APPEAL NO. 990318

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On January 20, 1999, a contested case hearing was held. With respect to the issues before her, the hearing officer determined that appellant's (claimant) compensable (low back) injury of _____ (all dates are 1998) was not "a producing cause of [claimant's] T7-8 herniated nucleus pulposus [HNP]";that, at some time between August 19th and August 31st, claimant sustained "an unidentified injury" which resulted in the T7-8 HNP; and that claimant had disability from the compensable _____ injury from July 23rd through August 12th inclusive but that claimant's inability to obtain and retain employment thereafter is not due to the compensable injury.

Claimant appeals, contending that all of his injuries stemmed from his _____ compensable fall and that he has had disability since July 23rd. Claimant requests that we reverse the hearing officer's decision and render a decision in his favor. The file does not contain a response from the respondent (carrier).

DECISION

Affirmed.

Claimant testified that he was employed as a "repair welder," that on _____ he was on an extension ladder when he received a shock from a welding machine which caused him to fall 10 or 12 feet to the ground on a concrete surface. Claimant is not exactly sure how he fell or what parts of his body he landed on. Claimant said that he initially felt back pain but did not seek immediate medical treatment because he thought his condition would get better ("would work out"). When claimant's symptoms did not improve, he sought treatment from Dr. A, a doctor chosen by the employer. Carrier has accepted liability for the _____ fall and at issue is the extent of the injury.

Dr. A, in a report dated July 23rd, noted the incident, that claimant did not know "what part of his anatomy struck the ground," noted tenderness "of the entire back ranging from approximately T-12 down to his iliac crest," that an "EKG was performed with minimal changes noted" and prescribed physical therapy (PT) "for aggressive care." X-rays of the lumbar spine were normal. Claimant was taken off work.

Claimant began PT and PT notes of July 30th indicate complaints of "constant pain and 'pressure' across bilateral lumbar and lower thoracic regions." Claimant testified that the PT did not help, but only made his back pain worse. Claimant testified about a knot in the middle of his back, six or eight inches above the belt, that the therapist massaged. PT notes of July 31st, August 3rd, 5th, 7th, 10th, 12th, 14th and 18th all note continued complaints. The August 18th note states that "[m]ost pain is noted in thoracic/lumbar area . . . . (around T-6 & L4-5)."

In evidence is a surveillance videotape showing an individual performing various activities on August 13th and August 19th. The August 13th segment does not show the individual's face clearly and there is a suggestion that it is not the claimant. It shows the individual vigorously digging a ditch on claimant's property (either his house or at a trailer park claimant owns). The activities on August 19th, which fairly clearly show claimant, include hooking and unhooking a trailer, dragging a log with a truck, and climbing stairs, all without visible signs of discomfort.

In a PT note of August 25th, it was noted that claimant's "lower back is sore and is improving. Upper portion of back like a pinch in the center of the spine. It gets worse later in the day, and better in the morning." Claimant was eventually referred to Dr. C, whose letterhead indicates he is a neurosurgeon. An MRI was performed on August 31st, which showed an HNP at T7-8 with an extruded fragment. In a report dictated on September 22nd, Dr. C recites the history of the fall and that "[r]ight thereafter he had severe pain in the mid thoracic area . . . ." It was noted claimant had PT for four weeks without relief and that "he can hardly get up and move around." Regarding the August 31st MRI, Dr. C states:

> MRI scan shows a profound disc herniation in the midline and to the left, sloping out to the left with cord displacement and significant anterior thecal sac and spinal cord compression and impression with flattening of the spinal cord at that level at T7-T8.

Emergency spinal surgery was performed on September 29th, for a "very significant midline and left lateral disc herniation at T7, T8, with compressive myelopathy." A discectomy and fusion with instrumentation was performed.

