

APPEAL NO. 990384

This appeal is brought pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on February 1, 1999. The appellant (carrier) and the respondent (claimant) stipulated that the claimant sustained a compensable injury on _____. The hearing officer determined that the claimant had disability beginning on March 16, 1998, and continuing through the date of the hearing. The carrier appealed, urged that the evidence is insufficient to support the determination or that the determination is so contrary to the evidence as to be manifestly unjust, and requested that the decision of the hearing officer be reversed and that a decision in its favor be rendered. A response from the claimant has not been received.

DECISION

We affirm.

The claimant managed the meat department in a store of the employer. On _____, he slipped on ice on the floor of a walk-in freezer. The claimant testified that he was seen by Dr. Z; that x-rays were taken and physical therapy was prescribed; that Dr. Z asked if he could go back to work at light duty; that he said that there was no light duty in his job; that he told Dr. Z that he could not do the lifting and manual labor required in his job; and that Dr. Z released claimant to return to work on February 27, 1998. The claimant was shown a note from Dr. Z that says that the claimant will be referred for three weeks of physical therapy and states:

The patient is also advised that he can go back to work on Friday. The patient is showing some reluctance with this but I cannot identify the reason not to allow the patient to go back to work.

The claimant said that his testimony was accurate, that he did not know why Dr. Z wrote what he did, that he asked Dr. Z to have an MRI performed, and that the report of Dr. Z does not mention an MRI. The claimant stated that he returned to work, that he normally was required to move heavy boxes, that he was not able to do that type of work, that he had other employees do that work for him, and that he went to physical therapy. He testified that he was terminated on March 6, 1998; that he does not think that he was terminated for the reason given by the employer; but that he was terminated for other reasons. The claimant's immediate supervisor testified that the claimant was terminated for the reason given by the employer and that after the claimant returned to work he performed his normal job duties.

The claimant said that he looked for many lawyers to handle his case and that the attorney representing him may have referred him to Dr. D. He testified that Dr. D took him off work on March 16, 1998; prescribed physical therapy; referred him to Dr. H; that he had an MRI, a CAT scan, and a discogram; that the MRI showed that he had three herniated discs; that Dr. H performed a new type of surgery to remove part of a disc; that he has not

been returned to work by any doctor after being taken off work by Dr. D; and that he could not work because of the injury to his back. He said that he saw Dr. N at the request of the carrier, and that Dr. N said that he cannot lift over 10 pounds and that he would recommend a fusion. A report from Dr. N states that the claimant has not reached maximum medical improvement; that he can return to some work activities; that he cannot stand for a prolonged time or walk a prolonged distance; that he can lift and carry 10 pounds; and that if epidural steroid injections fail, the claimant is probably a candidate for lumbar laminectomy, discectomy, and fusion.

In a report dated March 13, 1998, Dr. D diagnosed lumbar problems, including lumbar radiculitis; ordered tests; stated that referral to a neurosurgeon or orthopedic surgeon may be necessary; and noted that there would be a follow-up in two weeks. On April 15, 1998, Dr. D reported that the claimant needs an MRI, that he may need surgery at L4-5 and L5-S1, and that he is in an off-work status. In a note dated May 21, 1998, Dr. D said that the claimant was taken off work on March 13, 1998, and should be off work until exhaustive diagnostic testing and consultation with an orthopedic surgeon or neurosurgeon has been accomplished. In a report dated August 5, 1998, Dr. H stated that the claimant had minimal disc bulging and protrusion at L3-4 and that this was compatible with his suspicion of discogenic pain. Dr. H performed surgery under anesthesia with needles on October 8, 1998. Dr. D continued to treat the claimant and keep him off work. The last off-work slip is dated January 13, 1999.

The burden is on the claimant to prove by a preponderance of the evidence periods of disability. Texas Workers' Compensation Commission Appeal No. 92030, decided March 12, 1992. The testimony of the claimant alone may be sufficient to satisfy the burden of proof. Texas Workers' Compensation Commission Appeal No. 94198, decided April 1, 1994. A claimant may go in and out of periods of disability. Texas Workers' Compensation Commission Appeal No. 91122, decided February 6, 1992. 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 because the finder of fact judges the credibility of each and every witness, the weight to assign to each witness's testimony, and resolves conflicts and inconsistencies in the 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). 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 would 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). During the time that the hearing officer determined that the claimant had disability, doctors had the claimant in a no-work status.

That a claimant is involuntarily terminated may be considered, but does not foreclose the existence of disability. Texas Workers' Compensation Commission Appeal No. 970089, decided February 28, 1997. The hearing officer's determination that the claimant had disability beginning March 16, 1998, and continuing through the date of the hearing is not so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986). Since we find the evidence sufficient to support the determination of the hearing officer, we will not substitute our judgment for his. Texas Workers' Compensation Commission Appeal No. 94044, decided February 17, 1994.

We affirm the decision and order of the hearing officer.

Tommy W. Lueders
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Joe Sebesta
Appeals Judge