APPEAL NO. 991007

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 (CCH) was held on April 13, 1999. She (hearing officer) determined that the appellant (claimant) injured his right knee in the course and scope of his employment on _____, when he tripped and fell on a stairwell; that from September 26 through October 3, 1998, the claimant continued to work performing his regular duties; that from October 5 through 30, 1998, the employer paid the claimant his regular wages even though he did not report to work; that the claimant's "attempt at disability was staged out of revenge since Claimant was scheduled to be removed from his assigned work site on October 5, 1998, as a reprimand by Employer"; that the evidence did not establish that the claimant was unable to obtain and retain employment at wages equivalent to his preinjury wage from October 31, 1998, through the date of the CCH; and that the claimant did not have disability from October 31, 1998, through the date of the CCH. The determination that the claimant sustained a compensable injury on _____, has not been appealed and has become final under the provisions of Section 410.169.

The claimant appealed the determinations that he staged the attempt at disability, that he did not establish that he was not able to work at the preinjury wage for the claimed period, and that he did not have disability for that period. The respondent (carrier) responded, urged that the evidence is sufficient to support the appealed determinations of the hearing officer, and requested that they be affirmed.

In his appeal, the claimant also stated that his average weekly wage (AWW) was higher and that he is owed more benefits. In its response, the carrier said that AWW was not an issue at the CCH. The record does not indicate that AWW was an issue at the CCH, the hearing officer did not make a determination concerning the claimant's AWW, and there is not a determination concerning AWW for the Appeals Panel to review. The claimant may discuss AWW with the ombudsman.

DECISION

We affirm.

The Decision and Order of the hearing officer contains a statement of the evidence. Only a brief summary of the evidence related to the appealed determinations will be repeated in this decision. The claimant sustained an electrical shock injury on (prier injury date); received treatment for that injury; and was able to continue to work after that injury. He testified that, when he fell on Saturday, _____, he dislocated his right knee; that, after remaining on the floor for about 15 minutes, he was able to roll his knee back into place; that on Monday, September 28, 1998, his supervisor, Mr. W, asked him why he was limping and that he said that he fell and pointed to the stairs; that he worked that week and his knee popped out three or four times; that on Friday, October 3, 1998, he was told that he would no longer be a supervisor because of the way he reprimanded the two employees

who worked for him and he was told to report to Mr. S on Monday; that he went to an emergency room (ER) on Monday, October 5, 1998; and he called Mr. S from the ER; that Mr. S told the claimant to keep him informed of his status and that he would continue to be paid; that on October 7, 1998, Dr. C took him off work; that he advised Mr. S of that; that Mr. S told him that he needed to be on light duty to continue to be paid; that he obtained a statement from Dr. C that he could perform light duty; and that he was paid through October 30, 1998. The claimant stated that he was not able to work because of the two injuries and the combination of the medications he was taking for the two injuries.

Mr. S testified that he has worked for the employer for 20 years; that in September 1998, he was the general manager; that the claimant was hired as a carpenter on June 17, 1998; that the claimant was a good worker; that the claimant became a supervisor and received two pay raises; that the claimant continued to be a good worker, but was not a good supervisor; that plans were for the claimant to no longer be a supervisor and to start working in the warehouse on October 5, 1998; that on October 7, 1998, the claimant had a disability slip and was told that he needed a light-duty slip and had to work light duty if he was to continue to be paid; that for awhile the claimant kept him informed of his status; that the claimant stopped keeping him informed; that the employer last paid the claimant on October 30, 1998; that in January 1999, the claimant asked for light duty; that then another person was working in the only light-duty position available; and that the claimant was terminated.

A report of an MRI of the knee dated October 15, 1998, states that the claimant had extensive subcutaneous edema and apparent resolving hematoma; a complete tear of the meniscofemoral ligament and medial patella retinaculum; minimal strain of the anterior cruciate ligament; contusions of the bone marrow of the lateral margin of the lateral femoral condyle in the anterior and inferior margin of the patella secondary to recent lateral subluxation of the patella; a large joint effusion without a Baker's cyst; and a small avulsion of the medial and inferior margin of the patella cortex. A report from Dr. C dated December 14, 1998, states that the claimant has signs and symptoms of a sprain to the right knee of the medial collateral ligament superimposed on some mild degenerative changes, that the claimant was placed in a knee immobilizer, that he still has swelling, that physical therapy was prescribed, and that it was his impression that the claimant sustained a small evulsion fracture of the patella with ligamentous sprain and effusion of the right knee. In a letter dated February 8, 1999, Dr. C makes almost the identical comments.

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). That different factual determinations could have been made based upon the same evidence is not a sufficient basis to overturn factual determinations 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 appealed determinations of the hearing officer 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 those determinations. 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 determinations 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:

_____
Philip F. O'Neill
Appeals Judge

_____
Alan C. Ernst
Appeals Judge