APPEAL NO. 001663

This appeal is brought pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on June 15, 2000. It is undisputed that the appellant (claimant) sustained a compensable injury to his lumbar spine on _____. The hearing officer determined that the compensable injury does not extend to the claimant's cervical spine, thoracic spine, right knee, left knee, right hip, right elbow, or right wrist and that the claimant had disability from August 25, 1999, through April 5, 2000. The claimant appealed, contended that the hearing officer erred in determining that a benefit review conference (BRC) agreement determined the extent-of-injury issue, urged that the determinations of the hearing officer are so against the great weight and preponderance of the evidence as to be clearly wrong and unjust, and requested that the Appeals Panel reverse the decision of the hearing officer and render a decision in his favor. In the alternative, the claimant requested that the decision of the hearing officer be reversed and remanded to a different hearing officer for a fair hearing. The respondent (carrier) replied; stated "[w]ithout necessarily reaching the question of whether the language of the agreement acts as *res judicata* with regard to the extent of the compensable injury, the hearing officer could certainly weigh the evidentiary effect of the agreement"; urged that the evidence is sufficient to support the determinations of the hearing officer; and requested that his decision be affirmed.

DECISION

We affirm.

The Decision and Order of hearing officer contains a thorough statement of the evidence. While we do not agree with all of the language used by the hearing officer in commenting on the evidence, his summary of the evidence is accurate. Only a brief summary of the evidence will be included in this decision.

The claimant and three coworkers were lifting a container holding heavy things to be discarded. The claimant testified that the container slipped and as a result he had all of the weight for a short period of time. The claimant was taken to a clinic and was seen by Dr. H. The claimant stated that he told Dr. H that his back and whole right side were hurting. Dr. H recorded that the claimant sustained a lumbar strain and that he had radiating pain. The claimant went to an attorney and was referred to Dr. M, a chiropractor. Dr. M testified that in his opinion the claimant sustained a low back injury and injury to his neck, body parts on the right side, and left knee. Dr. M was examined and cross-examined about his opinions of the claimant's injury and the medical records of Dr. C examined the claimant at the request of the carrier. In a Report of Medical Evaluation (TWCC-69) dated April 17, 2000, Dr. C certified that the claimant reached maximum medical improvement (MMI) on April 5, 2000, with a five percent impairment rating for a specific injury to the lumbar spine. In a narrative attached to the TWCC-69 he stated why he thought other claimed body parts were not part of the compensable injury; explained that he selected April 5, 2000, as the date the claimant reached MMI because that was the last day the

claimant was seen by his physician; and opined that the claimant was, on the date of the examination on April 11, 2000, able to perform any job he was able to perform prior to the compensable injury.

In his appeal, the claimant made complaints about how the hearing officer arrived at making his determinations. Review of the record and the Decision and Order of the hearing officer indicates that it would have been better had he not used some of the words he used, but review does not reveal a basis for reversing his decision and remanding the case to another hearing officer.

In his Decision and Order, the hearing officer commented on the BRC agreement and wrote:

> In this case, it is obvious that the extent of injury claimed by the Claimant does not exist even without considering the effect of the agreement. Even so, the agreement should be considered res judicata with respect to the question of the claimed extent of injury.

The BRC agreement contains:

| ISSUE CODE (Commission use only) | DISPUTED ISSUE(S) | RESOLUTION(S) |
|---|---|---|
| C06 | Did the claimant sustain a compensable injury on 8/9/99? | Parties agree that claimant did sustain a compensable lumbar spine injury on 8/9/99. |
| W01 | What is the average weekly wage (AWW)? | Parties agree that the AWW is $375.00. |

The Texas Workers' Compensation Commission's Disputed Issues Code document states that C06 is "Compensability/injury (existence)" and has a footnote that states

> Includes compensability disputes raised by the carrier within the first 60 days: (1) Was there an accident? (2) Did an injury occur as a result of the accident? (3) Was the injury within the course and scope of employment? (4) Is a preexisting condition the sole cause of the purported injury?

The document states that disputed issue code C07 is "Extent of Injury."

The record does not contain a statement by either party as to whether the intent of the agreement for the first disputed issue was intended to resolve a dispute beyond

whether the claimant sustained a compensable injury. The record is not sufficient to support the hearing officer's statement that the agreement is *res judicata* for the issue of extent of injury. However, the hearing officer also stated it is obvious that the extent of injury claimed by the claimant does not exist even without considering the effect of the agreement. The statement of the hearing officer about *res judicata* did not result in reversible error and will be disregarded.

The burden is on the claimant to prove by a preponderance of the evidence the extent of an injury. Texas Workers' Compensation Commission Appeal No. 94248, decided April 12, 1994. 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, determines 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). The hearing officer did not find the testimony of the claimant or of Dr. M on the extent of the claimed injury to be credible. The hearing officer's determination that the claimant's compensable injury does not extend to his cervical spine, thoracic spine, right knee, left knee, right hip, right elbow, or right wrist 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 that determination of the hearing officer, we will not substitute our judgment for his. 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). Since we have found the evidence to be sufficient to support the determination of the hearing officer on the extent of the injury, only the compensable injury to the lumbar spine may be considered in determining disability. Dr. C used both April 5, 2000, and April 11, 2000, in the narrative attached to the TWCC-69. The evidence is sufficient to support the determination that the claimant had disability from August 25, 1999, through April 5, 2000.

We affirm the decision and order of the hearing officer.

Tommy W. Lueders
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Robert E. Lang
Appeals Panel
Manager/Judge