APPEAL NO. 950149

This appeal is considered under the provisions of the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On January 9, 1995, a contested case hearing was held in (city), Texas, with (hearing officer) presiding as hearing officer. With respect to the issues before him, the hearing officer determined that respondent/cross-appellant (claimant) had disability as a result of his (date of injury), compensable injury from May 5 to July 4, 1994; that claimant's employer did not tender a bona fide offer of light duty employment; and that claimant's average weekly wage (AWW) is $306.44. Appellant/cross-respondent (carrier) appeals challenging only the hearing officer's AWW determination. Claimant's appeal asserts error in the hearing officer's disability determination and the AWW determination. In its response to claimant's appeal, carrier urges affirmance of the hearing officer's disability determination on the basis of the sufficiency of the evidence. Neither appeal challenges the hearing officer's determination that there was not a bona fide offer of light duty employment, within the meaning of the 1989 Act, made in this instance and that part of the decision and order has become final pursuant to Section 410.169.

DECISION

We affirm.

It is undisputed that claimant sustained a compensable back injury on (date of injury). On the day of the injury, claimant was employed as a range supervisor at (employer) and was riding on a tractor picking up golf balls on the range; the tractor went over a bump, his back was jarred and he felt intense pain in the middle of his back. Claimant testified that he got off the tractor and reported the injury to his supervisor at that time, (Mr. B). Claimant testified that on the day after the incident he called someone in "special services" at the employer and told that person that the pain in his back had gotten worse. He was instructed to come in and fill out an accident report and then was taken to the emergency room at South (city) Medical Center. At the emergency room, claimant was prescribed medication, taken off work for two days and advised to rest.

Claimant returned to work on May 10, 1994, complaining that his back was still hurting and that he was having difficulty finding a doctor. (Ms. M), an employee in employer's human resources department, helped claimant schedule an appointment with (Dr. D), on that day. Dr. D took claimant off work for seven days at the May 10th visit and prescribed medications. On May 13, 1994, claimant had a total bone scan which was normal and on May 17th, Dr. D referred claimant for physical therapy. In a Report of Medical Evaluation (TWCC-69) dated May 31, 1994, and an accompanying narrative report, Dr. D stated that claimant would reach maximum medical improvement on June 15, 1994, with no permanent impairment. In addition, Dr. D stated that claimant should work light duty until June 15th and thereafter would be released to full duty, with no restrictions. On July 5, 1994, claimant returned to Dr. D saying that his back pain was worse since he attempted some lifting. Dr. D noted in progress notes of the July 5th visit that his

examination was unremarkable. He concluded his report stating "I am not sure what is causing his pain and I can not think of anything else that would help clarify the situation. Subjective symptoms are out of proportion to the objective findings."

On July 9, 1994, claimant completed an Employee's Request to Change Treating Doctors (TWCC-53), seeking to change from Dr. D to (Dr. P), noting as the reason for the request his continued pain and Dr. D's statement that he could do nothing more for claimant. On July 15, 1994, the Texas Workers' Compensation Commission (Commission) approved the change in treating doctor's to Dr. P. In a narrative report of August 9, 1994, Dr. P noted a "[d]earth of organic findings at this time, with considerable evidence of functional overlay and psychophysiological components apparent. . . . " In addition, Dr. P stated that "from what is seen at this point, no grounds to keep him off his regular work activities. . . ." With respect to claimant's ability to return to work, Dr. P also noted in an August 9, 1994, notation that it was "OK to perform regular work duties (no restrictions)." Dr. P repeated his release to full duty on August 22, 1994, and August 31, 1994. Specifically, in his August 31st release, Dr. P stated "[p]atient's incident of (date of injury) did not cause enough injury now after 4 months' healing to prevent being at job at regular duties."

On September 22, 1994, the Commission approved a second request to change treating doctors from Dr. P to (Dr. W), a chiropractor. Dr. W restricted claimant to light duty and imposed the restriction of no lifting over 25 pounds, no repetitive bending and no riding on tractors/mowers. As of the date of the hearing, Dr. W continued to have claimant under those work restrictions.

Ms. M testified that as of July 7, 1994, in accordance with its policy in the employee handbook, employer considered claimant to have abandoned his job, because he failed to report for three consecutive shifts for which he was scheduled. She noted that the employer was in receipt of Dr. D's release to full duty as of that date and in accordance therewith had returned claimant to the schedule. She stated that she was also in receipt of claimant's request to change treating doctor's from Dr. D to Dr. P at the time the resignation became effective but she did not know whether the Commission had approved the request and had not received any medical reports from Dr. P. Claimant testified that in October 1994, he reapplied for employment with the employer within the work restrictions imposed by Dr. W and was told that there was no position in member services consistent with those restrictions and therefore, that he would not be rehired. However, Ms. M stated that claimant nonetheless continues to be eligible for rehire and that the only reason he was not currently working for employer was that there was no light duty position available.

