APPEAL NO. 991351

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 on June 2, 1999. He (hearing officer) made the following findings of fact and conclusions of law:

FINDINGS OF FACT

2. On _____, Claimant [respondent] first knew or should have known that his claimed back injury may have been caused or aggravated by his work.

3. At the time of the claimed injury, Claimant had a pre-existing degenerative condition in his lumbar spine.

4. Claimant's work aggravated the pre-existing condition in his lumbar spine due to his long work hours and repetitive lifting.

5. Claimant sustained a repetitive trauma injury to his lumbar spine in the course and scope of his employment on _____.

6. Due to the claimed injury to his lumbar spine Claimant was unable to obtain and retain employment equivalent to his pre-injury wage only for the period beginning August 18, 1997 and continuing through January 14, 1998 and beginning March 14, 1998 and continuing through the date of this hearing.

CONCLUSIONS OF LAW

3. The date of injury is _____.

4. On _____ Claimant sustained a compensable occupational disease injury.

5. Claimant reported the injury to the Employer within 30 days after the date of injury.

6. Claimant had disability beginning August 18, 1997 and continuing through January 14, 1998 and beginning March 14, 1998 and continuing through the date of this hearing.

The appellant (carrier) requested review; contended that the evidence established that the date of the claimed injury is _____, that the claimant did not timely report the claimed injury to the employer, and that the claimant did not have good cause for not timely reporting the claimed injury; urged that the determinations that the claimant sustained

disability are contrary to the great weight of the evidence; and requested that the Appeals Panel reverse the decision of the hearing officer and render a decision that the claimant did not sustain a compensable injury on _____, and that he did not have disability. The claimant responded, urged that the evidence is sufficient to support the determinations of the hearing officer and requested that his decision be affirmed.

DECISION

We reform in part, affirm in part, and reverse and render in part.

The Decision and Order of the hearing officer contains a statement of the evidence. Only a brief summary will be repeated in this decision. The claimant testified that he worked for the employer for about 29½ years; that he worked as an electrician for about 15 years before he was injured; that he used a belt with pouches that holds tools weighing 25 pounds or more; that he carried parts that weigh varying amounts; that in July 1997 he had the first part of an annual physical performed; that on _____, he felt a strain when he was putting his tools up; that on August 15, 1997, he had the second visit to the doctor who performed the physical to get the report; that the report was good; that he asked the doctor if he might be having kidney problems because of the pain in his back where he though a kidney is located; that the doctor told him he did not have kidney problems and should see an orthopedic doctor; that he was told it would take 30 to 60 days to see the orthopedic doctor; that he had severe problems and went to an emergency room on August 31, 1997; that he was given medication, but it did not help; that on August 31, 1997, he did not attribute the pain to putting the tools up on _____; that he was able to see Dr. AH, an orthopedic doctor, on September 11, 1997; that Dr. AH had an MRI performed; that on _____, Dr. AH provided him with the results of the MRI and that is when he realized he had a work-related injury; and that he reported the injury to the employer on October 7, 1997. The claimant stated that he did not know he had sustained an injury at work before _____, and denied changing his claim from a specific injury on _____, to a repetitive trauma injury with a date of injury of _____, so that he would have reported the injury within 30 days of the date of injury. The claimant said that he was not able to work because of the injury from August 18, 1997, through January 14, 1998; that from January 15, 1998, through March 13, 1998, he worked for the employer performing light duty; that he was given the choice of being taken off the rolls without benefits; working in a clerical position that he was not qualified to perform; or retiring with benefits; that he chose to retire with benefits; and that he could not perform the work he was doing before he was injured.

Ms. C testified that she is a human resources specialist for the employer; that the claimant was offered clerical positions, retirement, or to be taken off the rolls; that the claimant would have to pass a typing test and an aptitude test before he could work in a clerical position; and that the claimant said he was not interested in working in a clerical position. The record does not contain a letter offering the claimant a job in a clerical condition. A functional capacity evaluation indicates that the claimant could not perform the work he was doing prior to the injury.

In a report dated September 11, 1997, Dr. AH reported that the claimant was referred to him by Dr. CH; that the family doctor had worked him up for kidney problems; that he persisted with severe low back pain; that the onset of symptoms was without injury; that the claimant does not have severe lumbar radiculopathy; that x-rays showed degeneration in the entire lumbar spine; and that an MRI was recommended. In a note dated _____, Dr. AH said that the MRI was reviewed and showed degenerative changes at L3-4 and L4-5; that it is an advanced degenerative form of arthritis; and that rehabilitation, medication, and steroid injections were prescribed. The note does not mention cause of the condition. In a follow-up examination note dated December 18, 1997, Dr. AH stated that the claimant did have degenerative arthritis in his back and that his condition had been exacerbated by working extra long hours and lifting and pulling.

We first address the determination that the claimant sustained a repetitive trauma injury on _____. 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). In his Decision and Order, the hearing officer stated that the claimant's testimony was credible. 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 hearing officer's determinations that the claimant sustained a repetitive trauma injury to his lumbar spine in the course and scope of his employment and that the date of injury is _____, 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). The claimant did not work on _____, and generally a repetitive trauma injury is not sustained on a specific day. We reform Finding of Fact No. 5, Conclusion of Law No. 4, and part of the decision to state that the claimant sustained a repetitive trauma injury in the course and scope of his employment with a date of injury of _____.

We next address the determinations concerning disability. We have affirmed the determination that the claimant sustained a compensable injury, so that part of the carrier's argument on disability is without merit. In Texas Workers' Compensation Commission Appeal No. 981116, decided July 2, 1998, a repetitive trauma case, the Appeals Panel held that a claimant cannot have disability before the date of the injury, and reversed the decision of the hearing officer and rendered a decision that the claimant's disability began on the day that the claimant knew that his back injury was work related. Concerning the first period of disability, we reverse the finding of fact, conclusion of law, and decision that

disability began on August 18, 1997, and render determinations that the claimant had disability beginning on _____, and continuing through January 14, 1998. The carrier also contended that the claimant could not have disability beginning on March 14, 1998, because he retired from employment with the employer. A claimant with a conditional medical release is not required to show that work is not available or that he is unable to work in the absence of a bona fide offer of employment by the employer or a showing that work was reasonably available. Texas Workers' Compensation Commission Appeal No. 950568, decided May 16, 1995. In Texas Workers' Compensation Commission Appeal No. 970089, decided February 28, 1997, the Appeals Panel affirmed a determination that the claimant had disability and stated that the fact that a claimant resigns, retires, or is involuntarily terminated may be considered, but does not foreclose the existence of disability. It is clear that the hearing officer considered the claimant's retirement and found that he had disability beginning on March 14, 1998, and continuing through the date of the hearing. That determination is not so against the great weight and preponderance of the evidence as to be clearly wrong or unjust and is affirmed.

In summary, we reform a finding of fact, a conclusion of law and part of the decision to state that the claimant sustained a repetitive trauma injury in the course and scope of employment with the date of injury of _____; we reverse the determination that the claimant had disability beginning August 18, 1997, and continuing through January 14, 1998, and render a decision that the claimant had disability beginning on _____, and continuing through January 14, 1998; and affirm the determination that the claimant had disability beginning on March 14, 1998, and continuing through the date of the hearing.

_____
Tommy W. Lueders
Appeals Judge

CONCUR:

_____
Elaine M. Chaney
Appeals Judge

_____
Dorian E. Ramirez
Appeals Judge