

APPEAL NO. 001276

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 May 4, 2000. The issues reported as unresolved at the benefit review conference are did the respondent (claimant) sustain an injury in the course and scope of employment on _____; what is the date of injury; is the appellant (carrier) relieved of liability because of the claimant's failure to timely notify the employer of the claimed injury; and did the claimant have disability resulting from the injury sustained on _____. The hearing officer determined that the date of injury is _____; that the claimant sustained an injury in the course and scope of his employment when driving and riding in a truck on _____; that he notified the employer of the claimed injury on that day; and that he had disability beginning on September 6, 1999, and continuing through the date of the CCH. The carrier appealed, commented on cumulative and specific injury, urged that the evidence is not sufficient to support the determinations of the hearing officer, and requested that the Appeals Panel reverse the decision of the hearing officer and render a decision in its favor on all issues. In the alternative, the carrier requested that the Appeals Panel reverse the decision of the hearing officer and remand for further development of the evidence concerning repetitive trauma. 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.

At the CCH, the hearing officer read the issues reported as unresolved. The parties agreed that those were the issues. Considering how many issues are stated as did the claimant sustain an injury in the course and scope of employment on a certain date when the issue in reality concerns a claimed repetitive trauma injury and the issue of the date of injury, it would have been better for the hearing officer to have discussed the issues to obtain clarification. However, the strict rules of pleading do not apply and alternative theories may be advanced if they are not contradictory or mutually exclusive. Texas Workers' Compensation Commission Appeal No. 951848, decided December 18, 1995. We do not reverse and remand for further development of the evidence.

The Decision and Order of the hearing officer contains a statement of the evidence and also a discussion, in which she summarizes and comments on some of the evidence. Briefly, the claimant worked as a long-haul driver and frequently drove from Texas to Florida, using a route that included about 150 miles of extremely rough interstate highway. The claimant testified that he often felt beat up and sore after making the trip; that while traveling on the rough area on _____, the truck bounced more than normal because two empty trailers were being pulled; that he felt pain in his neck and lower back, radiating into his left leg; and that he never felt pain radiating into his leg before. A report shows that Dr. W took the claimant off work on _____. The claimant testified that he has not

been released to return to work. Reports of MRIs dated October 26, 1999, indicated herniations in a lumbar and a cervical disc. In an orthopedic report dated February 14, 2000, Dr. B stated that the claimant's lumbar spine was injured as a direct result of excessive bouncing in the cab of the 18-wheeler and that the vertical stresses on the lumbar spine could easily explain the herniated disc at L4-5.

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 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 different factual determinations could have been made based upon the same evidence is not a sufficient basis to overturn factual determinations of a hearing officer. Texas Workers' Compensation Commission Appeal No. 94466, decided May 25, 1994. In the discussion in her Decision and Order, the hearing officer stated that she found the claimant's testimony and statements of coworkers about the especially bumpy road to be credible and that the claimant knew that his work on _____, resulted in a different type and intensity of pain. The determinations of the hearing officer 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, 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 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:

Thomas A. Knapp
Appeals Judge

DISSENTING OPINION:

Generalized, global testimony that interstate highways, in a large stretch, are "terrible" is legally insufficient evidence, in my opinion, to establish the sort of injury claimed here, most especially in a vehicle equipped with airbags and a suspension not shared by many private vehicles. A doctor's opinion on causation based upon such global history is no better than the history itself. Common experience of just about any fact finder should be enough to cause some more critical examination of the contention that the interstate highways are long, continuous stretches of ridges and potholes as was the nature of testimony in this case. (I am struck in this case that there is no mention of the infamous section of interstate 10 immediately east of Houston through Baytown.) We have affirmed denials of similar claims with not much more in the way of assertion than this case. There may be a case that could have been made here (more likely for repetitive trauma); however, I do not believe that it was made with legally sufficient evidence in this record.

Susan M. Kelley
Appeals Judge