APPEAL NO. 001135

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 convened on March 10, 2000, with (hearing officer 1). The issue reported as unresolved at the benefit review conference was whether the compensable injury sustained on _____, extends to and includes a medial meniscus tear. The issue of disability was added. Hearing officer 1 granted a continuance because the appellant (claimant) was not prepared to litigate the added issue. The CCH was reconvened on April 20, 2000, with (hearing officer 2) presiding as hearing officer. Hearing officer 2 determined that the claimant's compensable injury extends to and includes the tear in the medial meniscus of his right knee and that the claimant did not have disability. The determination concerning the extent of injury has not been appealed and has become final under the provisions of Section 410.169. The claimant appealed the determination that he did not have disability; contended that the great weight of the evidence established that he had disability from August 3, 1999, through the date of the CCH; urged that the determination that he did not have disability is so against the great weight and preponderance of the evidence as to be manifestly erroneous and unjust; and requested that the Appeals Panel reverse the decision of the hearing officer and render a decision that he had disability from August 3, 1999, to the date of the CCH. The respondent (carrier) responded, urged that the evidence is sufficient to support the determination that the claimant did not have disability, and requested that that determination be affirmed.

DECISION

We affirm.

The Decision and Order contains a statement of the evidence. It is undisputed that the claimant injured his knee on _____; that he worked light duty after that until he was terminated on August 2 or 4, 1999; and that a report of an MRI dated August 30, 1999, indicates that the claimant has a tripartite patella that appears to be a chronic developmental abnormality, has patellar cartilaginous thinning over the lateral facet with subchondral cyst formation, and a tear in the posterior horn of the medial meniscus. Some of the other evidence concerning disability is conflicting. The claimant testified that when he worked light duty he had difficulty doing the work, asked for an assistant to help him, and went to the doctor several times. Records from a clinic indicate that he was seen on April 10, 15, and 22; May 3; and August 4, 1999. Mr. K, a level three foreman and a supervisor of the claimant's supervisor, testified that he did not recall the claimant's supervisor telling him that the claimant could not do his work after the injury, that it was the supervisor's duty to do so if it had occurred, and that he did not recall the claimant going to a doctor during the time he was working light duty. Reports from Dr. C indicate that the claimant was taken off work on September 1, 1999, and that Dr. C had him off work until March 31, 2000, when he was to see the claimant again. In an undated letter, Dr. C opined that arthroscopic surgery was necessary to determine the extent of the injury. The claimant contended that he was not able to work after he was terminated because he

found out that his knee injury was more severe than he had previously thought. The carrier contended that the claimant was claiming that he was unable to work after August 4, 1999, because he was terminated for another reason on that date. The claimant denied working after August 4, 1999. At the CCH, the claimant was asked to show his hands to the hearing officer, but the record does not contain any description of the condition of the claimant's hands at the CCH.

The burden is on the claimant to prove by a preponderance of the evidence that disability exists. Texas Workers' Compensation Commission Appeal No. 93953, decided December 7, 1993. 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 opinion from a medical expert is not binding on the hearing officer even when it is not contradicted by another expert. Texas Workers' Compensation Commission Appeal No. 961610, decided September 30, 1996. 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 a hearing officer. Texas Workers' Compensation Commission Appeal No. 94466, decided May 25, 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 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). Hearing officer 2 did not find the claimant to be credible concerning his ability to work and determined that for the period of April 11, 1999, to the date of the CCH the claimant was able to obtain and retain employment at a wage equivalent to his preinjury wage and that he did not have disability. Only were we to conclude, which we do not in this case, that hearing officer 2's determinations concerning disability are so against the great weight and preponderance of the evidence as to be clearly wrong or unjust, would there be a sound basis to disturb those determinations. 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 affirm the decision and order of hearing officer 2.

Tommy W. Lueders
Appeals Judge

CONCUR:

Kathleen C. Decker
Appeals Judge

Philip F. O'Neill
Appeals Judge