APPEAL NO. 001316

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on May 3, 2000. The hearing officer determined that the appellant (claimant) did not sustain a compensable injury; that the claimant did not have disability; and that the date of injury is _____. The claimant appealed the issues of compensability of the injury and disability, asserting that the hearing officer erred when he failed to address the claimed injury of a cervical, thoracic, and lumbar soft tissue sprain/strain because he only made findings of fact regarding whether the claimant had sustained an injury to his spine. The respondent (carrier) responded that the hearing officer's decision was supported by sufficient evidence and should be affirmed. The determination that the date of injury was _____, was not appealed and has become final by operation of law. Section 410.169.

DECISION

We reverse the decision and order and remand the case to the hearing officer for further consideration and findings as to whether the claimant sustained an injury in the form of a soft tissue sprain/strain to the cervical, thoracic, and lumbar areas of his back and as to disability consistent with the additional requested findings.

The claimant testified that he worked as a long-haul truck driver for the employer and that while driving to California on _____, he hit a four- to five-inch drop-off in the pavement which caused a jarring of the truck cab and trailer and his seat to bottom out bouncing him around in his seat. The claimant contended at the hearing that the impact caused an injury along his entire back from his neck to his lumbar area. The claimant stated to an adjuster in a recorded conversation of January 31, 2000, that he only injured his mid-back and neck and denied any injury to his low back. During opening argument, the claimant asserted that the evidence would support a finding that the incident of _____, caused the "compression" of his back and, therefore, he experienced a back injury that was work related. The evidence was conflicting as to whether claimant sustained an injury when the truck hit the drop-off in the pavement.

The claimant, at the request of the employer, presented to Dr. T at (clinic) on January 12, 2000, who diagnosed a cervical and thoracic strain and possible sciatica. Medication was prescribed for muscle spasms and the claimant was released the same day to sedentary duty with instructions of no prolonged standing or walking, no heavy lifting, and that he be allowed to change position. The claimant returned to the clinic on January 24, 2000, and Dr. T entered in the progress note that the claimant had an acute cervical and back strain. Dr. T wrote that the claimant was making gradual progress and continued with a restriction of no heavy lifting, pulling, or pushing. The claimant returned for treatment four more times, the last on January 27, 2000, and the restriction to sedentary duty with no heavy lifting, pulling, or pushing was continued through February 2, 2000. The claimant was requested to return to the clinic on January 31, 2000.

The claimant testified that although he knew the employer had light-duty work available, he could not work after January 12, 2000, due to his pain and inability to move his neck. The claimant admitted that he contacted the union steward who advised him that he could change treating doctors. The claimant subsequently changed doctors to Dr. M, and saw her for the first time on February 2, 2000. Dr. M documented in her initial medical report that the claimant presented with complaints of neck and lower back pain, left leg numbness and tingling, shoulder pain, tingling from the cervical spine to the left arm, pain radiating up and down the spine, and headaches. Dr. M diagnosed low back syndrome, cervical nerve root compression, sacroiliac (ligament) sprain, and pain in the thoracic spine, and issued the claimant a full-work release. Dr. M ordered chiropractic manipulation of the cervical, thoracic, and lumbar spine and other conservative chiropractic modalities, including massage and heat pack therapy.

A full spine x-ray taken on February 2, 2000, was interpreted by Dr. H, as indicating early degenerative disc disease and no vertebral compression or spondylolisthesis. The report from Dr. H contained findings that the soft tissues were unremarkable but there was an abnormal straightening of the cervical spine, shallow right cervical convexity suggestive of paravertebral muscle spasm, left lateral list of the upper thoracic spine, and mild accentuation of the lumbar lordosis.

MRIs for the cervical and lumbar spine were performed on March 29, 2000, which were interpreted by Dr. F, who noted on the cervical film that the prevertebral (sic) soft tissues were unremarkable and that the claimant had 1 mm disc bulges at C3-4 and C6-7 but no lateralizing defects, spinal stenosis, or abnormal cord signal. Dr. M found no disc bulges, herniations, or lateralizing defects at any level on the lumbar spine and a diagnosis of early degenerative disc disease was entered on both of the reports.

The hearing officer made the following findings of fact:

FINDINGS OF FACT

3. Claimant did not injure any part of his spine while driving a tractor trailer for his employer on or about _____.

4. Any inability of Claimant to obtain and retain employment at wages equivalent to his pre-injury wages is due to something other than an alleged _____, compensable injury.

The claimant contended on appeal that the hearing officer only addressed whether the claimant had sustained an injury to his spine, i.e., the bony structures of the back, and failed to address the sprain/strain asserted by the claimant as the work-related injury. Although in opening the claimant asserted a “compression” injury, the type of injury and position asserted by the claimant during closing changed to that of a sprain/strain as evidenced by the statement from the claimant’s attorney, “[w]ell, what the doctors are saying here is that there is a sprain/strain type injury, soft tissue injury.” The carrier argued

there was no injury, that the claimant simply suffered from degenerative disc disease, an ordinary disease of life. Whether the claimant sustained a strain/sprain to any portion of his neck or back is a fact question to be resolved by the hearing officer. Section 410.165(a) provides that the hearing officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence as well as the weight and credibility that is to be given the evidence. It is for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). 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). The trier of fact may believe all, part, or none of the testimony of any witness. Aetna Insurance Company v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ). An appeals level body is not a fact finder and 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 could 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).

The relief requested by the claimant is properly the province of the hearing officer; that, in addition to the finding as to the spine, he make findings of fact as to whether the claimant sustained a sprain/strain to his back and neck and a decision as to disability based on those findings. We reverse the decision and order of the hearing officer and remand for findings consistent with the evidence adduced at the hearing of May 3, 2000. No additional hearing is necessary.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Texas Workers' Compensation Commission's Division of Hearings, pursuant to Section 410.202. *See* Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

Kathleen C. Decker
Appeals Judge

CONCUR:

Alan C. Ernst
Appeals Judge

Susan M. Kelley
Appeals Judge