APPEAL NO. 002461

This appeal arises 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 September 28, 2000. The hearing officer determined that the respondent (claimant) sustained a compensable injury in the form of an occupational disease on _____, and had disability from that injury from _____ through July 3, 2000. The appellant (carrier) appealed the adverse determinations on the grounds of sufficiency of the evidence. The appeals file does not contain a response from the claimant.

DECISION

Affirmed.

The claimant testified that his duties for the employer required him to grease and clean the heavy equipment as well as operate the rock crusher and backhoe. He explained that he operated the equipment about five hours on each machine. He either worked five hours on both each day or solely on one machine for ten hours one day and on the other machine the next day for ten hours. The claimant stated that when he operated the backhoe he was jolted and was in the same position for five hours during the operation of this equipment. When he worked at the rock crusher he stood at a conveyor belt and removed rubbish such as trash and wood from the conveyor. He was also responsible for keeping the machine greased and cleaned. The claimant stated that he greased the machine every other day and cleaned the machine once a week by hand using a shovel. The claimant admitted that when he filed his claim he asserted on his Notice of Injury or Occupational Disease and Claim for Compensation (TWCC-41) that his injury was caused by remaining in one position for so long that it gave him a stiff neck. He contended that this was also his position at the CCH. The claimant asked if this was the only cause of his injury and he replied, "yes."

The claimant testified that he sought medical treatment from Dr. H because his neck and the area between his shoulders hurt and that Dr. H took him off work. He was off work about five to six weeks. The claimant stated that his neck hurt about two weeks before _____.

Mr. C testified that he was the manager over the rock crusher and recycling plant and that he was the claimant's supervisor. He explained that the claimant operated a backhoe with a pincher attachment; that concrete was broken up with the pincher and placed into the rock crusher. Mr. C stated that the claimant approached him on _____, complaining that he had a stiff neck and wanted to leave an hour early from work to go to the chiropractor, but that the claimant did not tell him what caused his neck to hurt, only that it could be the backhoe. Mr. C stated that operating the backhoe could cause a sensation similar to hitting a few potholes in the pavement in a car or riding in a dump truck, but not like riding a motorcycle down railroad tracks on the ties.

An investigator's report reflects that the claimant was interviewed by a claims representative on June 20, 2000. This same interview was provided as a recorded statement from the claimant. The claimant was questioned about his injury and the investigator wrote that:

> Claimant states that he works five hours in one position grinding the stones, then he got off, then went to the back/band (illegible) another five hours in same position--His back started hurting with the movements of the machinery, machine is bumping--hurt neck and back--since he did it daily, it started 3 weeks ago that when he couldn't work anymore--he reported it, [Mr. C] 3 weeks ago-reported 15 days prior to this past Friday (reported 6-2-00). First went to doctor on June 5, 2000-went-to chiropractor because he couldn't move his neck anymore. . . . No prior injuries to neck or back.

Medical records from Dr. H reflect that the claimant presented on _____, for complaints of neck pain from "bending over concrete machine . . . repetitive . . . bent over felt pain." Other records reflect that "the patient stated that he was operating a back hoe that was busting up concrete and his neck and back began hurting afterwards. He further stated that operating the machinery jarred his neck and back repetitively." The claimant was released from work and diagnosed with cervical and thoracic neuritis with muscle spasms. Dr. H administered chiropractic therapy through June 30, 2000. The claimant was to return on July 3, 2000, but missed his appointment because he had to leave town due to a family emergency. The claimant returned to Dr. H on July 13, 2000, and he was released to work the same day. The claimant continued to receive treatment through July 31, 2000.

By letter dated August 2, 2000, Dr. H wrote in response to the ombudsman's letter of July 31, 2000, stating that the claimant presented with complaints of neck and thoracic pain which he opined were caused by repetitive movements from breaking up concrete with a backhoe. Dr. H wrote that the repetitive jarring of the claimant's spine caused continual microtrauma to the cervical and thoracic regions and with time became a cumulative trauma disorder.

Section 401.011(36) defines repetitive trauma injury 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." To recover for an occupational disease of this type, one must not only prove that repetitious, physically traumatic activities occurred on the job, but also must prove that a causal link existed between these activities on the job and one's incapacity; that is, the disease must be inherent in that type of employment as compared with employment generally. Davis v. Employers Insurance of Wausau, 694 S.W.2d 105 (Tex. App.-Houston [14th Dist.] 1985, writ ref'd n.r.e.).

The hearing officer found that the claimant's activities in crushing the rocks furthered the business interests of the employer; that each time the claimant crushed rock and

released it, the backhoe would jolt fairly violently, jarring and shaking the claimant; that the claimant was exposed to a greater risk of harm by his operation of the backhoe than the risk of which the general public at large would be exposed; that as a result of the repetitive jolting and jarring of the backhoe, the claimant strained or sprained his cervical and thoracic spine; and, that the claimant was unable to work as a result of the injuries to his cervical and thoracic spine beginning _____, and ending July 3, 2000.

The carrier contends that the claimant's injury was caused by maintaining the same position for a lengthy period of time and that the claimant gave inconsistent descriptions of the activities to which he attributed his injury. The carrier urges that injuries caused by long periods of sitting, walking, or standing are merely ordinary diseases of life as opposed to compensable injuries. We agree generally with this concept. However, the record also contains descriptions of the claimant's activities at work which could have caused the injuries asserted by the claimant.

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, 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).

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, 224 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 hers. Texas Workers' Compensation Commission Appeal No. 94044, decided February 17, 1994.

The claimant asserted disability from _____, through July 13, 2000, the date he was released to return to work by Dr. H. 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*. The hearing officer found that the period of disability ended on July 3, 2000. Although she did not discuss why she found July 3, 2000, instead of July 13, 2000, the date the claimant was released to work by Dr. H, she could have believed that the claimant was capable of returning to work when he did not attend the scheduled office visit on July 3, 2000, and instead went out of town on a family emergency. The claimant had the burden of proving the dates of disability. He did not appeal the finding that his disability ended on July 3, 2000, and the carrier's appeal of disability does not include a claim of error by the hearing officer in limiting the disability to July 3, 2000. We will not unilaterally adjust the dates of disability.

We affirm the hearing officer's decision and order.

Kathleen C. Decker
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Judy L. Stephens
Appeals Judge