APPEAL NO. 990818

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 March 22, 1999. The appellant (claimant) and the respondent (carrier) stipulated that on June 22, 1998, the carrier filed a Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) contesting compensability of the claimed injury. The hearing officer determined that the claimant sustained a compensable low back injury in 1996; that he did not sustain another compensable injury with a date of injury of _____; that the carrier first received written notice of the claimed 1998 injury on June 19, 1998, and timely contested the compensability of the claimed injury; that due to the continuation of the 1996 compensable injury, the claimant was unable to obtain and retain employment at wages equivalent to the preinjury wage beginning on April 11, 1998, and continuing through the date of the hearing; and that since the claimant did not sustain an injury with a date of injury of _____, he did not have disability. The claimant appealed, urged that the determinations adverse to him are against the great weight and preponderance of the evidence, and requested that a decision in his favor be rendered. The carrier responded, urged that the evidence is sufficient to support the decision of the hearing officer, and requested that it be affirmed.

DECISION

We affirm.

The Decision and Order of the hearing officer contains a detailed three-page statement of the evidence. Only a brief summary of the evidence will be repeated in this decision. The claimant had three lumbar disc surgeries; the last being laminotomy, medial fasciatectomy, foramenotomy, and microsurgical discectomy at L2-3 performed by Dr. N on February 27, 1997. Prior to the February 1997 surgery, a report of an MRI dated November 26, 1996, indicates a small herniated disc at L1-2, a large herniated disc at L2-3, a disc bulge at L3-4, no herniation or foraminal narrowing at L4-5, and an annular disc bulge at L5-S1 and contains the comment "degenerative changes at every level with facet arthrosis becoming more prominent in the lower lumbar spine." In a report dated March 11, 1997, Dr. N reported that the claimant had immediate and complete release of his right leg pain. In a note dated February 2, 1998, Dr. N reported that the claimant returned to work at the beginning of October 1997; that he was supervising, doing welding, but doing no heavy lifting; that the claimant described a tired feeling but no pain in his right leg; and that he otherwise continued to work full time without restriction. The claimant testified that his right leg felt good after he returned to work; that some workers were terminated and that he had to pull wrenches, pick up heavy objects, and move welding machines in addition to supervising employees. He said that his left leg started hurting real bad; that on Friday, April 10, 1998, he told Mr. R about the pain and that he needed to see a doctor; that he went to Dr. N on Monday, _____; that Dr. N told him that he had a new injury

because his old injury involved left leg pain and that now his right leg was hurting and that an MRI would be necessary to determine what the problem was; and that he told Mr. R what Dr. N had told him. In a handwritten note dated _____, Dr. N stated that the claimant did well; that he had new pain down the left leg as far as the lateral calf; and that he had been working since November 1, 1997, in a foreman's job with hardly any lifting. An outpatient note dictated by Dr. N on _____, and typed the next day states that the claimant had improved after his surgery, had returned to work in November 1997, was doing mostly light duty as a foreman with only occasional heavy wrench work or lifting, that during the last several weeks he had experienced increasing pain now in the left leg, that his original pain was in the right leg, and that Dr. N was impressed that he may have a left radiculopathy possibly from new disc trouble at L5-S1 and possibly L4-5. The claimant stated that he has not been able to work since April 10, 1998, because of the back and left leg problems. A report of an MRI dated April 24, 1998, indicates a six mm herniation at L1-2, no indication of herniation at L2-3, a disc bulge at L3-4, and no herniation at L4-5 and L5-S1 and contains the comment "moderate to severe degenerative spondylosis of every level within the lumbar spine." In a brief letter to the Texas Workers' Compensation Commission dated August 11, 1998, Dr. N stated that due to repetitive activity at work the claimant developed new symptoms in the left leg on April 3, 1998. In a long outpatient clinic note dictated on August 27, 1998, Dr. N stated that the claimant was seen on August 10, 1998; provided some history; and stated that it was difficult to discuss whether the new left leg pain is a new injury, that it seemed more likely that the left-sided leg pain reflects continued degeneration of the already degenerated L2-3 disc, and that the left leg pain was derived from the original injury.

We first address the determinations that the carrier first received written notice of the claimed _____ injury on June 19, 1998, and timely contested the compensability of the claimed injury. The claimant contended that the _____, medical report provided written notice to the carrier. In her Decision and Order, the hearing officer stated that there was no evidence that the report was sent to the carrier and that the note contained nothing to indicate a date of injury or how an injury occurred. She also commented on the statements about new disc trouble and the request for an MRI to confirm his diagnosis. Those statements are subject to different interpretations and, if the other requirements for notice of an injury were met, do not require a reversal of the determination that the _____, medical report did not put the carrier on notice of an _____ injury.

We next address the determination that the claimant did not sustain a specific injury in _____ or a repetitive trauma injury with a date of injury of _____. 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 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). The officer's determinations that the claimant was not injured in the course and scope of his employment in _____ and did not sustain a repetitive trauma injury with a date of injury of _____ are 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 those determinations of the hearing officer, we will not substitute our judgment for hers. Texas Workers' Compensation Commission Appeal No. 94044, decided February 17, 1994.

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). Since we have found the evidence to be sufficient to support the hearing officer's determinations that the claimant did not sustain a compensable injury as claimed, the claimant cannot have disability under the provisions of the 1989 Act. Texas Workers' Compensation Commission Appeal No. 92640, decided January 14, 1993.

We affirm the decision and order of the hearing officer.

Tommy W. Lueders
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Dorian E. Ramirez
Appeals Judge