APPEAL NO. 991481

A contested case hearing (CCH) was originally held on December 17, 1998, under the provisions of the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act), with presiding as hearing officer. It was undisputed that appellant 2 (claimant) sustained a low back injury on Injury 1, and that the treating doctor certified that the claimant reached maximum medical improvement (MMI) for that injury on Injury 3, with a zero percent impairment rating. The claimant contended that he sustained a repetitive trauma low back injury, with a date of injury of Injury 2, and had disability from that claimed injury. The hearing officer determined that the date of injury for the claimed injury was Injury 2, and that the claimant did not sustain a new injury. (appellant 1, carrier 2) provided the employer with workers' compensation insurance on Injury 1, and did not receive notice of the December 1998 hearing and did not attend that hearing. In Texas Workers' Compensation Commission Appeal No. 990230, decided March 24, 1999, the Appeals Panel reversed the decision of the hearing officer and remanded for another CCH for carrier 2 to be given notice of the CCH and the opportunity to participate in that CCH, and for all parties to be afforded due process at the CCH on remand. The hearing officer held another hearing on June 21, 1999, at which carrier 2 had admitted into evidence 19 exhibits and called the claimant as a witness. The attorneys representing the claimant and (respondent, carrier 1) also examined the claimant and each party made a closing argument. The hearing officer rendered another decision on June 28, 1999, in which he determined that the claimant's current condition is a continuation of his original compensable injury sustained on Injury 1; that he did not sustain a new compensable occupational disease injury; and that, since the claimant did not sustain a new compensable injury and had been certified at MMI for the Date of Injury compensable injury, he did not have disability.

Carrier 2 appealed; contended that the hearing officer abused his discretion in not adding the issue of whether the claimant's compensable injury sustained on Injury 1, was the sole cause of the claimant's low back problems after Injury 2; summarized evidence favorable to its position; urged that the determinations of the hearing officer are against 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 sustained a new injury in the course and scope of his employment with a date of injury of Injury 2. The claimant appealed, briefly reviewed the evidence favorable to his position, stated that the original appeal contains a summary of the evidence, requested that the original appeal be considered, and requested that the Appeals Panel reverse the decision of the hearing officer and render a decision that he sustained a new compensable injury and had disability. Carrier 1 responded, stated that the original appeal submitted by the claimant should not be considered, reviewed the evidence favorable to its position, urged that the evidence is sufficient to support the determinations of the hearing officer, and requested that his decision be affirmed.

DECISION

We reform the conclusion of law and the decision concerning disability and affirm the decision of the hearing officer, as reformed, and his order.

We first address the contention by carrier 1 that the claimant's original appeal should not be considered because there is no provision in the Texas Workers' Compensation Commission's rules allowing adoption of previous requests for review by reference. At the CCH on remand, carrier 1 had the claimant's appeal admitted into evidence; the Appeals Panel has previously considered earlier appeals incorporated by reference; and we will consider both appeals filed by the claimant.

We next address the contention that the hearing officer erred in denying the motion to add the issue "[i]s the Injury 1, injury the sole cause of the claimant's back problems subsequent to Injury 2?" The hearing officer denied the motion and stated that the motion had not been timely made, that the sole cause issue was subsumed in the issue before him, and that the parties were not precluded from presenting evidence related to sole cause. There is no indication that the hearing officer improperly placed the burden of proof in rendering his decision.

We next address the sufficiency of the evidence to support the determinations of the hearing officer. The record contains 87 exhibits, many of which were prepared by health care personnel. As would be expected, some of the medical exhibits support the contention of carrier 2 and the claimant that he sustained a new occupational disease injury to his low back with a date of injury of Injury 2, and others support the contention of carrier 1 that the claimant's current low back condition is a continuation of the Date of Injury compensable injury and not a new injury.

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. 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 a case such as the one before us where both parties presented evidence on the disputed issue of whether the claimant sustained a new injury, the hearing officer must look at all of the relevant evidence to make factual determinations and the Appeals Panel must consider all of the relevant evidence to determine whether the factual determinations of the hearing officer are so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. Texas Workers' Compensation Commission Appeal No. 941291, decided November 8, 1994. The hearing officer had the difficult task of considering evidence that could support a decision that the claimant's back condition on and after Injury 2, is the result of the Injury 1, injury or is a new occupational disease with a date of injury of Injury 2. He determined that the claimant did not sustain a new injury in the course and scope of his

employment. An appeals level body is not a fact finder, and it does not normally pass upon the credibility of witnesses or substitute its own judgement for that of the trier of fact even if the evidence could 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). Only were we to conclude, which we do not in this case, that the hearing officer's findings of fact and conclusions of law related to the determinations that the claimant did not sustain a new compensable injury and that his current back condition is a continuation of the Injury 1, compensable injury are so against the great weight and preponderance of the evidence as to be manifestly unjust would there be a sound basis to disturb those determinations. In re King's Estate, 150 Tex. 662, 224 S.W.2d 660 (1951); Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986). Since we find the evidence sufficient to support the determinations of the hearing officer that the claimant did not sustain a new injury and that his current back condition is a continuation of the Date of Injury injury, we will not substitute our judgement for his. Texas Workers' Compensation Commission Appeal No. 94044, decided February 17, 1994.

Lastly, we consider the determination concerning disability. Conclusion of Law No. 7 states "[a]s there is no new compensable occupational disease injury and the Claimant has been certified at [MMI] for the original compensable injury, Claimant does not have disability." 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). Disability and MMI are separate issues, and disability may exist after a claimant reaches MMI. Texas Workers' Compensation Commission Appeal No. 91014, decided September 20, 1991, and Texas Workers' Compensation Commission Appeal No. 91060, decided December 12, 1991. A claimant is entitled to temporary income benefits if he or she has disability and has not reached MMI. Section 408.101(a). The hearing officer made a finding of fact that "[d]ue to the claimed injury, Claimant was unable to obtain employment at wages equivalent to his pre-injury wage beginning March 24, 1998 through November 3, 1998." We reform Conclusion of Law No. 7 and the last sentence of the hearing officer's decision to state:

> Since the claimant did not sustain a new compensable injury with a date of injury of Injury 2, he does not have disability from that claimed injury. As the result of the Injury 1, compensable injury, the claimant had disability beginning on March 24, 1998, and continuing through November 3, 1998.

We affirm the decision of the hearing officer, as reformed, and his order.

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Tommy W. Lueders
Appeals Judge

CONCUR:

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Philip F. O'Neill
Appeals Judge

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Gary L. Kilgore
Appeals Judge