APPEAL NO. 002253

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 August 18, 2000. The appellant (carrier 1), respondent 1 (carrier 2), and respondent 2 (claimant) stipulated that the claimant sustained an injury in the course and scope of his employment on _____. The hearing officer did not add the issue of whether that compensable injury is the sole cause of the claimant's back condition, but did add the issue of is the claimant's current condition a direct and natural result of the _____, injury. The hearing officer made a number of determinations that are adverse to the interests of carrier 2, who provided insurance for the employer in April 1999; those determinations have not been appealed; and some of them need not be mentioned in this decision. The hearing officer did determine that the claimant sustained a compensable back injury on _____; that as a result of that injury, the claimant had disability from April 28, 1999, to July 30, 1999; and that the claimant's current back symptoms are a direct and natural result of the injury sustained on _____, and the injury sustained on _____. Carrier 1 appealed; stated that the hearing officer correctly decided not to add the issue of sole cause; urged that the determination that the claimant's current back symptoms are a direct and natural result of the _____, injury is supported by insufficient evidence, or alternatively, is contrary to the great weight and preponderance of the evidence; and requested that the Appeals Panel reverse that determination and render a decision in its favor on that issue. Carrier 2 responded, urged that the appealed determination is not against the great weight and preponderance of the evidence, and requested that it be affirmed. A response from the claimant has not been received.

DECISION

We affirm.

The claimant testified that in his job with the employer he lifted tools that weigh from 20 to 50 pounds; that if heavier objects had to be lifted, another worker helped or a hoist was used; that he injured his low back on _____; that he was treated by Dr. H, a chiropractor; that from January 27 to April 20, 1992, he was off work and was treated several times by Dr. H; that he saw Dr. H for normal chiropractic adjustments about three times a year because of everyday stress, strain, and tension; that those visits were not specifically because of the _____ injury; that if the records of Dr. H indicated that Dr. H last saw him in June 1993 before he saw him on April 28, 1999, he has no reason to dispute that; and that after the _____ injury he wore a back brace to prevent further damage and that he sometimes wore a back brace because his back was stiff and sore. The claimant said that for a couple of weeks before _____, he had soreness and stiffness in his lower back; that on _____, he picked up a tool, turned to put it on a cart, and felt sharp pain in his lower back; that the pain stayed constant and that evening the pain started going down his right leg; that the next morning he still had constant pain in his back and pain in his leg; that he had not had pain in his right leg before the _____, incident; that he knew that he hurt worse than he had before; and that he did

not know if he had suffered a relapse or if he had hurt his back worse. The claimant stated that he returned to work for another employer on July 30, 1999.

A report of a CT scan dated January 31, 1992, states:

> There is a broad-based annulus protrusion of approximately 5mms at the L5 level which touches slightly and flattens the dural sac. Within this protrusion there is a central more prominent area which may represent herniation of the nucleus pulposa. This measures approximately 8 mms and definitely cups the sac at that point. There is no canal involvement. The nerve roots were unremarkable. The other levels were intact and normal except for mild annulus bulge at L4. This annulus bulge does slightly deform the sac at that point. The nerve roots were normal.

A report from Dr. C dated February 19, 1992, states that the claimant had mid to low back pain, without radiation into the lower extremities. A report of a CT scan dated April 10, 2000, states:

> At the L5-S1 disc space, there is diffuse bulging annulus noted centrally and to the right without any herniated nucleus pulposus. It is causing minimal compression of the thecal sac. The spinal canal is adequate, and the neural foramina are patent. There is minimal hypertrophy of the facet joints without any foraminal stenosis.
>
> At the L4-5 disc space, there is evidence of disc herniation noted centrally and to the left with diffuse bulging annulus. It is causing compression of the nerve root and the thecal sac at this level. There is evidence of early spinal stenosis and foraminal stenosis noted bilaterally due to hypertrophy of the facet joints.
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> At the L3-4 disc space, there is diffuse bulging annulus without herniated nucleus pulposus. At the L2-3 disc space, no definite abnormality is noted.

Apparently Ms. R, a Texas Workers' Compensation Commission dispute resolution officer, requested that Dr. W examine the claimant, review records, and give an opinion about the claimant's injuries. In a letter to Ms. R dated April 4, 2000, Dr. W wrote:

> Based on review of medical records and the patient's examination today, I feel that the patient had a separate injury in _____ which resolved, and a subsequent injury in 1999, which resolved.

In a letter to Ms. R dated April 18, 2000, Dr. W stated that she now had the report of a CT scan performed on April 10, 2000; commented on the two reports of CT scans; and wrote:

> It should be remembered that the patient's pain in _____ was very central, with bilateral radiation and no particular lateralization. It resolved without significant abnormalities. On this occasion in 1999, the patient had sharp pain down the right side of his back and into his right leg. I feel that this would be consistent with the new findings at L5-S1.
>
> Therefore to answer the original questions posed by this RME [required medical examination], I feel that the current back problems are a new injury, rather than a simple continuation of the _____ date of injury. It would appear that it has primarily resolved, however, this would appear to be question for the patient's treating physician and a subsequent Designated Doctor to address the MMI [maximum medical improvement] and impairment rating status.

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 evidence. 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). That a different factual determination could have been made based on the same evidence is not a sufficient basis to overturn a factual determination of a hearing officer, Texas Workers' Compensation Commission Appeal No. 94466, decided May 25, 1994. The issue was stated as carrier 1 requested. The carrier cited several Appeals Panel decisions and Texas Workers' Compensation Insurance Fund v. Mandlbauer, 988 S.W.2d 750 (Tex. 1999), a *per curiam* decision. There is nothing to indicate that the hearing officer did not properly apply the law in making his determinations. The appealed determination is not so against the great weight and preponderance of the evidence as to be clearly wrong or unjust and is affirmed. 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).

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

Tommy W. Lueders
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

DISSENTING OPINION:

I respectfully dissent. The January 1992 CT scan found no problem with the L-3 level; only a mild bulge at the L-4 level; a broad-based protrusion at the L-5 level, more prominent in the central area; and normal nerve roots. Dr. C in February 1992 noted no radiation into the lower extremities. After three months of treatment for the January 1992 low back injury the claimant, who returned to work, thereafter had only three routine chiropractic adjustments, the last in June 1993, and had no apparent low back problems except for some soreness and stiffness in April 1999 shortly before the new low back injury on _____. The April 2000 CT scan showed that at the L5-S1 level the claimant had diffuse bulging centrally and to the right; evidence of disc herniation at L4-5 centrally and to the left with diffuse bulging annulus compressing the nerve root and thecal sac; and diffuse bulging at the L3-4 level. The Texas Workers' Compensation Commission-appointed independent medical examination doctor, Dr. W, opined that based on her review of the medical records and her examination, the _____ injury had resolved and the claimant sustained a new injury in 1999. In my opinion, the determination that the claimant's current back symptoms are a direct and natural result of the injury of _____, is against the great weight of the evidence. There is, simply, a lack of probative medical evidence to support the drawing of a reasonable inference that the _____, injury directly and naturally resulted from the _____, injury.

Philip F. O'Neill
Appeals Judge