APPEAL NO. 950316

On October 11, 1994, a contested case hearing was held in (city), Texas, with (hearing officer) presiding as the hearing officer. The hearing was held under the provisions of the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). The hearing officer determined that the appellant (claimant) sustained a compensable injury on (date of injury), and that he had disability from May 13, 1994, through May 22, 1994. The claimant disagrees with the determination on disability and requests that we reverse that determination and remand the case to the hearing officer. The respondent (carrier) requests affirmance.

DECISION

Affirmed.

The employer maintains a waste incineration facility. The claimant is a maintenance mechanic and began working for the employer in 1979. He testified that he broke his right elbow in a work-related injury in 1983. According to a report of (Dr. B), the claimant was referred to him on January 4, 1994, by (Dr. D). Dr. B reported that the claimant had a four year history of pain and swelling in his left knee. Dr. B performed left knee surgery on the claimant on January 7, 1994. The claimant testified that he was off work for ten days due to his surgery and that he had no problems with his knee after the surgery.

(Mr. R) is the employer's maintenance manager. He testified that on (date), the claimant and four other employees were asked to change out the teeth on a shredder and the claimant told him that he could not do that job because of his elbow. He said that the safety files were checked and no work restrictions were found and so the claimant was sent to a doctor on (date). He said the claimant returned to work the same day with a note from the doctor stating that the claimant could return to full duty with "pain as tolerated." Mr. R said that upon returning from the doctor the claimant still said he was not able to do the shredder job. At that point the claimant was offered light duty work which the claimant accepted "under protest." The claimant was assigned a clerical job updating manuals which required using the copier, sorting pages, and collating. He said the claimant worked at the copier for about four hours on (date of injury) and then went to a doctor for his elbow. On May 5th he said the claimant worked all day at the copier and that on May 6th the claimant worked at the copier until about 2:00 p.m. when he complained of knee pain to the safety manager, (Mr. H). On Monday, May 9th, Mr. R said the claimant was offered a drafting stool to sit on while using the copier and that the claimant complained that afternoon about back problems from sitting on the stool. Mr. R further testified that on May 10th he met with the claimant and told the claimant that the copier work was the lightest duty available and that if he could not do that work he would have to go home.

The claimant testified that on May 5th, the second day of his copying job, he became aware of knee pain and his knee swelled up, and that on May 9th he told Mr. R about knee and back pain and Mr. R told him that if he could not do the copying job there was nothing

else for him to do so he should go home. The claimant went to Dr. D on May 10th. Dr. D noted on May 10th that the claimant has epicondylitis of his right elbow and should not lift anything more than 20 pounds with his right arm for two weeks. He also stated that "due to the slow healing of cartilage from his left knee surgery, [claimant] has developed a back pain resulting from shifting his weight while standing." Dr. D also said "it would be in the best interest of his health for him to stand no longer than one hour at a time for the next 30 days." The claimant went to Dr. B on May 13th and told Dr. B that he began to have swelling in his left knee and back pain when his job was "modified at work to doing a standing activity without relief for about six hours each day." Physical examination of the left knee revealed effusion and crepitus with motion. Dr. B diagnosed "left knee reactive synovitis secondary to articular cartilage injury," gave the claimant an off work excuse until May 23, 1994, and stated that "he should return [sic] his previous work at his job site which allowed him to be on and off his feet as his symptoms persisted." An off work note signed by Dr. B on May 13, 1994, states that the claimant may return to work on May 23, 1994, with the following restriction: "Return to previous job duty, maintenance mechanic. His swelling is due to prolong standing on his left knee." Dr. B saw the claimant again on June 3, 1994, at which time Dr. B noted that the claimant was feeling a lot better, but still had some pain. In regard to the left knee, Dr. B said there was no appreciable effusion, minimal pain to palpation, and crepitus which is "minimally symptomatic." Dr. B stated "I highly recommend that he be returned to his previous job description which allows him to be able to get off his feet as his knee may require."

The claimant did not return to work after May 10, 1994, until June 8, 1994. He said he did not go back to work because Mr. R would not accept the doctor's restrictions, and because his knee was "not functioning right." He said the employer would not offer him light duty meeting his restrictions. However, Mr. R testified that he did not recall the claimant showing him Dr. B's off work note of May 13th and that if the claimant had shown him that document, he would have allowed the claimant to return to work. The claimant said he worked at the employer from June 8th to June 23rd doing mostly pump repairs in the shop. He testified that on June 23rd Mr. R sent him home because he had problems with his knee. He said he has not returned to work since June 23rd because his knee has been "bothering" him and because he has not been able to afford a knee brace and physical therapy he said were recommended by Dr. B. He said his knee is worse now because of working between June 8th and June 23rd. He also testified that he injured his elbow at work on June 10, 1994. He said he has been unable to perform his maintenance mechanic job since June 23rd because of his knee. Mr. R testified that he believes that the employer does have light duty jobs available which would allow the claimant to sit after 30 minutes of standing. We note that the employer provided the claimant a stool to sit on while copying after he complained of knee pain.

