewis, 553 S.W.2d 153, 161 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.). 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.). We cannot agree that this was the case here, and affirm the decision and order.

Susan M. Kelley
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Alan C. Ernst
Appeals Judge