APPEAL NO. 000511

This appeal arises pursuant to the Texas Workers= Compensation Act, TEX. LAB. CODE ANN. ' 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on February 11, 2000. The hearing officer determined that the claimant sustained a work-related injury to his foot and ankle and, although he sought, received, and retained group health insurance benefits on account of his injury, he did not do so with full knowledge and understanding of the ramifications of his actions, and such actions therefore do not result in an election of remedies. Her determination of this issue has not been appealed.

On an issue concerning disability, the hearing officer found that claimant had disability for a period of 7 and 6/7 weeks; the periods involved were August 6 through 12, 1999, and another seven weeks in September and October 1999, but not thereafter.

The claimant has appealed this determination, saying that the hearing officer committed reversible error by not finding that he had disability beginning on September 23, 1999, and continuing through the date of the CCH. He attaches a new medical release from his doctor. The carrier responds that the decision is supported by medical evidence and objective testing showing the lack of an injury of sufficient magnitude to preclude claimant from obtaining and retaining employment equivalent to his preinjury average weekly wage beyond what the hearing officer has already found.

DECISION

We affirm the hearing officer's decision.

We cannot consider new evidence raised for the first time on appeal, but not admitted into the record of the CCH. The claimant said he injured his left foot and ankle on July 30, 1999, as he stepped from a forklift onto uneven ground. He was employed by (employer). He testified as to continuing pain in his foot, and the fact that he currently felt when he stopped on it like he was just stepping on bone. His primary treating doctor was Dr. D, who, he said, did not write down everything he verbally told the claimant. While much of the CCH was taken up over the election of remedies issue, and the reasons why claimant sought to have treatment paid for through his private health insurance, he did testify that Dr. D released him to light duty at one point, but that the company had no light duty available which would enable him to sit down. He said he returned to work the Monday after he had his accident, and tried to drive the forklift, but it was hard due to need to use his feet even if he could sit down.

To greatly summarize the evidence, claimant had x-rays and an MRI (on September 30, 1999) at the request of Dr. D; there was no fracture and Dr. D's examination notes during the period of treatment show that claimant had no swelling, heat, or discoloration, and had full range of motion. Claimant commented that this full range was the way that Dr. D moved his foot. He says that Dr. D never told him that there was nothing more that he could do for him, or that he had an unusual amount of complaints. According to claimant, Dr. D told him to try

doing what he felt he could do, even hunting. Claimant said he went hunting twice but each time afterwards he was unable to walk for a few days after he returned.

Dr. D's impression on August 6, 1999, was ankle sprain. X-rays showed no fractures and only a small avulsion of the tip of the fibula. There are off-work slips from Dr. D in evidence that correlate to the amount of disability that the hearing officer found. On November 8, 1999, Dr. D wrote claimant a release to return to light duty with limited standing or walking for four weeks. Dr. D noted on November 16th that claimant had been extensively worked up, although he contended that he had a dysfunction with his ankle joint. Dr. D noted that the claimant had been able to go deer hunting the previous weekend. Dr. D noted on December 2, 1999, that claimant's workup was entirely normal and said that medically the only thing which might help would be a therapy program. Dr. D noted on January 11, 2000, that claimant was having another worker's compensation hearing and that he felt he had very little to offer him. There was evidence that prior to his injury, the claimant had been counseled twice for excessive absenteeism.

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). In considering whether claimant had the inability to work due to his injury, she could consider the nature of the injury and evidently believed that it was of a fairly minor nature which would not after the period of disability she found prevent the claimant from working. We cannot agree that the hearing officer's decision is against the great weight and preponderance of the evidence, and we affirm her decision and order.

Susan M. Kelley
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Robert W. Potts
Appeals Judge