On the issue of AWW, claimant testified that in addition to the hourly wages, commissions and gratuities reflected in the wage statement, he also received cash tips from members, daily meals, a uniform and accrued vacation and sick time. Claimant estimated that he received $15.00 to $35.00 or $40.00 in tips daily in the spring of 1994. He stated that he would have had to pay $7.00 or $8.00 per day to buy the meals from another source. He testified that the uniform was two golf shirts and two pairs of shorts, which he did not

return to the employer. Finally, he stated that although he accrued vacation and sick time, he did not know at what rate and could not provide an appraisal of its value. Ms. M testified that the cost to the employer for the daily meals was $3.00. She did not provide testimony as to the value of the vacation and sick leave and she stated that claimant was not required to return the uniform upon his resignation, premised on job abandonment.

Both parties appealed the hearing officer's AWW determination. Carrier argues that there was insufficient evidence to support the determination that claimant made $75.00 per week in tips and that for purposes of the AWW determination the value of the daily meals should be calculated at the $3.00 cost to the employer rather than the $7.00 price claimant estimated he would have to spend to buy a comparable meal. Claimant argues that the AWW does not adequately include the value of vacation and sick leave or his uniform. It is well settled that "the burden of proof is upon the claimant claiming workers' compensation to offer sufficient competent evidence to establish his AWW." Texas Workers' Compensation Commission Appeal No. 94734, decided June 6, 1994. "[T]he hearing officer as sole judge of the relevance and materiality of the evidence and of its weight and credibility (Section 410.165(a)), was not bound to accept the testimony of claimant, an interested party, at face value." Appeal No. 94734, citing Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). Rather the hearing officer is free to 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.).

Upon review, we have determined that neither appeal on the issue of AWW has merit. The hearing officer included $75.00 per week for cash tips, crediting claimant's testimony as to the tips he received per day. The hearing officer did not include any money for the value of vacation and sick time. However, we note that there was no evidence presented on the value thereof. Claimant could not recall how such time was accrued and could not provide an estimate of its value. Similarly, Ms. M did not place a value on vacation/sick time either in the wage statement or her testimony. Admittedly, claimant's attorney assigned a value in his final argument at the hearing but it is well established that final argument is not evidence. With respect to the value of the uniform provided to claimant, the evidence establishes that claimant was not required to return his uniform when he was deemed to have resigned. As a result, he has not lost the use thereof and it is not properly included in the calculation of his AWW. Finally, carrier argues that the hearing officer incorrectly calculated the value of the meals at claimant's $7.00 estimate of replacement cost to him rather than the $3.00 actual cost to the employer of the daily meal. Carrier does not cite any authority for its position and we are unaware of any authority so stating. To the contrary Tex. W. C. Comm'n, 28 TEX. ADMIN. CODE § 128.1 (Rule 128.1) specifically provides that the advantages provided to an employee, including meals, are to be included at "market value" in calculating a claimant's AWW. Black's Law Dictionary defines market value as "the price property would command in the market." Thus, in accordance with the plain language of Rule 128.1, we believe that the hearing officer correctly determined that the estimated cost of replacing the meal, rather than its cost to the employer more closely reflects the "market value" of the benefit provided. Accordingly, the

AWW was properly calculated using the $7.00 figure. Finding that the evidence sufficiently supports the hearing officer's AWW determination and that our review does not indicate that it is so against the great weight of the evidence as to be manifestly unjust, we find no basis for disturbing that determination on appeal. Atlantic Mutual Insurance Co. v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.) .

Now we turn to claimant's assertion of error in the hearing officer's determination that his disability ended on July 4, 1994. Under the 1989 Act, the claimant has the burden of proving that he had disability as a result of his compensable injury. Texas Workers' Compensation Commission Appeal No. 94248, decided April 12, 1994. Disability is defined as "the inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage." Section 401.011(16). Whether claimant had disability is a fact question to be resolved by the hearing officer. The hearing officer is the sole judge of the weight, credibility, relevance and materiality to be given to the evidence. Section 410.165(a). As the fact finder, the hearing officer is charged with the responsibility for resolving the conflicts in that evidence, including the medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). To that end, the hearing officer could believe all, part, or none of the testimony of any witness and could properly decide what weight he would assign to the other evidence before him. Campos, *supra*. As an appellate body, we will not substitute our judgment for that of the hearing officer where her determinations are supported by sufficient evidence. Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986).

In this instance, the hearing officer determined that the claimant did not have disability from July 5, 1994, through the date of the hearing. In so doing, the hearing officer chose to credit the evidence from Drs. D and P that claimant could work at full duty, as of July and August 1994, respectively, with no restrictions as compared to that of the claimant that he could not obtain work at his preinjury wage because of the continuing effects of his compensable injury and that from Dr. W, claimant's current treating doctor, who restricted claimant to light duty. It was within the hearing officer's province as the finder of fact to so resolve the conflicts in the testimony and evidence. Nothing in our review of the record indicates that the hearing officer's disability determination is so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. To the contrary, our review indicates that it is supported by sufficient evidence and, accordingly we affirm. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986). Similarly, the fact that the evidence may have allowed different inferences than the ones drawn by the hearing officer herein does not provide a basis for reversing the hearing officer's decision. Texas Workers' Compensation Commission Appeal No. 92308, decided August 20, 1992.

The decision and order of the hearing officer are affirmed.

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Alan C. Ernst
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Tommy W. Lueders
Appeals Judge