APPEAL NO. 000244

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was originally held on August 31, 1999. The Appeals Panel, in Texas Workers' Compensation Commission Appeal No. 992134, decided November 12, 1999, stated that "constant" repetitive work is not necessary to establish a repetitive trauma injury, reversed the decision of the hearing officer, and remanded for the hearing officer to consider all of the evidence and to apply the proper standard in determining if the claimant [appellant] sustained a repetitive trauma injury in the course and scope of her employment and whether she had disability. The hearing officer rendered another decision on January 18, 2000, in which he again determined that the claimant did not sustain a compensable injury with a date of injury of _____, and that since she did not sustain a compensable injury, she did not have disability. The claimant appealed, stated why she disagreed with determinations of the hearing officer, contended that the hearing officer did not consider her written argument submitted on remand, and requested that the Appeals Panel reverse the decision of the hearing officer and render a decision that she sustained a compensable injury and had disability. The respondent (carrier) replied; stated that the hearing officer rendered his decision before it had the opportunity to present written argument; that additional evidence was not presented after the remand, both parties made arguments at the first CCH based on the evidence in the record, and it was not reversible error for the hearing officer to render a decision on remand without receiving additional arguments from the parties; argued that information in the claimant's appeal that is not in the record should not be considered on appeal; urged that the evidence is sufficient to support the decision of the hearing officer; and requested that it be affirmed.

DECISION

We affirm.

Appeal No. 992134, *supra,* contains a three-page summary of the evidence, including quotations from exhibits in evidence. Briefly, the claimant contended that she sustained a repetitive trauma injury from sitting in a chair and bending, twisting, and reaching while sitting in a chair. The carrier contended that soon after the date of the claimed injury, the claimant mentioned sitting in a chair; that later she added the bending, twisting, and reaching; and that she did not meet her burden of proving that she sustained a repetitive trauma injury in the course and scope of her employment.

In the statement of the evidence and discussion section of his Decision and Order, the hearing officer stated that "constant" repetition is not required to prove a repetitive trauma injury; that he considered all of the evidence; that the late addition of allegations of repetitive bending, twisting, and reaching was inconsistent with earlier information about the claimed injury; that the assertions of repetitive activity were the least persuasive elements of the claimant's testimony; and that the claimant did not meet her burden of proving that she sustained a repetitive trauma injury.

Additional evidence was not received after the remand. In a letter dated December 10, 1999, that is not in the record, the hearing officer advised the parties that they had until January 28, 2000, to submit written argument. He rendered a decision dated January 18, 2000. It would have been preferable for him to have received written argument before he rendered his decision on remand, particularly because he offered this opportunity. However, his failure to do so, especially in view of the fact that additional evidence was not received, was not reversible error.

In rendering the decision on the sufficiency of the evidence, we do not consider information that is not in the record of the CCH. 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). 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. The hearing officer's determinations that the claimant's claimed back injury was not caused by bending, twisting, or reaching; that the injury is an ordinary disease of life; and that the claimant did not sustain a compensable 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 his. 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). Disability, by definition, depends upon there being a compensable injury. *Id.* Since we have found the evidence to be sufficient to support the determination that the claimant did not sustain a compensable injury, the claimant cannot have disability.

We affirm the decision of the hearing officer.

Tommy W. Lueders
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Alan C. Ernst
Appeals Judge