APPEAL NO. 001149

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was originally held on January 6, 2000. The Appeals Panel, in Texas Workers' Compensation Commission Appeal No. 000206, decided March 15, 2000, reversed the decision of the hearing officer and remanded the case to the hearing officer because he considered that the appellant (claimant) had a prior workers' compensation injury when the record did not establish that he had. No further hearing was necessary and none was held. On remand, the hearing officer stated that he reviewed the record and specifically considered the absence of prior workers' compensation injuries. The hearing officer again determined that the claimant did not sustain a compensable injury on _____, and because he did not sustain a compensable injury, the claimant did not have disability. The claimant appealed; stated evidence favorable to his position that he was injured in the course and scope of his employment on _____; 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.

Appeal No. 000206, *supra*, contains a summary of the evidence. Briefly, the claimant testified that on _____, he felt pain in his back while stacking pizza boxes; that he woke up the next morning with severe back pain; that he called the employer's personnel director and told her that he had hurt his back and needed to see a doctor; that he was told that he was still in a probationary period and did not have insurance; and that he saw a doctor on his own. Five employees of the employer testified generally that the claimant told them that he was unable to work because of back pain or because he was sick and that he did not say that he was injured at work.

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. In a case such as the one before us where both parties presented evidence on the disputed issue of whether the claimant was injured in the course and scope of his employment, 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). That different factual determinations could have been made based upon the same evidence is not a sufficient basis to overturn factual determinations of a hearing officer. Texas Workers' Compensation Commission Appeal No. 94466, decided May 25, 1994. In his Decision and Order, the hearing officer stated that he considered the record and that he specifically considered the absence of prior injuries. The hearing officer's determination that the claimant was not injured in the course and scope of his employment on _____, is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. 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 that determination of the hearing officer, we will not substitute our judgement for his and affirm the determination that the claimant did not sustain a compensable injury on _____. 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:

Elaine M. Chaney
Appeals Judge

Robert W. Potts
Appeals Judge