APPEAL NO. 001357

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 May 23, 2000. With regard to the issues before him, the hearing officer determined that the appellant (claimant) did not sustain a compensable injury on _____, or on any other relevant date; and that the claimant has not had disability. The claimant appealed, summarizing the evidence presented at the CCH from his point of view and stressing the medical reports of some of the doctors. The claimant contends his testimony was credible and that the hearing officer's decision was "clearly contrary to the great weight and degree of credible evidence." The claimant requests that we reverse the hearing officer's decision and render a decision in his favor. The respondent (carrier) responds that the decision is supported by the evidence and urges affirmance.

DECISION

Affirmed.

The claimant was employed in various capacities by (employer) for about a year prior to his alleged injury. The claimant testified that on _____, he was on a machine when a coworker started the machine, causing him to slip and in an effort to catch himself he twisted his body and sustained a low back injury. The mechanics of the incident were discussed in detail and a diagram was drawn to show how and what occurred. The incident was witnessed by a coworker, AS, who, in a handwritten statement, confirmed that the claimant had been complaining about a headache and later told him he had hurt his back "while they were loading the rods." At the end of the day, in response to "we'll see you tomorrow" the claimant replied, "I don't know man, I hurt my back pretty bad today." The claimant testified that his back continued to get progressively worse, that his wife took him to a hospital emergency room (ER) that night, and that that evening his wife called the "big boss" and reported the injury. (Reporting and notice are not issues.) The claimant testified that the next day, December 29, 1999, he told his supervisor about the injury and was told to go to Dr. W, a doctor selected by the employer. On the second visit, Dr. W referred the claimant to Dr. K, an "orthopedic surgeon." Dr. K ordered an MRI and the claimant eventually began treating with Dr. S.

There was substantial disputed testimony about how well the claimant got along with other workers, whether the claimant had been counseled and/or demoted, and an incident involving the claimant's verbal assault of a motel receptionist in another state. Suffice it to say that the testimony and evidence were disputed and subjects of differing interpretations. The carrier contends that this is a spite claim filed after the claimant had been counseled and told that this was his last chance to save his job.

The ER record of December 28, 1999, does not have a history and only shows a prescription of some pain medication. No medical report from Dr. W is in evidence. Dr. K ordered a lumbar spine MRI which was performed on January 12, 2000. The impression from the MRI is:

> Annulus bulging to a greater degree L4-5 disc with impression on the thecal sac and associated posterior osteophytes, particularly toward the left, as described. The neural foramina is also narrowed from the annulus bulging bilaterally.
>
> Mild annulus bulging lumbosacral disc as described.

That MRI is described in a note dated January 13, 2000, by Dr. K as showing "some mild bulges of the lumbar discs, lower levels. There is no signs of disc herniation." Dr. K's impression was lumbosacral strain/sprain and lumbar radiculitis, left lower extremity. In a note dated January 13, 2000, Dr. K prescribed physical therapy (PT) and returned the claimant to light duty. A nurse's note from Dr. K's office, dated January 13, 2000, states that when the claimant was told about the PT and light duty the "patient got mad and stated he refused to go to lite duty . . . ." In a subsequent note dated January 18, 2000, Dr. K wrote:

> Just got off the phone with [Dr. W] today. [The claimant] evidently has expressed his satisfaction [sic, apparently means dissatisfaction] with [Dr. W's] and my care to date and he wants to see his wife's physician, which of course is fine. Patient told [Dr. W] that he needed pain medication and wasn't given any. I, of course, have given the patient prescription for [lists medications] and that statement simply is inaccurate. Patient was unhappy with the light duty and [PT] direction which we were going and we wish him well in his endeavor to change treating physicians to another doctor and that is the end of our involvement with [the claimant].

The claimant subsequently began treating with Dr. S, who the claimant said was also treating his wife for a low back injury. In a handwritten report dated January 21, 2000, Dr. S wrote:

> To Whom it Concerns;
>
> I have reviewed the MRI report and clinic notes, physical exam of [Dr. K]. The MRI findings show degenerative pathology that could be exacerbated by an injury mechanism that [the claimant] incurred on 12/28/99. [The claimant] has ongoing symptoms at this time. This patient should have further diagnosis, treatment prior to any work return due to the nature of current findings and current symptoms.

Dr. S took the claimant off work. There is a dispute whether the MRI shows, or the claimant has, a herniated disc.

There were a good many more disputed incidents or conversations between the claimant and some of the employer's supervisors. The hearing officer found that the claimant's testimony was "not persuasive" and in his findings of fact gave four specific incidents in which he found the claimant "not persuasive." (Finding of Fact No. 4a, b, c, and d.) The hearing officer also found the claimant's testimony about whether his back condition was work related to be "not persuasive" and commented that the MRI only revealed bulging discs.

The claimant, in his appeal, goes into some detail regarding the various incidents, testimonies, and conversations, and complains that the "hearing officer ignored the treating doctor's [Dr. S] testimony as well as the credible testimony of the claimant." We note that Dr. S did not in fact testify and that his opinion was expressed in the quoted report. In any event, 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 his. Texas Workers' Compensation Commission Appeal No. 94044, decided February 17, 1994.

Both parties appeared to agree that credibility was the key issue and obviously the hearing officer found the carrier's evidence more convincing than the claimant's. With the

evidence in conflict we hold that the hearing officer's decision is supported by the evidence. In that we are affirming the hearing officer's decision that the claimant had not sustained a compensable injury, the claimant cannot by definition in Section 401.011(16) have disability. Consequently, we need not discuss the matter of a bona fide offer of employment, which, while discussed, was not an issue before the hearing officer.

Upon review of the record submitted, we find no reversible error. We will not disturb the hearing officer's determinations unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. King, *supra*. We do not so find and, consequently, the decision and order of the hearing officer are affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Kathleen C. Decker
Appeals Judge

Susan M. Kelley
Appeals Judge