APPEAL NO. 002306

On August 22, 2000, a contested case hearing (CCH) was held. The CCH was held under the provisions of the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. The hearing officer resolved the disputed issues by deciding that the appellant (claimant) did not sustain a compensable repetitive trauma injury on eighter _____, or _____, and has not had disability. The claimant requests that the hearing officer's decision be reversed and that a decision be rendered in his favor. The respondent (carrier) requests that the hearing officer's decision be affirmed.

DECISION

Affirmed in part, reversed and rendered in part.

The claimant had sustained a low back injury while employed by a restaurant in _____ and again in 1994. As a result of the 1994 injury, the claimant underwent spinal surgery, a lumbar hemilaminectomy at L4-5, in October, 1994. An MRI performed on September 28, 1994, revealed small to medium central disc herniations at L4-5 and L5-S1. The L5-S1 level of the spine was explored during the surgery, but the surgeon, Dr. G, determined that the defect did not require surgical intervention at that time.

After the 1994 surgery, the claimant was able to return to work and ultimately went to work for the employer as a maintenance mechanic. Although he was able to work, he continued to have intermittent low back pain. The claimant testified that he would have some symptoms down into both the right and left leg.

On _____, the claimant sneezed while at work and felt the sudden onset of severe pain radiating into his right leg. Diagnostic testing determined that the right leg pain was the result of a large herniated disc at L5-S1 with a free fragment impinging on the S1 nerve root on the right.

Conflicting medical evidence was presented regarding the cause of the L5-S1 herniation. In a report dated July 10, 2000, Dr. B stated:

> The patient asserts that his current situation is related to his occupation, but, there is no absolute information to exclude the fact that this could be natural progression of his previous discectomy (when the posterior aspect of a disc is removed, this removes the annular rings which confine the nucleus to its proper location), the natural course of spine disease, and previously operated upon lumbar spine, part of the aging process, sneezing, or any other activity.

To establish a repetitive trauma injury, a claimant must prove not only that repetitive traumatic activities occurred on the job, but also that there was a "causal link" between the activities and the claimed injury. Texas Workers' Compensation Commission Appeal No. 962650, decided January 31, 1997. In Texas Workers' Compensation Commission Appeal No. 92272, decided August 6, 1992, the Appeals Panel stated that to recover for a

repetitive trauma injury, an employee must prove not only that repetitious, traumatic activities occurred on the job but must also prove that a causal link existed between these activities and the incapacity, that is, "the disease must be inherent in that type of employment as compared with employment generally." The hearing officer resolved the conflicts of the evidence against the claimant, determining that the claimant had failed to prove a causal connection between his employment and the herniated disc at L5-S1.

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 an injury, 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. 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, _____. 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). In a case such as the one before us where both parties presented evidence on the disputed issues, the hearing officer must look at all of the relevant evidence to make factual determinations and the Appeals Panel must consider all of the relevant evidence to determine whether the factual determinations of the hearing officer are so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. Texas Workers' Compensation Commission Appeal No. 941291, decided November 8, 1994. An appeals level body is not a fact finder, and it does not normally pass upon the credibility of witnesses or substitute its own judgement for that of the trier of fact even if the evidence could 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 determinations were so against the great weight and preponderance of the evidence as to be manifestly unjust would there be a sound basis to disturb those determinations. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951); Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986). Since we find the evidence sufficient to support the determinations of the hearing officer, we will not substitute our judgement for his regarding whether the claimant sustained a compensable injury. 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 the claimant's lumbar injury is not compensable, there can be no disability.

The hearing officer made a conclusion of law that the claimant's "claimed dates of injury were on or about _____, and _____. The claimant asserted that he had sustained a repetitive trauma injury to his low back. At the hearing, the claimant testified that he was no longer asserting that the _____, sneezing incident was the cause of his injury. However, the evidence is abundantly clear that the claimant neither "knew or should have known" that his back injury was related to his employment on _____.

Section 408.00 states that the date for an occupational disease "is the date on which the employee knew or should have known that the disease may be related to the employment." The Appeals Panel stated in Texas Workers' Compensation Commission Appeal No. 94713, decided July 12, 1994, regarding an occupational disease (repetitive trauma) case, that "establishing a date of an injury is an essential matter in resolving the compensability of a claim," that "[o]nce there is an injury, it is the date of injury that starts the time clock on significant milestones that determine whether benefits are due," that "[d]etermining when a repetitive trauma injury occurs is sometimes an imprecise exercise and is, at best, frequently confusing when a claimant is required to state a specific date of injury," that this is provided for in Section 408.007, and that this is "a factual call for the hearing officer to make based upon the evidence before him. [Citation omitted.]" Since the evidence is clear that the claimant first believed that he had a back injury and believed that the back injury was related to his employment, despite the fact that he may have wrongly believed that it was related to his employment simply because he happened to experience severe pain while at work, we reverse the hearing officer's decision that the date of injury was on or about _____, and _____, and find that the date the claimant knew or should have known that the suspected injury was related to his employment was _____.

The decision and order of the hearing officer that the claimant did not sustain a compensable injury and did not have disability are affirmed. The decision and order of the hearing officer that the claimant's dates of injury are _____, and _____, are reversed and a new decision is rendered that the date of injury is _____.

Kenneth A. Huchton
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Tommy W. Lueders
Appeals Judge