APPEAL NO. 002127

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 July 11, 2000. The hearing officer determined that the appellant (claimant) did not sustain an injury in the course and scope of his employment on _____, and that he did not have disability. The claimant appealed, stated that the evidence is sufficient to establish that he was injured at work and had disability, contended that evidence was improperly admitted, and requested that the Appeals Panel reverse the decision of the hearing officer and render a decision in his favor. The respondent (carrier) replied, urged that the decision of the hearing officer is not so against the great weight and preponderance of the evidence as to be clearly wrong or unjust, and requested that it be affirmed.

DECISION

We affirm.

The claimant worked as a janitor for a college. He testified that on _____, he injured his back carrying tables. He said that he had prior compensable back injuries in _____ and _____ and that he had reported back pain in _____, _____, _____, and _____. He agreed that on September 2, 1999, he went to a clinic and was referred to a back clinic; but he denied telling the doctor that he had back pain for the last two years. On September 29, 1999, the claimant was seen by Dr. S in the clinic. Dr. S reported that the claimant complained of recurrent low back pain and right leg pain; that the pain had been present for about six months; that the claimant did not report a definite injury, but said that he had been doing too much at work moving furniture, etc.; that the claimant had been using his wife's pain medication for relief; and that x-rays showed lumbar spondylosis with disc degeneration. A report of an MRI dated November 11, 1999, states that the claimant has a mild disc bulge at T11-12; disc bulges and osteophytes at T12-L1; disc bulges and osteophytes at L1-2; disc bulges, disc space narrowing, osteophytes, and degenerative changes at L2-3; disc bulges, an extruded disc fragment, degenerative changes, and mild central canal stenosis, at L3-4; a broad based disc bulge, degenerative changes, mild central canal stenosis, and nerve root involvement at L4-5; mild degenerative changes at L5-S1; and post surgical changes in the posterior soft tissues, predominantly at the L2-3 level. In a clinic visit note dated November 18, 1999, Dr. S said that the claimant's wife called the day before requesting a copy of an MRI report and that he write a letter; that when he saw the claimant in September 1999 the claimant said that his pain had been present for about six months, that there had been no acute injury, and that it was not a workers' compensation injury and used his regular insurance; that at that time the claimant said that he may have been doing too much lifting and other things, but there was no specific inciting event; that today the claimant said that he had a workers' compensation injury; and that he told the claimant that he could not say with any degree of medical certainty that the changes that he has on his MRI and the disc herniation were caused by his work.

A Supervisor's Investigation of Accident dated September 29, 1999, states that the claimant reported injuring his back buffing floors on _____; that the buffer is a high speed, easy-to-use buffer; that many custodians use the buffer; and that the claimant is the only one that said that using the buffer made his back hurt. An Employee's Notice of Injury or Occupational Disease & Claim for Compensation (TWCC-41) signed by the claimant and dated November 17, 1999, states that the injury occurred "during various duties." The workers' compensation coordinator for the employer testified she was told that the claimant injured his back using a buffer, that later she had conversations with the claimant, that he said that he may have injured his back moving tables in _____ or _____, that in _____ or _____ tables were moved to be used in registration, and that tables were not moved in September 1999.

The claimant disputed one of the exhibits offered by the carrier. The hearing officer sustained the objection and did not admit the exhibit. There were no other objections by the claimant. The record does not indicate that evidence was improperly admitted.

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, 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 hearing officer considered the evidence and found that the claimant failed to establish with credible evidence that he sustained damage or harm to his low back in the course and scope of his employment on _____. 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 hers. 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, the claimant cannot have disability.

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

Tommy W. Lueders
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Philip F. O'Neill
Appeals Judge