APPEAL NO. 001213

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 July 24, 2000. The hearing officer determined that the appellant (claimant) was not injured in the course and scope of employment on _____; that as a result of his non work-related injury of _____, he was unable to obtain and retain employment equivalent to his preinjury wage from June 2, 1999, through October 31, 1999; and that the claimant did not have disability because he did not sustain a compensable injury. The claimant appealed; said that a witness did not appear and evidence he wanted to use was not presented at a benefit review conference (BRC) held on March 9, 2000; and stated information favorable to his position. The respondent (carrier) replied, stated that evidence not admitted at the CCH should not be considered, urged that the determinations of the hearing officer are not so contrary to the overwhelming weight of the evidence as to be clearly wrong or unjust, and requested that the determinations that the claimant did not sustain a compensable injury and did not have disability be affirmed. On June 29, 2000, the claimant filed a response to the carrier's response. It was not timely filed as an appeal and will not be considered.

DECISION

We affirm.

We first address the claimant's comments about exhibits not being presented and a witness not testifying at a BRC. At the CCH, the claimant offered 12 exhibits and all were admitted without objection. Also, the claimant testified on his own behalf, called a witness, and was given the opportunity to call additional witnesses and to present other evidence. The omissions or commissions of an attorney are regarded as the acts of the client whom he represents, and an attorney's neglect is the equivalent of the client's own neglect. Texas Workers' Compensation Commission Appeal No. 93605, decided August 26, 1993. Even if the attorney representing the claimant had neglected to do something that the claimant had requested that he do, such neglect would not result in reversible error.

The decision of the hearing officer contains a statement of the evidence. Briefly, the claimant testified that while he was alone near the end of his shift on a rainy day on _____, he slipped and fell, injuring his low back, neck, and right shoulder; that when he left work that day, a supervisor was not available for him to report the injury to; that the next day he did not immediately report the injury because he did not think it was serious; that later that morning, he was called to the office of Mr. M, a foreman, and was told that he was discharged from the facility when he was working and was told to report to the office of the employer; that he called Mr. S, the safety person, and asked to see a doctor; that he went to a clinic used by the employer; that he was told by an adjuster that he would receive a number to see a doctor; that he did not get the number; and that he went to another doctor on June 2, 1999.

Mr. M said that the claimant was transferred from the site where he was working to the employer's office because he and the two people the claimant supervised did not erect the scaffold in the time that the job should have taken; that at that time, the claimant did not tell him that he had been injured; that after the claimant said that he had been injured, he, Mr. M, questioned other employees; that no employees told him that they saw the claimant get hurt on _____; and that the claimant did not report the injury to anyone he spoke with prior to being advised that he was being transferred. Mr. S testified that the day after the claimed injury, the claimant told him that he had fallen the day before; that he wanted to have him, Mr. S, get an appointment with a doctor for him; that the doctor diagnosed contusions and lumbar and cervical sprains; and that he, Mr. S, did not see contusions on the claimant.

MRIs of the cervical and lumbar spine dated June 18, 1999, indicate that the claimant has a herniated disc in both the cervical and lumbar areas. In a letter to Dr. R, a chiropractor and the claimant's treating doctor, dated August 3, 1999, Dr. M, a spine surgeon, stated that the claimant may be a surgical candidate, recommended discography, and requested that the claimant return after the tests to discuss surgical options. Both Dr. R and Dr. C, to whom the claimant was referred by Dr. R, related the claimant's condition to the fall on the scaffold.

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. 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 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). 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 the hearing officer. Texas Workers' Compensation Commission Appeal No. 94466, decided May 25, 1994. At the CCH, both parities argued that credibility of witnesses was important. In her Decision and Order, the

hearing officer stated that the claimant "was less than credible in many regards." We are concerned that in making a finding of fact on the issue of disability, the hearing officer found "[a]s a result of Claimant's non work-related injury of _____, Claimant was unable to obtain and retain employment . . . .", when there is no evidence that the claimant sustained a non work-related injury on _____. However, that finding of fact is not inconsistent with the finding of fact that the claimant failed to establish that he was injured in the course and scope of his employment on _____, and that determination is 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, 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 the determination of the hearing officer that the claimant was not injured in the course and scope of his employment on _____; 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.

We affirm the decision and order of the hearing officer.

Tommy W. Lueders
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Dorian E. Ramirez
Appeals Judge