APPEAL NO. 950194

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 December 30, 1994, in (city), Texas, with (hearing officer) presiding as hearing officer. The issues at the hearing were whether a subsequent injury was the sole cause of the respondent's (claimant herein) current back problems and whether the claimant had disability from a compensable injury he sustained on (date of injury). The hearing officer determined that an intervening injury was not the sole cause of the claimant's current back condition and that he had disability from (date)), through May 27, 1994, and from October 24, 1994, through the date of the hearing. The appellant (carrier herein) appeals these determinations arguing that they are contrary to the great weight and preponderance of the evidence. The claimant replies that the decision and order of the hearing officer are supported by sufficient evidence and should be affirmed.

DECISION

We affirm.

It was not disputed that the claimant suffered compensable low back injuries on July 29, 1992, and again on (date of injury). At the time of these injuries the claimant worked as a truck driver. He remained off work as a result of his later injury from (date), through May 27, 1994, when he returned to full-time work as a plumber on May 28, 1994. He testified that he had been in more or less constant pain since his first injury, but the pain became especially severe after he performed work in a narrow crawl space on September 29 and 30, 1994. He said he was terminated on October 17, 1994, because this employer did not carry workers' compensation insurance and was afraid that the claimant would injure himself again if he continued working.

The claimant said he had about a month earlier scheduled an appointment with (Dr. N), his treating doctor, for October 4, 1994. At this appointment, Dr. N noted a history of pain since the original injury and interpreted previous MRIs as showing "a protruding disc and apparently one of the nerve roots appears to be involved in an anti-inflammatory process." He also commented that the claimant "overdid things this weekend lifting some heavy objects and this may account for some of the back muscle spasm today." (Emphasis added.) In a follow-on visit of October 24, 1994, Dr. N diagnosed back pain with radiculopathy and said the claimant "clarifies the situation previously involving some lifting on the weekend, most involvment [sic] was supervisory rather than involving maunul [sic] labor. . . ." In a Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) of October 10, 1994, the carrier disputed paying for further treatment of the claimant "per phone call from clt's wife. Clmt. reinjured back at home 10-2-94 putting in stairs to their trailer. Confirmed with [S] at [Dr. N's] office."

The carrier argued that the sole cause of claimant's back condition after October 2, 1994, was his activity installing concrete steps at home on October 1 and 2, 1994, and his

work in the crawl space. It contends that this conclusion is supported by evidence that the claimant's wife called Dr. N's office on October 13, 1994, to ask if Dr. N could take the claimant off work as of his appointment date on October 4, 1994; by the lack of medical care between February and October 1994 from which the carrier infers that the claimant's previous back condition had completely resolved; and by the absence of workers' compensation coverage with the second employer from which the carrier infers the claimant sought to attribute his new injury to his previous employment.

The claimant in essence countered these contentions of the carrier by stating he did no heavy lifting of concrete at home and supported this with the written statements of two helpers (one of which was his son-in-law); by asserting he had no knowledge that his wife called Dr. N to try to get a work excuse; and by contending that his back pain was continuous since his first injury, that he sought to change treating doctors over the course of time and that his work in the crawl space produced only the same symptoms.

The claimant in a worker's compensation case has the burden to prove by a preponderance of the evidence that he sustained a compensable injury in the course and scope of his employment. Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). It was not disputed that the claimant sustained compensable back injuries on July 29, 1993, and (date of injury). However, the burden of proving that a subsequent injury, in this case either the crawl space activity or the work at home, was the sole cause of the claimant's current condition and disability was on the carrier. Texas Workers' Compensation Commission Appeal No. 94280, decided April 22, 1994. Whether such a subsequent injury is the sole cause, and not merely a producing cause of the current condition, is a question of fact for the hearing officer to decide. Texas Workers' Compensation Commission Appeal No. 94844, decided August 15, 1994. In its appeal, the carrier offers an interpretation of the evidence favorable to its position and challenges the credibility and motives of the claimant.

The hearing officer is the sole judge of the relevance and materiality of the evidence and of its weight and credibility. Section 410.165. To this end, the hearing officer as fact finder may believe all, part or none of the testimony of any witness. The testimony of a claimant as an interested party raises only an issue of fact for the hearing officer to resolve. Burelsmith v. Liberty Mutual Insurance Company, 568 S.W.2d 695 (Tex. Civ. App.-Amarillo 1978, no writ). An appeals level body is not a fact finder, and 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). When reviewing a hearing officer's decision we will reverse such decision only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Company, 715 S.W.2d 629 (Tex. 1986). The hearing officer obviously found the claimant credible in his assertions about the continuing nature of his pain from his first

compensable injury and that he did not participate in strenuous activities at home or attempt to gain benefits to which he was not otherwise entitled. None of the medical evidence compels a contrary finding. To the contrary, Dr. N finds only "some" of the claimant's condition on October 4, 1994, attributable to his activities over the previous few days. Having reviewed the record, we conclude that the decision of the hearing officer, that intervening injuries are not the sole cause of the claimant's current medical condition and that the carrier is not relieved of liability for this reason, is supported by sufficient evidence and we decline to reverse that decision on appeal.

The carrier also appeals the findings of the hearing officer that the claimant had disability but gives no reason for its disagreement with these findings. There was no dispute at the contested case hearing about the claimant's disability from his compensable injury of (date of injury). Disability need not be a continuing status and a claimant may go into and out of disability at various times. Texas Workers' Compensation Commission Appeal No. 93953, decided December 7, 1993. The later recurrence of disability on October 24, 1994, through the date of the hearing is supported by claimant's testimony which the hearing officer found credible. Such testimony constitutes sufficient evidence of disability in this case. Texas Workers' Compensation Commission Appeal No. 92285, decided August 14, 1992.

The decision and order of the hearing officer are affirmed.

Alan C. Ernst
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Tommy W. Lueders
Appeals Judge