

APPEAL NO. 000407

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 February 3, 2000. The issues at the CCH were the date of injury, whether the respondent (claimant) sustained a compensable injury, and whether the claimant had disability. The hearing officer determined that the claimant sustained a compensable injury on _____, to his low back and had disability from September 13, 1999, through the date of the hearing. The appellant (carrier) appealed, contended that the determinations of the hearing officer are against the great weight and preponderance 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 and did not have disability. 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 claimant operated heavy equipment for an excavation company. He testified that on Saturday, _____, he was leveling a site so that a house could be built on it; that there was solid rock at the back of the site; that he used a front-end loader to chip away the rock; that the equipment bounced and vibrated as he chipped the rock; that about 10:30 a.m. his lower back began to hurt; that about 3:30 p.m. he got a drink of water and told a supervisor that he had hurt his back; that before this, his wife had changed the doctor he saw under her insurance coverage and had made an appointment for him with the doctor for Monday, _____; that he told the doctor what had happened; that the doctor took him off work for a few days; that his wife called his supervisor and told the supervisor that he would not be able to work because he had hurt his back; and that he has not been able to work since then because of his back pain. The claimant said that his wife completed the Employee's Notice of Injury or Occupational Disease and Claim for Compensation (TWCC-41) for him; that they made a mistake and used _____, as the date of injury; and that that date was used until a few days before the benefit review conference when the mistake was discovered. The claimant denied injuring his back in a motor vehicle accident (MVA), telling anyone that he had injured his back in an MVA, and injuring his back while in jail. The testimony of the claimant's wife and a friend of the claimant's wife is generally consistent with the testimony of the claimant.

The claimant's supervisor testified that the claimant last worked for the employer on _____; that on that day the claimant did not tell him that he injured his back; and that the next week, the claimant's wife called him, told him that the claimant's "back was out," and did not say that the claimant had hurt his back at work. The supervisor said that he has chipped rock and that doing so could shake a person. The owner of the company that

employed the claimant testified that when he spoke with the claimant after _____, the claimant told him that he had not hurt his back at work; that the claimant asked about disability benefits, unemployment compensation, and workers' compensation benefits and said that he needed to draw something to pay bills; that the claimant had told him his back had bothered him since he was in an MVA about six years ago; and that a person could get sore from using equipment to chip rock or sandstone. The owner's son testified that he is a foreman, but not the claimant's supervisor; that previously he and the claimant had been married to sisters; that they still talked to each other and after _____, the claimant asked him about sick pay; that the claimant did not tell him he was injured on the job; that a few years ago the claimant was in jail; that after that the claimant told him he injured his back in jail and would tell him his back hurt; that the claimant was still able to do his job after he was in jail; and that there is some jarring when rock is chipped.

In a report dated _____, Br. B, a physician's assistant, said that the claimant was at the clinic for a general checkup; included comments on areas that would be expected to be in a report of a general checkup; and stated that the claimant complained of lower back pain with radiation into his upper buttock and leg on the left and that his assessment was lumbar radiculopathy. An undated return-to-work certificate from Dr. G states that the claimant had been under his care from _____ to _____, 1999, and does not indicate when the claimant may return to work. A report of an MRI dated September 30, 1999, from Dr. Z and later reports from Dr. B state that the claimant has a 7 to 8mm severe herniated disc at L5-S1 with bilateral S1 nerve root impingement, a 4mm broad based herniated disc at L4-5, and a mild disc bulge at L2-3.

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 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. 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 judgment 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). At the hearing, the carrier stated that the outcome of the case depended on the credibility of the witnesses and argued that the claimant's testimony was not credible. In the statement of the evidence in her Decision and Order, the hearing officer stated that the claimant was a credible witness. The hearing officer's determinations 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, 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, we will not substitute our judgment for hers. Texas Workers' Compensation Commission Appeal No. 94044, decided February 17, 1994.

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