APPEAL NO. 001093

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 April 27, 2000. The hearing officer determined that the respondent/cross-appellant's (claimant) current left knee meniscus tear is not a result of the compensable injury of _____; that the claimant had disability from June 9, 1999, to August 4, 1999; and that the Texas Workers' Compensation Commission did not abuse its discretion in approving the claimant's change of treating doctor. The appellant/cross-respondent (carrier) appeals the hearing officer's disability determination, urging that it is against the great weight and preponderance of the evidence. The claimant did not respond to the carrier's appeal. In a cross-appeal, the claimant asserts that the hearing officer improperly denied a motion to reopen the record and the case should be remanded. The carrier replies that the Appeals Panel should not reconsider the claimant's motion to reopen the record and should not remand the case for consideration of the designated doctor's report. The issue of claimant's change of treating doctor was not appealed and has become final. Section 410.169.

DECISION

Affirmed in part, reversed and rendered in part.

The claimant worked for the employer as an electrician and sustained a compensable left knee meniscus tear on _____. The claimant testified that following the injury, he worked light duty for the employer through July 9, 1999, when he he had surgery performed by Dr. V. The claimant testified that after the surgery, he was released to return to work light duty, but did not return to work because his leg was swollen, sore and bruised. Following the surgery, the claimant did not return to Dr. V until August 23, 1999, and in September 1999, he changed treating doctors.

The claimant had the burden to prove disability. Section 410.165(a) provides that the hearing officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence as well as of the weight and credibility that is to be given the evidence. When reviewing a hearing officer's decision for factual sufficiency of the evidence, we will reverse such decision only if it is so contrary to 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 Co., 715 S.W.2d 629, 635 (Tex. 1986).

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. Texas Workers' Compensation Commission Appeal No. 93953, decided December 7, 1993. Whether disability exists is generally a question of fact and can be proved by the testimony of the claimant alone if found credible.

Texas Workers' Compensation Commission Appeal No. 93560, decided August 19, 1993.

The hearing officer determined that the claimant had disability from June 9, 1999, through August 4, 1999. In so determining, the hearing officer made a finding that as a result of the compensable injury of _____, the claimant was unable to perform his usual job duties, and unable to obtain and retain employment at his preinjury wage from June 9, 1999, to August 4, 1999. While the hearing officer's finding refers to the claimant's inability to perform his "usual job duties," by definition, disability is dependent on the inability to obtain and retain employment at preinjury wage. (Emphasis added.) Section 401.011(16). The claimant presented no evidence concerning his preinjury wages and his wages from his employment after his injury. Without such evidence, we find the hearing officer's decision that the claimant had disability from June 9, 1999, through July 9, 1999, to be against the great weight and preponderance of the evidence. We reverse the hearing officer's decision and order and render that the claimant did not have disability from June 9, 1999, through July 9, 1999, the date the claimant had knee surgery.

Although the claimant was released to return to light-duty work following the surgery on July 9, 1999, he testified that he was unable to work because of the injury. Generally, a release to light duty is evidence that disability continues. Texas Workers' Compensation Commission Appeal No. 992899, decided February 7, 2000; Texas Workers' Compensation Commission Appeal No. 970579, decided May 12, 1997. The carrier asserts that a light-duty job was available to the claimant had he chose to avail himself of the opportunity; however, bona fide offer of employment was not at issue. The hearing officer resolved the conflicting evidence and determined that the claimant had disability from July 10, 1999, through August 4, 1999. We find the evidence sufficient to support the hearing officer's determination of disability for this period of time.

The claimant did not appeal the hearing officer's determination that his current left knee meniscus tear, if any, is not a result of the compensable injury of _____. The claimant's appeal asserts that he filed a motion with the hearing officer to reopen the record based on newly discovered evidence of the designated doctor's report; that the designated doctor opined that the knee surgery was unsuccessful and that another surgery is needed to correct a still torn meniscus; that the hearing officer denied the motion to reopen on two grounds; and that the hearing officer's opinion is "clearly wrong and manifestly unjust when considering the newly discovered evidence of the Designated Doctor." None of the documents referred to by the claimant were provided on appeal.

In determining whether there is a basis to remand a case to a hearing officer based on a claim of newly discovered evidence, the Appeals Panel considers whether the evidence has come to the knowledge of the party after the CCH, it was not owing to want of due diligence that knowledge did not come sooner, the evidence is not just cumulative, and the evidence is so material it would probably produce a different result if a new hearing were granted. Texas Workers' Compensation Commission Appeal No. 92444, decided October 5, 1992. Even if we were to accept the claimant's assertions that the evidence came to him after the CCH, was not cumulative, and due diligence was exercised in filing

his motion to reopen immediately after receipt of the report, we do not have the designated doctor's report and we are without any basis to determine that such evidence would probably produce a different result if a new hearing was granted. We find no merit in the carrier's assertion of error concerning its motion to reopen the record for new evidence and the claimant has not met the requirements for a remand to consider newly discovered evidence.

We affirm the hearing officer's decision that the claimant's current left knee meniscus tear, if any, is not a result of the compensable injury of _____. We reverse the hearing officer's decision that the claimant had disability from June 9, 1999, to August 4, 1999, and render a decision that the claimant did not have disability from June 9, 1999, through July 9, 1999. We affirm the hearing officer's decision that the claimant had disability from July 10, 1999, through August 4, 1999.

Dorian E. Ramirez
Appeals Judge

CONCUR:

Tommy W. Lueders
Appeals Judge

Judy L. Stephens
Appeals Judge