APPEAL NO. 991744

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 July 19, 1999. With respect to the issues before him, the hearing officer determined that: (1) the appellant/cross-respondent (claimant) sustained a compensable injury to his head and cervical, thoracic, and lumbar spine, but not to his shoulders and right eye; (2) claimant had disability from ________, to April 5, 1999; and (3) claimant's average weekly wage (AWW) is $588.00. Claimant appeals, contending that the hearing officer erred in determining that he did not have disability after April 5, 1999. Claimant also asserted that the hearing officer abused his discretion in admitting a videotape that was not timely exchanged. Respondent/cross-appellant (carrier) responds that the complained of determinations did not amount to reversible error. In its cross-appeal, carrier appealed the determinations regarding injury, disability, and AWW on sufficiency grounds. Claimant responds that carrier's contentions are without merit.

DECISION

We affirm.

Claimant contends the hearing officer erred in determining that the period of disability for his ________, injury, ended on April 5, 1999. Claimant asserts that he established that he had disability from April 1, 1999, to the date of the CCH. Carrier contends that the hearing officer erred in determining that, "although not documented, there was testimony to the effect that Dr. AG released claimant to full duty on April 5, 1999 . . . ." Claimant asserts that he had only a sedentary work release from Dr. AG dated March 31, 1999. Claimant also contends, and the record shows, that Mr. _____ (Mr. _), employer's safety manager, testified that claimant was never released to full duty as far as he knew. Claimant also contends that he was terminated for filing a workers' compensation claim, and that this termination did not end his 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). Disability, by definition, depends upon there being a compensable injury. *Id*. Termination for cause does not necessarily preclude a finding of disability. Texas Workers' Compensation Commission Appeal No. 92282, decided August 12, 1992. Whether disability exists is a question of fact for the hearing officer to decide and can be established by the testimony of the claimant alone if deemed credible. Texas Workers' Compensation Commission Appeal No. 93560, decided August 19, 1993. The 1989 Act does not "impose on an injured employee the requirement to engage in new employment while still suffering some lingering effects of his injury unless such employment is reasonably available and fully compatible with his training, experience and qualifications." Texas Workers' Compensation Commission Appeal No. 91045, decided November 21, 1991. The 1989 Act "is not intended to be a shield for an employee to continue receiving temporary income benefits where, taking into account all the effects of the injury, he is capable of employment but

chooses not to avail himself of reasonable opportunities or, where necessary, a bona fide offer." Texas Workers' Compensation Commission Appeal No. 91045, decided November 21, 1991. The Appeals Panel has also stated, under the particular facts of the cases, that a restricted release to work is evidence that the effects of the injury remain and that disability continues; that where the medical release is conditional and not a return to full duty because of the compensable injury, disability, by definition, has not ended; and that, generally, an employee under a conditional work release does not have the burden of proving inability to work and is not required to look for work. *See* Texas Workers' Compensation Commission Appeal No. 970597, decided May 19, 1997.

Claimant testified that he sustained a compensable injury on ________, when he fell off a ladder, falling backwards onto another person, and then to the ground, hitting his back and head. Claimant testified that he would not have been able to do sedentary work on March 31, 1999, and that on April 6, 1999, he was still "totally immobilized." Claimant said Dr. AG took him off work on April 12, 1999, and that he has not been released to return to work. Claimant testified that he does not think he is able to perform any gainful employment. Claimant said he went to see Dr. AG with employer's safety manager and that Dr. AG first released him to sedentary duty. Claimant then said that he went to see Dr. AG a second time. Dr. AG's medical records state that claimant was to return on April 5, 1999. Claimant testified that when he went back to Dr. AG, the doctor said he was fine and released him to full duty.

In this case, the hearing officer determined that claimant did not have disability after April 5, 1999. The hearing officer stated that he did not find claimant's testimony or the evidence from claimant's treating doctor, Dr. JG, to be persuasive. The hearing officer said that claimant "was capable of returning to his preinjury duties" on April 5, 1999 The hearing officer was the sole judge of the credibility of the evidence and he decided what weight to give to the evidence of disability in this case. He reviewed the evidence and decided what facts were established. After reviewing the evidence in this case, we conclude that the disability determination is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986)

Claimant contends the hearing officer abused his discretion in admitting a videotape that was not timely exchanged by carrier. Claimant asserts that in answers to interrogatories dated June 14, 1999, carrier represented that its adjuster, Ms. C, had possession of videotape evidence taken of claimant. The benefit review conference (BRC) took place on May 24, 1999. The videotape reflects that the dates that claimant was videotaped were May 5, May 22, May 26, and June 4, 1999. Claimant's activities depicted on May 5th and May 22nd involved sitting and walking. The activity on May 26th involved sitting, picking up a child, and bending. On June 4th, claimant was shown walking and getting in a car. Claimant asserted at the CCH that carrier did not exchange this videotape until June 30, 1999, so it was not timely exchanged. Carrier's response was that it had good cause for the failure to exchange the videotape. The attorney for carrier stated that the last day of surveillance was June 4, 1999; that the videotape was edited by the

investigator and then was not forwarded to carrier until June 26th or 27th; and that carrier exchanged it as soon as reasonably possible.

For the first time on appeal, claimant contends that interrogatories show that carrier had a portion of the videotape by June 14, 1999.[1] Claimant attaches the interrogatories, as well as other documents, to his appeal. This evidence was not admitted at the CCH. Based on the record before the hearing officer, the hearing officer determined that carrier had good cause for the late exchange because the videotape was not completed until after the BRC.

Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 142.13 (Rule 142.13) deals with discovery generally and the time limits for the exchange of evidence. Rule 142.13(c) provides for the exchange of medical records no later than 15 days after the BRC and "[t]hereafter, parties shall exchange additional documentary evidence as it becomes available." Rule 142.13(c)(2). Untimely exchanged documents may be admitted on a showing of good cause. Rule 142.13(c)(3). A party who belatedly investigates the facts and then does not disclose known information in order to make further investigation and development does run the risk of having evidence excluded for failure to exchange. Texas Workers' Compensation Commission Appeal No. 960513, decided April 26, 1996. However, a party is not required to create evidence within 15 days of the BRC in order to exchange it.

There was no evidence before the hearing officer that showed that carrier intentionally delayed the receipt of the videotape from the investigator in order to avoid the requirements for timely exchange. Nothing in the record showed that carrier had the videotape earlier than represented at the CCH. We are thus hard-pressed to conclude that the hearing officer abused his discretion, considering the record that was before him when claimant objected to the admission of the videotape. We will not conclude that a hearing officer "abused his discretion" by considering evidence that the hearing officer could not have known about and, thus, could not have considered. We conclude that the hearing officer could determine that carrier exchanged the videotape when it became available to carrier and that good cause was established in this case.

Claimant contends that the investigation took place both before and after the BRC and that the investigation was prolonged in order to avoid exchange requirements. However, there is nothing in the evidence admitted before the hearing officer to support this contention. We perceive no error.

Claimant asserts that the videotape was edited and should not have been admitted absent a report from the investigator stating that evidence favorable to claimant was not omitted. The hearing officer was free to consider that the videotape was edited and to

[1] At the CCH, claimant's attorney said the interrogatories showed that carrier received the videotape by June 22, 1999.

assign whatever weight he thought appropriate under the circumstances. We perceive no error.

In its cross-appeal, carrier contends the hearing officer's determination that claimant sustained a compensable injury to his head, neck, and back is not supported by sufficient evidence. Carrier asserts that the history of an accident given by a patient is not proof of the patient's truthfulness. Carrier contends that claimant had only a contusion, that he fell on another person and this broke his fall, and that evidence showed that claimant was able to go back to work after the injury.

The claimant in a workers' compensation case has the burden to prove by a preponderance of the evidence that he or she sustained a compensable injury in the course and scope of employment. Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). The 1989 Act defines "injury" as "damage or harm to the physical structure of the body and a disease or infection naturally resulting from the damage or harm." Section 401.011(26).

Where there are conflicts in the evidence, the hearing officer resolves the conflicts and determines what facts the evidence has established. As an appeals body, we will not substitute our judgment for that of the hearing officer when the determination is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain, *supra;* Texas Workers' Compensation Commission Appeal No. 950456, decided May 9, 1995.

Claimant said he lost bladder control when he sustained his compensable injury in a fall on ________. Claimant had been working two days at the time of his injury. A ________, medical report states that claimant reported falling off a ladder, that he lost bladder control, that he reports head and back pain, and that he has a bump on his head. In an April 13, 1999, medical report, Dr. JG stated that claimant's diagnoses included lumbar sprain/strain, multiple cervical subluxations, rotator cuff syndrome, and an injury to "nerve C5-6." The hearing officer resolved any conflicts in the evidence and determined that claimant sustained a compensable injury to his head, back, and neck. The medical evidence supports the hearing officer's determination in this regard. We will not substitute our judgment for the hearing officer's because his determination is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain, *supra*.

Carrier next contends that the hearing officer erred in determining that claimant had disability from ________, to April 5, 1999. The applicable standard of review and the law regarding disability is set forth in Texas Workers' Compensation Commission Appeal No. 950264, decided April 3, 1995. The March 31, 1999, report from Dr. AG supports the hearing officer's disability determination. We will not substitute our judgment for the hearing officer's because his disability determination is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain, *supra.*

Carrier contends the hearing officer erred in determining that claimant's AWW is $588.00. Carrier contends that claimant's AWW should have been calculated based on a 40-hour workweek.

Section 408.041(b) provides that the AWW of an employee who has worked less than 13 weeks immediately preceding an injury for the employer is determined by the usual wage the employer pays a similar employee for similar services, and that if a similar employee does not exist, the usual wage paid in that vicinity for the same or similar services provided for remuneration. Section 408.041(c) provides that if the methods in Section 408.041(b) cannot be reasonably applied, the Texas Workers' Compensation Commission (Commission) may determine the AWW by any method the Commission considers fair, just, and reasonable to all parties. Rule 128.3. Rule 128.3(f) defines a "similar employee" as a person with training, experience, skills, and wages that are comparable to the injured employee and that age, gender, and race shall not be considered.

It was undisputed that employer did not provide evidence regarding a "same or similar" employee and there was no evidence regarding the usual wage paid in that vicinity for the same or similar services. Claimant testified that he worked for employer as a painter's helper from March 28, 1999, to ________, the date of his injury. Claimant said he worked 25 hours during that time. He said he was hired to work seven days per week for 12 hours per day, which is an 84-hour work week. Mr. M indicated that claimant was paid $7.00 per hour. Mr. M said he declined to provide the wage statement of a same or similar employee that was requested by carrier because of his "past experience." There was evidence that it would be unusual for a worker in claimant's position to work that many hours consistently and that the average number of hours worked per week was probably 40.

The hearing officer determined that claimant's AWW is $588.00, based on a pay rate of $7.00 per hour and an 84-hour work week. The evidence conflicted regarding claimant's AWW. The hearing officer stated that his calculations were based on a fair and just method. Considering the evidence in the record, we perceive no error. The hearing officer's AWW determination is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain, *supra.*

We affirm the hearing officer's decision and order.

Judy Stephens
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Thomas A. Knapp
Appeals Judge