APPEAL NO. 002272

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 22, 2000. The hearing officer determined that the appellant (claimant) did not injure his low back in the course and scope of his employment on _____, and that, since he did not sustain a compensable injury, he did not have disability. The claimant appealed, stated that the evidence showed that he injured his low back driving a truck, 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 evidence is sufficient to support the decision of the hearing officer, and requested that it be affirmed.

DECISION

We affirm the decision, as reformed, and the order of the hearing officer.

The claimant testified that he began working for the employer as a long-haul truck driver on December 1, 1997; that he normally drove for 21 days and then had four days off; that he drove many hours and many miles a day; that in less than a year he drove over 140,000 miles; that he drove throughout the United States and into Canada; that he was bounced and jarred while driving trucks; that the roads in Louisiana and Arkansas were really, really bad; that in December 1999, he had back problems; that he thought that the back problems may be caused by his kidneys; that he began drinking Cran-Apple juice; that that did not help; that he tried pillows and other things; that they did not help; that he could no longer stand the pain and went to a doctor; and that the doctor referred him to Dr. Z, a back specialist. He said in March 2000 an MRI showed that he had herniated discs in his lumbar spine; that Dr. Z told him that it could be from driving, that truck drivers get back problems from driving all of the time, and that he would not be able to go back to driving; that he takes muscle relaxers and has had cortisone injections in his back; and that surgery is planned. The claimant stated that he had not done anything outside of his work that could have caused the problem.

A report of an MRI dated March 8, 2000, states that the spinal canal appears to be slightly small from L3 through S1; that at L3-4 there is a 1-2 mm diffuse disc bulge/ protrusion with minimal central stenosis; that at L4-5 there is a 2 mm broad-based posterocentral disc bulge/protrusion with mild central stenosis; and that at L5-S1 there is a 4 mm somewhat broad-based posterior disc protrusion/herniation, disc desiccation, a frank annular tear, and moderate-to-severe central stenosis. Reports from Dr. Z state what the claimant's problems are; that he should avoid bending and lifting; that he should not drive a truck; and that if conservative treatment is not successful, the claimant will need surgery. In a letter dated June 23, 2000, Dr. T states that the claimant is a truck driver; that an MRI revealed a disc bulge at L5-S1; and that in his professional opinion, the claimant's injuries could be caused from prolonged driving due to constant vibration.

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 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). The claimant did not contend that he injured his back at a specific time, but rather that he sustained a repetitive trauma injury from being bounced and jarred while driving a truck many hours a day for many days at a time. An occupational disease is a disease that arises out of and in the course and scope of employment that causes damage or harm to the physical structure of the body and includes a repetitive trauma injury. Section 401.011(34). Repetitive trauma is defined as damage or harm to the physical structure of the body occurring as the result of repetitious, physically traumatic activities that occur over time and arise out of and in the course and scope of employment. Section 401.011(36). The hearing officer determined that the claimant did not meet his burden of proving that his undisputed back condition arose out of and in the course and scope of his employment. 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's determinations that the claimant did not injure his low back from driving many hours as a truck driver and that he did not sustain a compensable injury in the form of an occupational disease on _____,[1] are not so against the great weight and preponderance of the evidence as to be clearly wrong or unjust and are 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). Since we find the evidence sufficient to support those determinations 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, the claimant cannot have disability.

[1]Should have been "with a date of injury of _____," since the claimant was claiming a repetitive trauma injury sustained over a period of time and not a specific injury sustained on a specific day.

We reform the decision of the hearing officer to state that the claimant did not sustain a compensable injury in the form of an occupational disease with a date of injury of _____, and that the claimant did not have disability. We affirm the decision of the hearing officer, as reformed, and the order.

Tommy W. Lueders
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Judy L. Stephens
Appeals Judge