APPEAL NO. 991967

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 July 26, 1999. The appellant (carrier) requested review of the following findings of fact and conclusions of law, urging that the evidence is insufficient to support them and requesting that the Appeals Panel reverse them and remand the case to the hearing officer for reconsideration of the evidence:

FINDINGS OF FACT

2. Claimant [respondent] was injured in the course and scope of employment on _____ when a coworker loss [sic] control of a pressure hose and fell from a ladder onto Claimant striking Claimant about the left shoulder and back and causing Claimant to fall and strike his left knee on the pavement.

3. Claimant experienced pain in his left knee, shoulder and back following the _____ injury.

9. Multiplying the rate [of] pay ($7.00) by 60 hours (12 hours per day multiplied by 5 days) is a fair, just and reasonable method of calculating the average weekly wage [AWW] and is consistent with the methods established under Rule 128.3(g) [Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE §128.3(g)].

CONCLUSIONS OF LAW

2. Claimant sustained a compensable injury to his left knee and cervical, thoracic and lumbar spine on _____.

3. Claimant had disability resulting from the injury sustained on _____ from April 12, 1999 continuing to the date of this hearing.

4. The [AWW] is $420.00.

In an unappealed finding of fact, the hearing officer determined "[a]s a result of the injury sustained on _____, Claimant was unable to obtain and retain employment at wages equivalent to the preinjury wage from April 12, 1999 continuing to the date of this hearing." The claimant 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 statement of the evidence. Only a brief summary of evidence related to the appealed determinations of the hearing officer will be included in this decision.

We first address the determinations that the claimant was injured in the course and scope of his employment on _____, and that he had disability beginning on April 12, 1999, and continuing to the date of the hearing. The claimant and Mr. A worked for the employer as painter's helpers for about one and one-half days before the incident on _____. The claimant testified that he and Mr. A, who are related, used sandblasting equipment to remove paint from steel to prepare the surface to be painted. He said that while one of them used the equipment the other held a ladder that the person using the equipment was standing on. The claimant stated that Mr. A was standing on the ladder about four feet from the floor; that the air hose and the piece of equipment that blasted the surface separated; that the hose moved around rapidly and struck Mr. A's head; that Mr. A fell on him, striking his shoulder and back; that he fell, striking his knee on the concrete floor; that he was taken to an emergency room (ER); that he told people in the ER that his knee, shoulder, and back hurt; that the next day he was seen by Dr. AG, the company doctor; that Dr. AG placed him on light duty; that he went to Dr. JG, a chiropractor, on April 12, 1999; and that Dr. JG treated him, took him off work, and has not returned him to work. Mr. A was interviewed by an adjuster. A transcript of that interview indicates that Mr. A's answers concerning the incident are generally consistent with the testimony of the claimant. Mr. M, the safety manager for the employer, testified that he went to the ER at the same time that the claimant and Mr. A went there; that after the claimant was told in the ER that he could return to work, he told the ER personnel that his back hurt; that he questioned other employees and none of them said that they saw the incident; that Mr. A and the claimant were using a six-foot ladder; that the claimant said that he was holding the ladder on the side; and that it did not make sense that the accident could have occurred as described by the claimant. A report from the ER indicates that the claimant complained of left leg and back pain. Medical records from Dr. AG indicate that the claimant received numerous treatments from him and that Dr. AG took the claimant off work and has not released him to return to work. A report of an MRI of the lumbar spine dated April 20, 1999, indicates that there is a broad posterior L4-5 bulge pressing against the anterior thecal sac and dehydration of the L5-S1 disc consistent with degenerative change and a broad posterior L5-S1 disc bulge pressing on the anterior thecal sac. In a letter dated June 17, 1999, Dr. JG stated that the claimant sustained a work-related injury, that a functional capacity evaluation was performed, that the claimant's prior job involved heavy work, and that he could perform medium work. In a letter dated June 29, 1999, Dr. F stated that he reviewed a letter from Dr. JG and found little scientific, medical, or social credibility in the letter. A video of the claimant made in June 1999 shows the claimant walking and getting

in and out of a car without apparent difficulty, but does not show the claimant performing any work.

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, and that the claimant had disability, Texas Workers' Compensation Commission Appeal No. 93953, decided December 7, 1993. The testimony of the claimant alone may be sufficient to satisfy the burden of proof. Texas Workers' Compensation Commission Appeal No. 91013, decided September 13, 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). While a claimant's testimony alone may be sufficient to prove a claim, the testimony of a claimant is not conclusive but only raises a factual issue for the trier of fact. Texas Workers' Compensation Commission Appeal No. 91065, decided December 16, 1991. 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). Findings of Fact Nos. 2 and 3 and Conclusions of Law Nos. 2 and 3 are not so against the great weight and preponderance of the evidence as to be clearly wrong or unjust and are affirmed. 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).

We next address the determination that the claimant's AWW is $420.00. The claimant testified that this was the only job that he had ever had; that when he was hired, he was told that he would be paid $7.00 an hour and that he would work 12 hours a day seven days a week; and that he was also told that there would be work after this job was completed. In response to questions, Mr. A said that he had some experience, was hired as a painter's helper, and was paid $7.50 an hour. Mr. M testified that the painting work of the employer is sporadic; that depending on the work load, the employer may have about 300 to 700 employees working; that the employer tries to schedule employees to work 40 hours a week; that most employees work about 10 hours a day, four days a week; that most of the employer's jobs are maintenance jobs and do not involve the shutdown of a plant; that the job the claimant was working on involved the shutdown of a plant while it was being painted; that during a shutdown, work is performed 24 hours a day until the work is completed; that during a shutdown, employees usually work 12-hour shifts; that the claimant was working 12-hour shifts; that after the shutdown was completed, the claimant

would have continued to have worked for the employer if work was available; and that the claimant probably would have worked 30 or 40 hours a week. Mr. M said that while other employees did work similar to that being done by the claimant, he was not aware of an employee who had similar training, experience, and skills and worked similar hours. The hearing officer did not err in deciding to use the fair, just, and reasonable method provided for in Section 408.041(c). It is undisputed that the claimant was paid $7.00 an hour. The evidence is conflicting on how many hours the claimant would have worked in a 13-week period. The hearing officer chose not to completely believe the testimony of the claimant or that of Mr. M on the hours that the claimant would have worked during a 13-week period and determined that the claimant would have worked 12 hours a day, five days a week. He did not apply overtime payment for hours in excess of 40 hours a week, but that has not been appealed. 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 the hearing officer. We affirm the determination that the claimant's AWW is $420.00.

We affirm the decision and order of the hearing officer.

_____
Tommy W. Lueders
Appeals Judge

CONCUR:

_____
Gary L. Kilgore
Appeals Judge

_____
Alan C. Ernst
Appeals Judge