APPEAL NO. 002093

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 June 21, 2000. The appellant/cross-respondent (carrier) and the respondent/cross-appellant (claimant) stipulated that the claimant sustained a compensable injury on _____. The hearing officer admitted a lengthy exhibit offered by the carrier over the objection of the claimant, kept the record open for the claimant to review the exhibit and offer additional evidence, and closed the record on July 12, 2000, without receiving additional evidence. The hearing officer determined that the claimant had disability from March 2, 2000, through the date of the CCH. The carrier appealed, urged that overwhelming evidence is contrary to the determination of the hearing officer, and requested that the Appeals Panel reverse the decision of the hearing officer and render a decision that the claimant did not have disability. The claimant appealed; stated that he wanted to terminate his attorney immediately; contended that his disability began on February 25, 2000; and said that the carrier did not use the correct average weekly wage (AWW) in determining his weekly benefits and paid him less than he should have been paid for several reasons. A response from neither the claimant nor the carrier has been received.

DECISION

We affirm.

The only issue at the CCH was whether the claimant had disability. The claimant's AWW was not an issue. The claimant may communicate with personnel in the field office handling the claim concerning any questions he has about his claim.

The Decision and Order of the hearing officer contains a statement of the evidence. Only a brief summary of the evidence will be included in this decision. The claimant injured his lower back on _____; was treated by a company doctor; was prescribed pain medication; and was released to return to work at light duty. He testified that after he was released to light duty he did not do any work because of the pain, that the medication made him sleepy, and that he walked and slept at work. The claimant was referred to other doctors. On August 13, 1999, Dr. K performed a right-sided microdiskectomy, excising a massive axillary disk herniation. The claimant testified that after the surgery he was still in pain, but was released to return to work at light duty after being off work two days and went back to the employer doing the same thing he did before he had the surgery. On January 26, 2000, the claimant was sent to a business that provides light-duty employment and was given a job sitting at a workbench assembling staplers. He testified that he was required to sit for four hours, was given limited breaks, and could not sleep. The claimant stated that he told the doctor that he could not do the work assembling the staplers, but the doctor did not take him off work. He said that he worked through February 25, 2000; that he could not work because of the pain; that he changed doctors; that Dr. P, a chiropractor, became his treating doctor; and that Dr. P took him off work. The

claimant testified that he applied for unemployment compensation benefits because he needed money and was not receiving any benefits.

Mr. R, the employer's health and loss control manager, testified that the claimant was released to sedentary work with no lifting, bending, or twisting; that after the surgery and work hardening, the claimant was released to medium-level work; that he took the claimant to doctor's appointments and to physical therapy; that the claimant did not complain about his treatment or the light-duty work; that he did not view the claimant doing light-duty work; that he spoke with Dr. K; that Dr. K did not say that the claimant could not assemble the staplers; and that he considered assembling the staplers to be sedentary work.

A report from Dr. P dated March 2, 2000, contains a history provided by the claimant; includes diagnoses; states that the claimant will be referred for an orthopedic evaluation and evaluation for chronic pain management; and says that the claimant is not capable of working. A report from Dr. D, an orthopedic surgeon, dated March 27, 2000, states that the claimant injured his low back at work on _____; that he developed severe pain in his back with radiation into both legs; that the claimant was treated conservatively and underwent back surgery on August 13, 1999; that he returned to work one day postop and was placed in a work hardening program; that the claimant has now developed increased symptoms of pain to the low back with radiation into the right hip and back; that the symptoms are progressively getting worse; that the diagnosis is recurrent right herniated nucleus pulposus at L5-S1 and lumbar spine instability at L5-S1; that additional treatment is indicated; and that the claimant is not capable of working.

The carrier cited Texas Workers' Compensation Commission Appeal No. 952121, decided January 26, 1996. In Appeal No. 952121, the claimant said that on October 19, 1994, she quit her job because of low pay and an inability to communicate with a supervisor and that she told her supervisor that she was experiencing problems with her hands and asked her supervisor if she could get her hands checked by a doctor. On November 23, 1994, a doctor reported that the claimant had mild to moderate carpal tunnel syndrome, that she had been off work since quitting a month earlier, and that her pain condition was getting better. The report does not take the claimant off work or indicate that she has any restrictions. The claimant stayed at home and took care of her children. On September 16, 1995, the claimant began working at a part-time job that paid less than her preinjury wage. The hearing officer determined that the claimant had disability beginning September 16, 1995. The Appeals Panel reversed that determination. It stated that there was no evidence to indicate an adverse change in the claimant's condition; that if anything, the evidence indicated an improvement in her condition; that under the circumstances of the case, merely securing a part-time job at a lower hourly rate did not establish the beginning of disability; and that there was no indication of any changed condition other than the acceptance of the part-time job.

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). The evidence in the case before us is clearly different from that in Appeal No. 952121, *supra*. The claimant was being paid his preinjury wage for performing light duty. The evidence is conflicting on what he was doing. His testimony and reports from doctors indicate his condition worsened. The carrier included Appeal No. 952121 in its written argument that was presented after the evidence was received and is included in the record as a hearing officer's exhibit. There is nothing to indicate that the hearing officer did not consider Appeal No. 952121 in rendering her decision. The claimant testified that he last worked on February 25, 2000. Dr. P took the claimant off work on March 2, 2000. 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 had disability from March 2, 2000, through the date of the CCH 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 the determination 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 the order of the hearing officer.

Tommy W. Lueders
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Robert W. Potts
Appeals Judge