APPEAL NO. 990762

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. She determined that on Sunday, _____, the appellant (claimant) was at home watching a football game and his back went out when he got up from a sofa and that he did not sustain a compensable injury in the form of an occupational disease on that day. The claimant appealed, contended that he sustained an injury to his back due to repetitive work and heavy lifting at work, and requested that the Appeals Panel reverse the decision of the hearing officer and render a decision in his favor. The respondent (carrier) replied, urged that the evidence is sufficient to support the determinations of the hearing officer, and requested that her decision be affirmed.

DECISION

We affirm.

The claimant testified that he worked as a machine operator for the employer, who made refrigeration units, for about nine years; that he injured his low back in 1992, received treatment for that injury, performed light duty for a while, but did not miss work; that as a machine operator, he did a lot of repetitive work that included lifting, pulling, and pushing pieces of metal that weigh up to 60 pounds and moving carts that had up to 2500 pounds of material on them; that he normally worked 10 hours a day, Monday through Thursday; that beginning in about March 1998 he began having low back pain about twice a month; and that he took over-the-counter medication and it relieved the pain. He said that on _____, he watched a football game on TV; that as he got up from lying on a sofa, he felt pain in his low back; that he went to a grocery store to shop; that the pain became severe, he returned home, and took over-the-counter medication; and that he thought that he would be able to work on Monday. The claimant stated when he got up on Monday, he could hardly walk; that because of a point system used by the employer, he told his supervisor that he had something to do and did not tell him that he had hurt his back; that he went home and took medication; that on Tuesday he was not able to work and told his supervisor that he did something to his back over the weekend; and that his supervisor told him to see a doctor. He testified that on September 29, 1998, he wanted to go to his family doctor; that his family doctor was not able to see him; that he looked in the telephone book and got an appointment with Dr. V, a chiropractor; that he told Dr. V what had happened on Sunday and what he does at work; and that Dr. V told him that he had a work-related injury from the lifting and repetitive work he did for the employer. The claimant said that he did not do anything other than his work that could have caused the back injury. In an employee's report of injury dated September 29, 1998, on a form provided by the employer, the claimant stated the date of injury was _____; that the cause of the injury was repetitive work; and that it resulted from repetitive lifting of parts and pushing work trucks.

In an Initial Medical Report (TWCC-61) dated September 29, 1998, Dr. V said that the claimant had a gradual build-up of low back pain, that episodes had been severe and

frequent, and that his back pain was due to repetitive strain at work and diagnosed lumbar strain/sprain, lumbar myofascial syndrome, lumbar subluxation with instability, and overexertion and strenuous motions--repetitive stress injury. In an undated note Dr. V said that based on history and clinical picture, the claimant's lumbar problems are directly related to his on-the-job activities and refers to articles and books to support his position. In a letter dated January 21, 1999, Dr. V opined that the claimant's lumbar problems are not the result of a one-time incident, but are the result of long-term, chronic overuse.

We have previously pointed out problems that arise in claims in which a repetitive trauma injury is claimed and the issue is stated as whether the claimant sustained an injury on a specific date. The problems were compounded in this case with both possible dates of injury for a claimed repetitive injury being on days that the claimant was not at work. We again encourage the use of the phrase "date of injury" rather than "injury sustained on" in claims involving repetitive trauma.

The burden is on the claimant to prove by a preponderance of the evidence that an injury occurred in the course and scope of employment. Texas Workers' Compensation Commission Appeal No. 91028, decided October 23, 1991. 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). 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 expert's deductions from facts are never binding on a hearing officer, even when not contradicted by an opposing expert. Texas Workers' Compensation Commission Appeal No. 961610, decided September 30, 1996. 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). That a different factual determination could have been made based upon the same evidence is not a sufficient basis to overturn a factual determination of a hearing officer. Texas Workers' Compensation Commission Appeal No. 94466, decided May 25, 1994. Only were we to conclude, which we do not in this case, that the hearing officer's determinations are so against the great weight and preponderance of the evidence as to be clearly wrong or unjust, would there be a sound basis to disturb the determination that the claimant did not sustain a repetitive trauma injury in the course and scope of his employment. 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 appealed determination of the hearing officer, we will not substitute our judgment for hers. 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:

Alan C. Ernst
Appeals Judge

Dorian E. Ramirez
Appeals Judge