At issue is whether the _____ fall and/or attendant PT caused claimant's HNP at T7-8. Dr. P performed a record review for carrier and, in a report dated November 4th, questioned whether claimant's surgery was truly an emergency and commented:

> Within reasonable medical probability, the thoracic surgery does not constitute an emergency situation as it related to the work injury of _____. The possibility of some intervening injury must be raised. Within reasonable medical probability, the medical necessity for the surgery of September 29, 1998 is related to an intervening injury that caused the thoracic herniated and extruded fragment. It is not reasonable that the injury occurred on _____ and did not become emergent until September 24, 1998, some two ½ months post injury. As stated, an intervening injury may have occurred.

The hearing officer commented that she was not persuaded that the claimant had shown a causal relationship between the _____ fall and the HNP at T7-8 that was diagnosed on August 31st. In the discussion portion of the decision, the hearing officer commented:

> In this regard, the Hearing Officer notes that although, on August 25, 1998, Claimant advised health care providers that he had been in constant severe

> pain without improvement, and that such pain had prevented him from performing any significant activities, this representation to health care providers is belied by the contents of the videotape, which clearly demonstrates that Claimant was capable of performing some fairly strenuous activities on August 13 and August 19, 1998. Although Claimant has contended that he may not be the person shown in portions of the videotape, he has wisely conceded that he is the person shown in other portions of the videotape, and a review of the videotape reveals that Claimant's face was identifiable in brief portions of the tape, and unless one assumes that the person digging the ditch at Claimant's trailer park and the person videotaped at Claimant's residence made the identical fashion statement on the same date by mere coincidence, it is highly unlikely that the investigators conducting the surveillance accidentally videotaped a person other than Claimant during a portion of their surveillance activities.

The hearing officer also relies on the videotape to establish the period of disability, finding that claimant had disability from the _____ fall beginning on July 23rd, when he was taken off work by Dr. A, until August 12th, the day before the surveillance videotape showed someone the hearing officer determined to be the claimant, performing a fairly vigorous activity of digging a ditch. The hearing officer concludes:

> Since the evidence overwhelmingly indicates that Claimant's physical condition was substantially worsened by some event occurring between August 19 and August 31, 1998, it also appears logical to conclude that Claimant did, as Carrier has alleged, sustain a subsequent injury which constitutes the sole cause of Claimant's current condition. [The HNP t T7-8.]

The evidence is in conflict, and there is no easy explanation of how an individual with a severely herniated disc at T7-8 can undergo several weeks of PT, perform routine tasks and even dig a ditch on August 13th. Moreover, we have many times stated that the hearing officer is the trier of fact and is the sole judge of the relevance and materiality of the evidence and of the weight and credibility to be given to the evidence. Section 410.165(a). While a claimant's testimony alone may be sufficient to prove a claim, the testimony of a claimant is not conclusive but only raises a factual issue for the trier of fact. Texas Workers' Compensation Commission Appeal No. 91065, decided December 16, 1991. The trier of fact may believe all, part, or none of any witness's testimony. Taylor v. Lewis, 553 S.W.2d 153 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.); Texas Workers' Compensation Commission Appeal No. 93426, decided July 5, 1993. This is equally true regarding medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). In a case such as the one before us where both parties presented evidence on the disputed issues, the hearing officer must look to all of the relevant evidence to make factual determinations and the Appeals Panel must consider all of the relevant evidence to determine whether the factual determinations of the hearing officer are so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Texas Workers' Compensation Commission Appeal No. 941291, decided November 8, 1994. An appeals level body is not a fact finder, and it does

not normally pass upon the credibility of witnesses or substitute its own judgment for that of the trier of fact even if the evidence could support a different result. National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied). Although another fact finder may have drawn different inferences from the evidence, which could have supported a different result, that does not provide a basis for us to reverse the hearing officer's decision on appeal (Salazar, *et al.* v. Hill, 551 S.W.2d 518 (Tex. Civ. App.-Corpus Christi 1977, writ ref'd n.r.e.)), and we decline to substitute our judgment for that of the hearing officer.

Accordingly, the hearing officer's decision and order are affirmed.

_____
Thomas A. Knapp
Appeals Judge

CONCUR:

_____
Stark O. Sanders, Jr.
Chief Appeals Judge

_____
Robert W. Potts
Appeals Judge