APPEAL NOS. 002067 AND 002326

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 (CCH) was held on August 9, 2000. The only issue for one claim was whether the appellant (claimant) was injured in the course and scope of his employment on _____. The hearing officer determined that he was and that determination has not been appealed and has become final under the provisions of Section 410.169.

For the other claim, the issues were whether the claimant was injured in the course and scope of his employment on _____, and whether he had disability. The hearing officer determined that the claimant was not injured in the course and scope of his employment on _____; that due to the claimed injury the claimant was unable to obtain or (sic, and) retain employment at wages equivalent to the preinjury wage beginning on February 23, 2000, and continuing through the date of the CCH; and that since the claimant did not sustain a compensable injury on _____, he did not have disability. The claimant appealed; commented on the evidence; urged that the determinations of the hearing officer are so contrary to the great weight and preponderance of the evidence as to be manifestly unjust; and requested that the Appeals Panel reverse the decision of the hearing officer pertaining to that claim and render a decision that he sustained a compensable injury on _____, and had disability beginning on _____, and continuing through the date of the CCH. The respondent (carrier) replied; commented on the evidence; urged that the evidence is sufficient to support the determinations that the claimant 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; and requested that those determinations be affirmed.

DECISION

We affirm.

The claimant testified that he worked as a trainee route salesman for a soft drink company; that he was placed on light duty after the _____, lifting injury; and that he returned to full duty on January 27, 2000. On _____, the claimant and Mr. C, the district sales manager, had a discussion about the claimant's being off work to have a meeting with the principal of the school where the claimant's son attended. The claimant wanted to be off work all day and Mr. C wanted the claimant to miss work only for the time the claimant had to be away from work because of the meeting. On February 4, 2000, Mr. C and the claimant had a disagreement about the claimant "running a route" and on February 9, 2000, Mr. C counseled the claimant, apparently about the February 4, 2000, incident. Mr. C testified that on _____, he received a call from a store manager; that the manager said that he told the claimant he was going to call Mr. C; that the manager complained about the claimant; that he, Mr. C, went to the store; and that, from observing the company's products in the store and from his conversation with the store manager, he determined that the claimant had not performed the way he should have at

the store. The claimant testified that his actions at the store were proper. Records indicate that on February 23, 2000, Mr. C counseled the claimant about his activities at the store on _____.

The claimant testified that on _____, at about 11:00 a.m. he had to get into the truck to get a case that weighed between 60 and 80 pounds; that he stepped on a split in the concrete and was thrown forward; that his arms were extended holding the case and his back popped; that he rested for a while; that he should have stopped, but he finished the route; that he did not report it that day; that he thought that he could work his way through it; that he got worse over the weekend; and that he reported it Monday morning. The claimant said that his family doctor would not treat him because she did not treat workers' compensation patients; that he went to a company doctor on Tuesday, February 22, 2000; that he went to a chiropractor on Wednesday and was taken off work; that he continues to be treated by the chiropractor; and that he is not able to work. A report from the doctor who saw the claimant on February 22, 2000, states that the diagnoses are thoracic pain and thoracic strain; that the claimant could return to work that day with restrictions; and that he should have one week of physical therapy. An Initial Medical Report (TWCC-61) from the chiropractor dated February 23, 2000, contains a history of injury consistent with the testimony of the claimant and states that the claimant has cervical, thoracic, and lumbar sprains. Excuse slips indicate that the claimant was taken off work by the chiropractor on February 23, 2000, for a _____, injury and that he remained in an off-work status.

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). The claimant contended that he was injured as he described in his testimony and in his statements to health care providers. The carrier contended that the claimant was not injured and that he claimed he was hurt because he had been counseled on his job performance and thought he would lose his job. The claimant denied that. In his Decision and Order, the hearing officer stated that he did not find the claimant's evidence concerning the claimed injury on

_____, to be credible and determined that the claimant was not injured in the course and scope of his employment on that day. 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). Only were we to conclude, which we do not in this case, that the hearing officer's determination that the claimant was not injured in the course and scope of his employment on _____, 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 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). 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 on _____, the claimant cannot have disability for that claimed injury. The claimant had returned to work after the _____, compensable injury and did not contend that he had disability as a result of that injury after he returned to work on January 27, 2000.

We affirm the decision and the order of the hearing officer.

Tommy W. Lueders
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Judy L. Stephens
Appeals Judge