APPEAL NO. 010695

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 March 8, 2001. The hearing officer determined that the appellant (claimant) had disability from his November 2, 1999, injury for the period from June 22 through July 25, 2000, but not thereafter. The claimant has appealed, arguing that disproportionate weight was given to videotapes whose admission was objected to by the claimant. The claimant also complains that the hearing officer admitted, with no finding of good cause, the belatedly exchanged report of an expert. Finally, the claimant contends that the CCH did not live up to the standards of a fair hearing. The respondent (carrier) points out that no objection to the expert's opinion was made at the CCH, and that the hearing officer's decision is otherwise supported.

DECISION

We affirm the hearing officer's decision.

In considering the record in this case, it is apparent that the hearing officer did not err in his finding on the period of disability. Disability is defined as "the inability because of a compensable injury to obtain and retain employment at wages equivalent to the pre-injury wages." Section 401.011(16). The trier of fact may consider whether wages are earned in another job, or may consider whether the status of being out of work or working for less than the preinjury wage relates to something other than the injury that was sustained. It was the claimant's position that any income he was paid for the purchase and resale of used cars was investment or hobby income.

Briefly, the claimant, who was 29 years old, said he had not looked for another job because he still had a job with his former employer and was on an unpaid leave status. He said that no light-duty offer had been forthcoming from his employer. The claimant contended that he therefore began buying cars at auction through his grandfather's used car dealership and selling them within 21 days, without transferring title to himself. A surveillance videotape showed him at the used car lot on November 2, 2000, at a desk, writing out paperwork, or walking around the car lot, cell phone in hand, apparently describing vehicles to a caller. At one point, the claimant gets down on his knees and looks under the front of a car. The claimant is shown on this day (and other days that were recorded) moving quickly, pacing almost restlessly, and functioning in no apparent discomfort. The claimant contended that he sold his cars overall at a loss. When asked why he would consider selling a car at a loss, he stated that he would do so for reasons of cash flow and the need to pay bills or the rent. The source of money used to buy the vehicles was not set out in his testimony. The claimant presented a list showing that he had bought and sold 17 vehicles in the period after July 25, 2000, until he moved to another state in December 2000. The claimant had driven to the CCH alone from his out-of-state residence which was a two-day drive.

Other than objection to the surveillance reports and videotapes, no objection was made to other exhibits proffered by the carrier. The claimant offered no exhibits even after being advised by the hearing officer that medical evidence that was in the claimant's file, but not offered at the CCH, could not be considered. We agree that error on admission of the expert's report was not preserved and the hearing officer was not required on his own to investigate or rule on timely exchange or good cause without proper objection being made.

The constitutional arguments raised by the claimant are not supported by citation. The constitutionality of the administrative hearing system set up in the 1989 Act has been upheld in Texas Workers' Compensation Commission, *et al.* v. Garcia, 893 S.W.2d 504 (Tex. 1995). While much of the claimant's argument emphasized that the carrier failed to offer any countervailing evidence to his testimony, it was the claimant's burden to show entitlement to temporary income benefits. As he offered nothing more than testimony, the hearing officer's assessment of the claimant's credibility was directly related to the outcome of his claim.

The hearing officer stated that he found the contention that the claimant bought and sold vehicles as a hobby or an investment "implausible" and that he determined that the claimant was actually engaged in used car sales as employment. This determination is amply supported in the record. We do not agree that under the circumstances, where the claimant denied that he received any wage from the auto dealership in whose name the cars were titled, the hearing officer was required to come up with a figure that he believed was earned and compare it to the preinjury wage to assess disability. He could believe that the compensable injury had ceased to be a factor in any fluctuation of wage that would have been actually demonstrated.

The hearing officer is the sole judge of the relevance, 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.). We will not reverse the decision absent great weight

of evidence to the contrary. That not being the case here, we affirm the decision and order.

Susan M. Kelley
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Thomas A. Knapp
Appeals Judge