APPEAL NO. 000884

This appeal arises pursuant to the Texas Workers= Compensation Act, TEX. LAB. CODE ANN. ' 401.001 *et seq.* (1989 Act). A contested case hearing was held on March 28, 2000. She determined that the appellant (claimant) sustained a compensable back injury on _____; that he had disability beginning June 13, 1999, and ending July 20, 1999; that the employer had actual knowledge of the claimant=s injury within 30 days of _____; that the decision of the Fourth Court of Appeals in Downs v. Continental Cas. Co., No. 04-99-00111-CV (Tex. App.-San Antonio January 26, 2000) was "not applicable" to the contest of compensability in this case; and that the respondent (carrier) timely disputed claimant=s injury by disputing it within 60 days of receiving written notice of the injury.

We need not address the Downs issue because the claimant prevailed on the compensability issue, which was not appealed.

The claimant appealed the termination of disability on July 20, 1999, as against the great weight of the evidence and the finding that Downs did not apply as error as a matter of law. The carrier responded that the disability determination has sufficient evidentiary support and that the applicability of Downs to this case is irrelevant because the claimant prevailed on the compensability determination. The determinations not appealed have become final. Section 410.169.

DECISION

Affirmed.

The claimant was a back hoe operator. He injured his lower back on _____, as a result of breaking concrete with a back hoe. He had back surgery on June 30, 1999, and, according to his testimony, returned to his same job running a back hoe on or about July 20, 1999, after the surgery. He said he worked about five days until he was terminated because of a "problem" he had with his new supervisor about something unrelated to his compensable injury. He also commented in his testimony that "I couldn't have held up much longer anyway" because he had not yet recovered from his surgery. The claimant also testified that he did not have a release from his surgeon to return to work and was told not to work for three months after the surgery. He returned to work anyway. The claimant secured another job, presumably involving running a back hoe, through his union hall on October 18, 1999, and worked until November 19, 1999, when this job ended, despite, he said, his doctor's advice to stop working. He said he turned down several jobs and had not worked since then because of his back injury. He has collected unemployment compensation since then.

In a letter from the employer dated October 29, 1999, some three months after the termination, the senior vice-president wrote the claimant that "[w]e appreciate your interest in coming back to work for us. However, the position you held is currently filled. . . . We do

not have any opening available right now but when we do we will consider your offer." The medical evidence of disability was a letter of December 16, 1999, from the claimant's surgeon recommending that the claimant "not lift more than 20 lbs and decrease the number of bending or twisting. In the long run he would be best served by limiting the severity of his profession."

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." The claimant had the burden of proving disability. Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). Whether disability existed for any period is a question of fact for the hearing officer to decide and can be proved by the claimant's testimony alone if found credible. Texas Workers' Compensation Commission Appeal No. 93560, decided August 19, 1993. Not appealed is the finding of the hearing officer that the claimant had disability from June 13 to July 20, 1999. In his appeal of the determination that the claimant did not have disability after July 20, 1999, the claimant argues that his testimony and the medical evidence was uncontradicted and established disability. He further asserts, consistent with existing case law, that a conditional work release is evidence of disability.

Because the claimant had the burden of proof in this case, the carrier was not required to present contradictory evidence in order to prevail. And while there was medical evidence of a limited work release and the claimant's comment that "I couldn't have held up much longer anyway," there was also evidence directly from the claimant that he, in fact, returned to his preinjury job with the employer; was terminated for reasons not related to his injury; worked another same or similar job until it ended; and sought a return to work with his former employer. Section 410.165(a) provides that the hearing officer was the sole judge of the weight and credibility of the evidence. In her role as fact finder, she weighed the admittedly conflicting evidence and found that the claimant did not establish disability after his last job ended. We will reverse a factual determination of a hearing officer only if that determination is so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986). Applying this standard of review to the record of this case, we find the evidence sufficient to support the disability determination.

For the foregoing reasons, we affirm the finding of disability. We reverse the determination that the Downs case is not applicable and render a decision that it is applicable to the facts of this case.

Alan C. Ernst
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Philip F. O'Neill
Appeals Judge