According to a report of Dr. B, the claimant returned to see him on June 24th and told him his knee was doing better, although he had problems with stairs. Dr. B said the claimant had no effusion at that time and had only minimal tenderness. Dr. B stated that he explained to the claimant that there was certainly work he was able to do at his employer,

but that he recommended against prolonged standing and/or climbing. Dr. B further reported that he again saw the claimant on July 22, 1994, and that he, Dr. B, had talked with the employer at length regarding what the claimant was able to do and that he was under the impression that "this would not be a problem." He noted that the claimant complained of knee pain, but that there was no effusion, no crepitus with motion, and only minimal tenderness. He diagnosed left knee osteoarthritis which he said may be a chronic problem and that a knee brace may be of some benefit. Dr. B stated that it was his impression that prolonged standing aggravated the claimant's osteoarthritis and may have accelerated some of the osteoarthritic processes. He stated that he had explained at length to the claimant that "there are certainly numerous jobs that he can do at work which would not put excess strain across his left knee."

The issues at the hearing were whether the claimant sustained a compensable injury on (date of injury), and whether the claimant has had disability from the injury of (date of injury). The carrier has not appealed the hearing officer's determination that the claimant sustained a compensable injury on (date of injury), when he aggravated the osteoarthritic condition of his left knee. The claimant has appealed the hearing officer's determination that he had disability from May 13, 1994, to May 22, 1994. The claimant contends that he has had disability since May 10, 1994, with the exception of the period of June 8, 1994, to June 23, 1994, when he worked for the employer. The claimant further contends that the hearing officer did not apply the definition of disability as found in the 1989 Act and that as a result he has been denied equal protection of the law and has been harmed because had the correct definition been used the hearing officer would probably have found in his favor.

"Disability" means "the inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage." Section 401.011(16). In his discussion of the evidence and in a finding of fact the hearing officer used the phrase "obtain or retain employment" instead of "obtain and retain employment." In Texas Workers' Compensation Commission Appeal No. 92282, decided August 12, 1992, we stated that "[w]e believe it more nearly effectuates Legislative intent to find `obtain and retain' employment to be a single concept." We further stated that "it is consistent with the concept of disability under the 1989 Act that a claimant not be foreclosed from income benefits simply because he is able to secure employment; his compensable injury also must not prevent him from keeping that job." While we do not endorse the hearing officer's use of the phrase "obtain or retain employment" in his discussion and finding on disability, we are not persuaded under the particular circumstances presented in this case and from a reading of the entire decision of the hearing officer, that the claimant has shown that the hearing officer misapplied the law in this case. As pointed out by the hearing officer in his decision, the claimant's testimony that he has been unable to work after May 22, 1994, because of his compensable injury (with the exception of the period of June 8th to 23rd when he actually did work), is in direct conflict with the medical evidence. Dr. B more than once pointed out in his reports that the claimant is able to work, that he discussed work duties with the employer, and that there are jobs at the employer which the claimant is able to do. The employer gave evidence of its willingness to accommodate the claimant's work restrictions.

The hearing officer is the trier of fact and is the sole judge of the relevance and materiality of the evidence offered and of the weight and credibility to be given to the evidence. Section 410.165(a). The hearing officer can believe all, part, or none of the testimony of any witness, and resolves conflicts in the evidence, including the medical evidence, and determines what facts have been established. Texas Workers' Compensation Commission Appeal No. 950084, decided February 28, 1995. An appellate level body is not a fact finder and does not normally pass upon the credibility of witnesses or substitute its judgment for that of the trier of fact, even if the evidence would support a different result. Appeal No. 950084, *supra*. When reviewing a hearing officer's decision to determine the factual sufficiency of the evidence, we should set aside the decision only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Appeal No. 950084, *supra*. We conclude that the hearing officer's decision regarding the period of disability from May 13, 1994, through May 22, 1994, is supported by sufficient evidence and is not so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust.

The hearing officer's decision and order are affirmed.

Robert W. Potts
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Alan C. Ernst
Appeals Judge