APPEAL NO. 991858

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 (CCH) was held on July 30, 1999. The hearing officer determined that the appellant (claimant) had a full-time job working in his own delivery business; that he also worked part time for the employer; that he was not injured while working for the employer on _____; and that since the claimant was not injured in the course and scope of his employment with the employer, he did not have disability. The claimant appealed; contended that the hearing officer erred when he relied on the testimony of Mr. H, the claimant's supervisor, and the statement of Mr. W, a coworker, rather than his testimony and the medical evidence; and requested that the Appeals Panel reverse the decision of the hearing officer and remand for a CCH before another hearing officer. The respondent (carrier) replied, stated that it accepted the statement of the evidence in the Decision and Order of the hearing officer, urged that the decision of the hearing officer is not so contrary to the overwhelming weight of the evidence as to be clearly wrong and manifestly unjust, and requested that it be affirmed.

DECISION

We affirm.

The Decision and Order of the hearing officer contains a statement of the evidence. Briefly, the claimant testified that he has his own delivery business; that he manages that business and has drivers that do most of the delivering; that he also works part time for the employer, a pharmacy, and makes deliveries for them starting at about 6:00 p.m.; that on Tuesday, _____, he went to a room in a nursing home to make a delivery, no one answered at the room, he used the stairs to go to another place to leave items when he could not find a nurse, and fell on the stairs when he was going from the second floor to the first floor; that he did not work for the employer the next day because of his pain; and that he went to an emergency room on Saturday. The claimant denied telling Mr. H that he hurt himself lifting heavy boxes the week he was injured and any reference to heavy boxes concerned an injury in the past that he recovered from. Mr. H testified that he has worked for the employer for 22 years, that he is a supervisor and also makes deliveries, that he has made thousands of deliveries to the nursing home that the claimant said that he fell in, that there are five elevators in convenient places in the three-story building, that one would have to walk all the way across the building to get from the entrance of the building where elevators are located to get to the stairs, and that he never used the stairs in the nursing home. He also said that on Friday of the week that the claimant said that he was injured the claimant told him that he hurt himself lifting heavy boxes off the floor, demonstrated how he lifted the boxes, and did not say that he was injured working for the employer. Mr. W was interviewed by an adjuster and his statement about what the claimant said and did on Friday is consistent with the testimony of Mr. H. An Initial Medical Report (TWCC-61) states that the claimant said that he slipped and fell on his back, that the tentative diagnosis was lumbosacral strain, that x-rays were taken, and that medication and therapy

were prescribed. A report of a radiologist dated March 31, 1999, concerning the lumbar spine said that there were no fractures or dislocations, that intervertebral spaces were normal, that facet joints and sacroiliac joints were in normal limits, that there was anterior productive spurring at L3 and L4, and that the diagnosis was early degenerative changes in the lumbar spine.

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 testimony of the claimant alone may be sufficient to satisfy the burden of proof. Texas Workers' Compensation Commission Appeal No. 91013, decided September 13, 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). While a claimant's testimony alone may be sufficient to prove a claim, 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 because the finder of fact judges the credibility of each and every witness, the weight to assign to each witness's testimony, and resolves conflicts and inconsistencies in the 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). 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). There is no indication that the hearing officer acted improperly in resolving the conflicts in the evidence against the claimant and in determining that he did not meet his burden of proof. The hearing officer's determination that the claimant was not injured in the course and scope of his employment with the employer is not so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. 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 that determination 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.

We affirm the decision and order of the hearing officer.

_____
Tommy W. Lueders
Appeals Judge

CONCUR:

_____
Stark O. Sanders, Jr.
Chief Appeals Judge

_____
Alan C. Ernst
Appeals Judge