APPEAL NO. 960017

On December 6, 1995, a contested case hearing (CCH) was held in [city], Texas, with [hearing officer] presiding as the hearing officer. The CCH was held under the provisions of the Texas Workers' Compensation Act, TEX. LAB CODE ANN. § 401.001 et seq. (1989 Act). The issues at the CCH were maximum medical improvement (MMI), impairment rating (IR), and disability. There has been no appeal of that portion of the hearing officer's decision which holds that the claimant reached MMI on July 26, 1995, with a one percent impairment rating (IR) as reported by the designated doctor chosen by the Texas Workers' Compensation Commission (Commission). The appellant (claimant) appeals the hearing officer's decision that she has not had disability as a result of an injury sustained on [date of injury]. The respondent (carrier) requests affirmance.

DECISION

Affirmed.

The employer, [employer], is a vegetable processing company. The claimant, who is 23 years of age, testified that she felt back pain on [date of injury], when she lifted a 60-pound barrel of beans at work. She was examined by [Dr. R] on [the day after the date of injury], and he diagnosed a low back sprain and reported that the claimant could return to work on [the day after the date of injury], with restrictions for seven days of no lifting greater than five pounds and no excessive bending or stooping. Dr. R saw the claimant again on October 21, 1994, and he continued the work restrictions for another two weeks. The claimant said she returned to work on [the day after the date of injury], and worked as a spinach inspector until about the middle of November 1994. She said that she had to stoop and bend a lot at work and that she continued to have back pain. She also testified that three or four times a week she had to lift, carry, or push a barrel of water weighing 80 pounds. She said that in November 1994 she started seeing [Dr. S] who told her not to work. She said she called the employer, apparently about being taken off work, and was fired. The claimant testified that during the time she was off work her back condition prevented her from doing the work her employer offered her. The claimant said she returned to work working "light duties" about six weeks before the CCH and has continued to work since then. It is uncertain whether the claimant returned to work for the employer or for another company.

Dr. S is listed as a psychiatrist in a directory in evidence. He issued an off-work slip on November 9, 1994, which stated that the claimant is "unable to work" until December 9, 1994. He continued to issue the same type of off-work slips, which

indicated off-work status for about a month at a time, up through March 24, 1995, when he noted that the claimant's date of return to work was undetermined. Dr. S's reports indicate that he saw the claimant approximately 18 times from November 9, 1994, through July 18, 1995. These reports state that the claimant complained of back and neck pain and that she had back and neck tenderness and limited mobility, tightness, and spasms. The claimant underwent some period of physical therapy at Dr. S's request. In a report dated March 28, 1995, Dr. S stated that he had been advising the claimant to stay off work and noted that the claimant's job required her to carry heavy objects, "and this may aggravate her injury." A lumbar MRI scan done on November 15, 1994, was reported as normal and a cervical MRI scan done the same day was reported to show "loss of the cervical lordotic curve may be positional but is suggestive for muscle spasm. Otherwise, normal MRI of the cervical spine."

The carrier represented that the claimant was examined by [Dr. D] at the request of the Commission pursuant to a medical evaluation order. Dr. D reported in a Report of Medical Evaluation (TWCC-69) dated February 9, 1995, with an attached narrative report, that the claimant reached MMI on February 6, 1995, the date of his examination of the claimant, with a zero percent IR. Dr. D diagnosed "cervical and lumbar pain, no clinical evidence of HNP or radiculopathy." He stated that he felt that the claimant "is capable of working and I would recommend that she return back to her regular duties with no restrictions." He noted in his report that weakness and mobility deficits on examination appeared to be "effort related," that the claimant had "no true weakness," and that the claimant had invalidated range of motion measurements. He also noted that the claimant did not have any "focal spasm or tightness," and no "motor point tenderness."

The parties stipulated that [Dr. V] was the designated doctor chosen by the Commission. Dr. V reported in a TWCC-69 dated July 26, 1995, that the claimant reached MMI on July 26, 1995, which was the date of his examination of the claimant, with a one percent IR. He diagnosed a "cervical and thoracic/lumbar strain," and stated that he believed that the claimant "should be able to return to full duty without any restrictions."

The employer's safety manager testified that when the claimant returned to work on [the day after the date of injury], which was the day after the injury, she was given the spinach inspector job which he said involves picking bad spinach off a conveyor belt and putting it in a trash container. He said the inspector job involves standing, but that the claimant could have had a chair if she had requested one. He further stated that he observed the claimant at work every day after her injury and that, with the exception of one day, the claimant was able to do her job and did not appear to be having any problems doing her job. He said that on some unspecified date, the claimant said she was not feeling well, was in pain, and wanted to go home. He said the claimant was

allowed to go home on that day. He said that the claimant's inspector's job does not require her to carry buckets of water. He also said that the barrels of water the claimant had testified about were not in the claimant's work section. He said that those barrels were in the alfalfa growing section of the plant. He said that while the claimant had worked in the alfalfa section at some point before her injury on [date of injury], the claimant did not work in the alfalfa section after her injury. He also said that the barrels have a drain plug on them to empty out the water. He further testified that the claimant worked up until November 8, 1994, that after that day the claimant did not show up for work or call in to work for three days, and that the claimant was then terminated pursuant to employer's policy. He said he didn't know why the claimant quit coming to work. He said that the claimant's injury did not affect her wages.

The claimant appeals the hearing officer's decision that she did not suffer disability. 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). While the hearing officer found that the claimant suffered a soft tissue strain to her back on [date of injury], he also found that the claimant was "not unable" to obtain and retain employment because of the injury. There was much conflicting evidence on the disability issue. Dr. R reported in [the month of the claimant's injury] that the claimant was able to work with restrictions, Dr. D reported in February 1995 that the claimant was able to work without restrictions, and Dr. V reported in July 1995 that the claimant was able to work without restrictions. With the exception of taking one day off, which the hearing officer determined was not due to back complaints, the claimant worked until November 8, 1994. At that point Dr. S began issuing off-work slips. However, his reports are rather scant in content and offer mostly recitations of subjective complaints of pain from the claimant. Dr. S's off-work determination appears to be premised on the belief that the claimant has to lift heavy objects at work in her job as a spinach inspector. The claimant testified about having to lift, carry, or push heavy barrels of water. However, her testimony was contradicted by the safety manager's testimony that the water barrels were not even in the claimant's section and that that was not part of her job. The hearing officer is the judge of the weight and credibility of the evidence, resolves conflicts in the evidence, and is free to believe all, part, or none of the testimony of any witness. Texas Workers' Compensation Commission Appeal No. 950084, decided February 28, 1995. We conclude that the hearing officer's decision is supported by sufficient evidence and that it is not against the great weight and preponderance of the evidence.

The hearing officer's decision and order are affirmed.

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Robert W. Potts
Appeals Judge

CONCUR:

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Susan M. Kelley
Appeals Judge

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Lynda H. Nesenholtz
Appeals Judge