APPEAL NO. 000729

This case returns following our remand in Texas Workers' Compensation Commission Appeal No. 992738, decided January 20, 2000. In that decision, the majority remanded the case for the hearing officer to reconsider the issues of injury and disability, applying the correct legal standard. The hearing officer, held a hearing on remand on March 8, 2000. With respect to the issues before her, the hearing officer determined that the appellant (claimant) did not sustain a compensable injury on _____, and that he has not had disability because he did not sustain a compensable injury. In his appeal, the claimant essentially argues that those determinations are against the great weight of the evidence. In its response to the claimant's appeal, the respondent (carrier) urges affirmance.

DECISION

Affirmed.

It is undisputed that the claimant has a herniated disc at L4-5; what is at issue is the causal connection between the herniation and the claimant's work activities on _____. The claimant testified that on _____, he was employed as a welder for (employer) and that he was welding metal stairs. He stated that the stairs weighed 60 to 70 pounds and that he was required to move and shift the pieces onto a table so that he could weld them together. The claimant testified that when he woke up on the morning of _____, his back was hurting to such a degree that he was not able to put on his shoes and socks and had to ask his wife to help him do so. He stated that he was able to get to work on _____, walking with the assistance of a cane and that when he got to work he told Mr. H, his supervisor, that he had injured his back at work the day before. The claimant stated that he first sought medical treatment on August 25, 1999, from a chiropractor, who was not able to see him and recommended that he seek treatment from a doctor that could prescribe pain medication. The claimant stated that he attempted to see two doctors who were not available and finally sought treatment with Dr. B. The claimant testified that his preference was to file under his group health plan for the treatment from Dr. B but he learned that Dr. B was not on his group plan; thus, he decided that he had to file his claim under workers' compensation. However, he maintained that there was no doubt in his mind that his back injury was work-related despite his initial preference to pursue treatment under his group health insurance.

Mr. P testified that on _____, the claimant came to work walking with a cane; that Mr. P asked the claimant what had happened; and that the claimant told him that he had been doing hip exercises at home on the morning of _____ and felt a "pop" in his low back. The claimant acknowledged that he has had bilateral hip replacements; however, he denied that he had been performing hip exercises at home on the morning of _____ and that he had told Mr. P that he injured his back doing hip exercises. Finally, Mr. P stated that the claimant approached him at some point after his workers' compensation claim had been denied and asked Mr. P to give a statement that he had injured his back at work on _____. Mr. P stated that he declined to do so because he did not believe that the

claimant had injured his back at work because of the claimant's statement to him that he had injured it at home.

Mr. H testified that on the morning of _____ he asked the claimant how he had injured his back and the claimant responded that he did not know. Mr. H further testified that on August 30th, while he was completing an accident report for the employer, the claimant stated that he "guessed" he had hurt his back in the shop on _____ but he did not know for sure where he had hurt it. Mr. H also stated that he declined the claimant's request that he give a statement saying the claimant had hurt his back at work because he did not know where the claimant had hurt his back.

The carrier also called Ms. R, the office manager for the employer. Ms. R testified that on August 26th the claimant came in to get his paycheck and told her at that time that he did not know how he had hurt his back. In addition, she stated that she had a conversation with the claimant about the fact that Dr. B was not on the group health plan and that claimant told her that he wanted to continue his treatment with Dr. B. However, she further testified that the claimant asked her if there would be an investigation if he pursued a workers' compensation claim; that she told him there would be; and that the claimant advised her at that point that he would proceed under his group health insurance.

The claimant has the burden to prove by a preponderance of the evidence that he sustained a compensable injury. Johnson v. Employers Reinsurance Corp., 351 S.W.2d 936 (Tex. Civ. App. -Texarkana 1961, no writ). That question presented the hearing officer with a question of fact. The hearing officer is the sole judge of the relevance, materiality, weight, and credibility of the evidence before her. Section 410.165. The hearing officer resolves conflicts and inconsistencies in the evidence and determines what facts have been established. Texas Employers Ins. Ass-n v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). To that end, the hearing officer may believe all, part, or none of the testimony of any witness. The testimony of the claimant, as an interested party, raises only an issue of fact for the hearing officer to resolve. Campos; Burelsmith v. Liberty Mut. Ins. Co., 568 S.W.2d 695 (Tex. Civ. App.-Amarillo 1978, no writ). An appeals level body is not a fact finder and it does not normally pass upon the credibility of the witnesses or substitute its judgment for that of the trier of fact, even if the evidence would support a different result. National Union Fire Ins. Co. v. Soto, 819 S.W.2d 619 (Tex. App.-El Paso 1991, writ denied).

In this instance, the hearing officer determined that the claimant did not sustain a compensable injury on _____. A review of the hearing officer's decision demonstrates that she simply was not persuaded that the evidence presented by the claimant was sufficiently persuasive to satisfy his burden of proving that his lumbar herniation was caused by the work activities he performed on _____. She decided to give more weight to the testimony and evidence tending to refute the causal connection between the claimant's work duties and his back injury. The hearing officer was acting within her province as the fact finder in deciding to do so. Our review of the record does not reveal that the hearing officer=s determination that

the claimant did not sustain a compensable injury is so against the great weight of the evidence as to be clearly wrong or manifestly unjust. Accordingly, no sound basis exists for us to reverse that determination on appeal. Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986); Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986). Although another fact finder may well have drawn different inferences from the evidence, which would have supported a different result, that does not provide us with a basis to reverse the hearing officer's decision. Salazar v. Hill, 551 S.W.2d 518 (Tex. Civ. App.-Corpus Christi 1977, writ ref'd n.r.e.).

Given our affirmance of the determination that the claimant did not sustain a compensable injury, we likewise affirm the hearing officer's determination that the claimant did not have disability. Disability means the Ainability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage.@ Section 401.011(16). Thus, the existence of a compensable injury is a prerequisite to a finding of disability.

The hearing officer's decision and order are affirmed.

Elaine M. Chaney
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

DISSENTING OPINION:

I continue to dissent for the reasons I did previously, and note that the hearing officer has even compounded her error by basing this new decision in part on the "common knowledge" that chores involved in working a farm can be strenuous. I would counter, as did the claimant in his appeal, that it is common knowledge that welding involves the twisting and work around heavy items that led to the claimant's back injury.

Also, the hearing officer misread our decision, in my opinion. We did not suggest an abandonment of the specific, cause, time, and place standard, but pointed out that she had misunderstood what that standard meant. A series of activities stretched over a day can constitute sufficient time, place, and cause. While her decision indicates that it was not until

the remand hearing that the claimant connected his stair welding to his injury, this was the case at the first hearing as well.

I would reverse and render for the claimant.

Susan M. Kelley
Appeals Judge