

## APPEAL NO. 001179

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 April 19, 2000. The hearing officer determined that the appellant (claimant) timely reported the claimed injury to the employer; that he was not injured in the course and scope of his employment on \_\_\_\_\_; and that, since he did not sustain a compensable injury, he did not have disability. The claimant appealed the determinations that he did not sustain an injury in the course and scope of his employment and that he did not have disability; urged that the evidence is sufficient to support his contention that he was injured in the course and scope of his employment on \_\_\_\_\_, and had disability from October 11, 1999, to the date of the CCH; and requested that the Appeals Panel reverse the determinations against him and render a decision in his favor. The respondent (carrier) replied, urged that the evidence is sufficient to support the determinations of the hearing officer that the claimant was not injured in the course and scope of his employment and that he did not have disability, and requested that those determinations be affirmed.

### DECISION

We affirm.

It is undisputed that the claimant had a herniated disc at L5-S1 and that he had surgeries, including a fusion, in October 1999 and February 2000. The claimant contended that he was injured on \_\_\_\_\_, when he was lifting a bag of cement. He testified that he had pain when he lifted the cement; had had muscle strains in the past; that he thought that it was another muscle strain; that he took it easy the remainder of the workday; that at the end of the day, he told Mr. H, the owner of the employer, that he had back pain and was going to go to a doctor to see about it; that if you tell a doctor that you were hurt at work "they act like vultures" and you have to fill out a lot of paperwork; that since he thought the injury was minor, he told the people at (Center) that he had hurt his back waterskiing; that the back pain became more severe and he had pain in his buttocks and legs; that he saw a chiropractor and another doctor and told them that he hurt his back waterskiing; that an MRI performed on September 3, 1999, revealed disc protrusion and stenosis; that on October 11, 1999, a doctor took him off work; that on that day he told Mr. H that he was taken off work and that the injury was more severe than he had thought that it was; that Mr. H reported the injury to the carrier that day; that a myelogram was performed on October 15, 1999; and that he had the first surgery on October 28, 1999. The claimant said that previously he had missed some work because of muscle aches; that he missed some work after the \_\_\_\_\_, injury to go to physical therapy; and that Mr. H always paid him for 40 hours a week, even if he did not work 40 hours a week. He stated that after he learned that the injury was more serious than he thought, he told doctors that the injury occurred at work.

Mr. H testified that the claimant's injury was the first on-the-job injury that had been reported in the 20 years that he operated the water well business; that in the past, employees had missed work for minor injuries and he always paid them for 40 hours a week even if they did not work 40 hours a week; and that after his experience with the claimant's injury, he changed his policy and reports all injuries. He said that at some time in July at the end of the workday the claimant told him that he had hurt his back at work and that he was going to get something for it on his way home. He said that on October 11, 1999, the claimant told him that the injury was more serious than he thought that it was. Mr. H stated that he did not know how to handle workers' compensation injuries and immediately filed a report with the carrier without a date of injury in the report. He said that he and the claimant reviewed documents, including the report that the claimant went to the Center on \_\_\_\_\_, and decided that the injury occurred on that day. Mr. H testified that he believes that the claimant injured his back at work on \_\_\_\_\_.

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 testimony of the claimant alone may be sufficient to satisfy the burden of proof. Texas Workers' Compensation Commission Appeal No. 91013, decided September 13, 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). While a claimant's testimony alone may be sufficient to prove a claim, 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 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. 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).

In the statement of the evidence in her Decision and Order, the hearing officer stated that credibility played a pivotal role; that both the claimant and Mr. H testified that the injury was reported to Mr. H on \_\_\_\_\_; and that, because of the inconsistencies generated by the claimant, he did not meet his burden of showing by credible evidence that his back condition is work related. Under the circumstances of the case before us, we are somewhat troubled by the findings of the hearing officer that the claimant timely reported a claimed injury to the employer on \_\_\_\_\_, but that he was not injured in the course and scope of his employment on that day. However, a hearing officer may believe all, part, or none of the testimony of witnesses. 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. Only were we to conclude, which we do not in this case, that the hearing officer's determination that the claimant did not injure his back in the course and scope of his employment is 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 that determination. 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 that determination of the hearing officer, we will not substitute our judgment for hers. 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.

In his appeal, the claimant discussed the law concerning timely reporting of an injury to the employer. Since the hearing officer found that the claimant timely reported a claimed injury to the employer, we do not consider that the claimant appealed a determination favorable to him.

We affirm the decision and order of the hearing officer.

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Tommy W. Lueders  
Appeals Judge

CONCUR:

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Susan M. Kelley  
Appeals Judge

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Gary L. Kilgore  
Appeals Judge