APPEAL NO. 000304

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 held on December 17, 1999. The issues at the CCH were whether the respondent/cross-appellant (claimant) sustained a compensable injury on _____; whether the claimant had disability and, if so, for what period; and, as reported out of the benefit review conference, what was the average weekly wage (AWW). The parties agreed that this was no longer an issue in the case, that it had been agreed upon in a benefit conference agreement that, conditioned on compensability and disability being found, the claimant's temporary income benefits rate would be the maximum allowable rate of $523.00 and that the issue as to AWW would not be litigated at the CCH. The hearing offer found that the claimant sustained a compensable injury on _____; that he had disability from August 27, 1999, through the date of the CCH; and that his AWW was $723.73. The appellant (carrier) urges error in findings and conclusions of law regarding the hearing officer determining that venue was proper in the (City 1) field office and in finding the AWW was $723.73, an issue not before him. The carrier also appeals findings of fact and conclusions of law that the claimant sustained an injury on _____, and that he had disability, urging that the findings were against the great weight of the evidence. In response, the claimant agrees with the venue and AWW assertions of error, stating that the case was heard in (City 2) and that was the correct venue, and that an AWW issue was not before the hearing officer. Regarding the challenges to the findings and conclusions on compensability and disability, the claimant urges that there is sufficient evidence to support the determinations of the hearing officer and asks that the decision on these issues be affirmed.

DECISION

Affirmed.

The Decision and Order of the hearing officer sets forth fairly and adequately the evidence in the case and it will only be summarized here. The claimant, a long-haul truck driver, testified that on a return trip from (City 3) to (City 2) on _____, he hit a "dip" or a "pothole" on the interstate highway about an hour of more north of (City 2) and that it caused him to be thrown into the air and hit by the seat in his back, throwing his head over the seat. He felt a sharp burning pain in his neck and was dazed for a couple of minutes. He states that he later told his driving partner about "snapping his neck" when his partner came out of the sleeper compartment. The claimant reported the injury to the line haul manager when he arrived and he subsequently went to an emergency room. He states that he is not able, and has not been released, to return to driving a truck. His wife testified and corroborated much of the claimant's testimony regarding his condition both before and after the _____ incident.

Not in dispute was the fact that the claimant sustained a neck injury in 1992 as a result of a truck driving incident and that he eventually had a two-level cervical fusion. He was off work from this incident for a couple of years but returned to work with a full release from his doctor in 1995. He states that he had driven since then without incident and without cervical problems until the incident on _____, and that he had passed several required physicals.

A statement from the claimant's driving partner indicated that he was asleep in the sleeping compartment, that he did not remember any bumping incident, and that he did not remember the claimant telling him anything about an injury. He acknowledged the truck was pretty rough and that the highways were rough. Three statements from other truck drivers submitted by the claimant generally attest to the bumps or potholes in the highway in question, that it is considered one of the worst roads, and that one had experienced jarring and hitting his head. A statement from the adjuster handling the case stated that on July 23, 1999, the claimant indicated he was having some problems with his neck from his 1992 injury and that he wanted to get additional treatment but was told because of a third party settlement no further benefits would be paid until the credit was exhausted. The claimant generally denied this and stated that when he mentioned his future retirement, that it had been suggested to him that he have an x-ray of his neck to check it out since there had been no treatment for several years.

Both sides offered pictures and videos, apparently depicting areas of the roadway in contention. They tend to convey different impressions with the claimant's exhibits showing some potholes, repairs, and other disrepair of the road, while those of the carrier tend to show relatively good highway conditions.

Considerable medical evidence offered by both sides was before the hearing officer regarding the claimant's 1992 injury, whether his fusion was solid at the time he went back to work, the degenerative condition of the claimant's neck, his current condition, and whether he had sustained a new injury as opposed to continuing symptoms from the 1992 injury. The opinions expressed by Dr. R, who treated the claimant for the 1992 injury and the current injury, and the opinion of Dr. P, a carrier doctor who reviewed the records and issued an opinion, best sum up the divergence in opinion. Dr. R opines that the claimant's fibrous fusion at C6-7, which he indicated in 1994 was probably solid, was disrupted by the 1999 incident. He states that the claimant has gone from an asymptomatic stable fibrous union at C6-7 to an unstable and symptomatic segment and that he has sustained a new injury. Dr. P, summing up his opinion, stated the "bottom line is that there is insufficient evidence in these records to support that this gentleman has actually had a new injury on 08/26/99" and that the "complaints would most appropriately be ascribed to the normal degenerative process and/or extension of his prior 1992 injury."

Clearly, there was considerable conflict in the evidence offered by both parties. The claimant testifies to hitting a dip or pothole causing him to be jostled about and to experience severe neck pain. He reported the matter and subsequently sought medical

treatment. The evidence showed a prior injury, the treatment therefore, and that the claimant returned to work for some four years, although it is apparent there was a degenerative condition at the time of the 1999 incident. The carrier offered evidence to discount any road condition that could cause the injury, contended that the claimant's current condition is a continuation of the 1992 injury and a degenerative process, and urges the evidence shows that the claimant's motivation was his upcoming retirement and the need to create a new injury to have coverage for his prior neck condition. There is medical evidence which tends to support both sides of the issue. With this state of the evidence, credibility was a key factor in determining the facts of the case. In this regard, it is apparent that the hearing officer found the claimant to be a credible witness and accepted his testimony as corroborated by the other evidence offered by him in determining that a new injury was sustained 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). While a claimant's testimony alone may be sufficient to prove an injury, 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. 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 issues, 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. 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 determinations were 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 sustained a compensable injury on _____, and that he had disability from August 27, 1999, to the date of the CCH, we will not substitute our judgment for his. Texas Workers' Compensation Commission Appeal No. 94044, decided February 17, 1994.

The record shows that the case was heard in (City 2), Texas, and the parties agree that (City 2) is where the case was heard and is the correct venue. We conclude the hearing officer made a clerical error in stating (City 1), Texas, as the venue and we modify that part of the decision stating (City 1) as the venue and change the statement of venue to (City 2). We also agree with the parties that there was no issue as to the AWW before the hearing officer in this case and that his findings in that regard are surplusage. We reverse and set aside the finding and conclusion as to AWW. With these modifications of the decision as to venue and AWW, the decision and order of the hearing officer are affirmed.

Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Alan C. Ernst
Appeals Judge