APPEAL NO. 001434

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 held on May 5, 2000. The record closed on May 12, 2000. With respect to the issues before him, the hearing officer determined that the appellant (claimant) did not sustain a compensable injury on _____; that the claimant has not had disability; and that the respondent (carrier) is relieved of liability for this claim pursuant to Section 409.002 because of the claimant's failure to timely report his alleged injury to his employer in accordance with Section 409.001. In his appeal, the claimant challenges each of those determinations as being against the great weight of the evidence. The appeals file does not contain a response to the claimant's appeal from the carrier.

DECISION

Affirmed.

The claimant testified that he injured his low back on or about _____, while working as a roustabout for the employer. He stated that he was digging near a well in order to fix either a water or oil leak and he felt a "pull" in his low back, followed by pain which radiated down his right leg. The claimant testified that he reported his injury to his supervisor shortly after it occurred; however, he identified his supervisor as a different person at the hearing then he had previously claimed. The claimant acknowledged that shortly after he felt the "pull" in his low back he also suffered a seizure. The claimant continued to work after his injury, but he was transferred to the shop to be a mechanic's assistant. The claimant stated that his low back pain and the pain radiating down his leg continued while he worked in the shop. Nonetheless, he was able to continue working until July 12, 1999, when his employment was terminated because of a positive drug test.

The claimant introduced a written statement that purports to be the statement of Mr. G. That statement is written in Spanish and at the hearing, the claimant's attorney acknowledged that the statement had been translated to English by the claimant's daughter. In his statement, Mr. G states that the claimant reported to him that one of his legs was hurting.

On April 9, 1999, the claimant sought medical treatment for his low back at the hospital. The hospital records reflect complaints of back pain for three months; however, they also state that there was "no injury." In addition, in response to questioning from the hearing officer, the claimant testified that he initially paid for his medical treatment. Following the termination of his employment, the claimant sought medical treatment in Mexico. In a "To Whom it May Concern" letter dated August 26, 1999, Dr. P stated that the claimant had had lumbar pain radiating into the right pelvis/leg for seven months and that the pain "is in reference to an incident that occurred approximately 7 months ago while shoveling. . . ." Dr. P noted that the claimant's lumbar diagnostic testing had revealed that he had a herniated disc at L4-5 and that surgical intervention was needed. The claimant's

lumbar surgery was performed by Dr. A on August 9, 1999. The claimant testified that he has been unable to work since his lumbar surgery. The carrier introduced a record from (hospital) dated September 1, 1999, which states that the claimant's son "came in & requested a letter for 1 yr disability for workman's comp. . . ."

Mr. D testified that he is a field supervisor for the employer. He recalls a day in _____ when he went to a work site where the employees had been digging near a well to repair a leak and found the claimant resting in the truck. Mr. D stated that the claimant's coworkers told him that the claimant had suffered a seizure and that no mention was made of the claimant's having hurt his back while shoveling in addition to having the seizure. Mr. D stated that the claimant continued to work from _____ to July 1999, when he was fired for a positive drug test. Mr. D stated that he saw the claimant at work nearly every day during that period and that the claimant was able to perform his job duties without giving any indication of his having been injured. Finally, Mr. D testified that following his termination, the claimant contacted him and asked him to help him out by saying that he had been hurt at work and Mr. D had told the claimant that he could not do so.

Mr. Z, another supervisor with the employer, testified that the claimant did not report an on-the-job injury to him prior to the time he was fired; however, Mr. Z further testified that he was aware of the claimant's having had a seizure at work. Mr. Z stated that after the claimant was fired, he came to Mr. Z's home and asked Mr. Z to say that the claimant had reported a work-related injury to him. In addition, Mr. Z testified that he saw the claimant working in the period from January to July 1999 and that the claimant did not give the appearance of having been injured.

The claimant has the burden to prove by a preponderance of the evidence that he sustained a compensable injury. Johnson v. Employers Reinsurance Corp., 351 S.W.2d 936 (Tex. Civ. App. -Texarkana 1961, no writ). That question presented the hearing officer with a question of fact. The hearing officer is the sole judge of the relevance, materiality, weight, and credibility of the evidence before him. Section 410.165. The hearing officer resolves conflicts and inconsistencies in the evidence and determines what facts have been established. Texas Employers Ins. Ass'n v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). To that end, the hearing officer may believe all, part, or none of the testimony of any witness. Generally, the existence of an injury can be established by the claimant's testimony alone, if it is believed by the hearing officer. Gee v. Liberty Mut. Fire Ins. Co., 765 S.W.2d 394 (Tex. 1989). However, the testimony of the claimant, as an interested party, raises only an issue of fact for the hearing officer to resolve. Campos, *supra*; Burelsmith v. Liberty Mut. Ins. Co., 568 S.W.2d 695 (Tex. Civ. App.-Amarillo 1978, no writ). An appeals level body is not a fact finder and it does not normally pass upon the credibility of the witnesses or substitute its judgment for that of the trier of fact, even if the evidence would support a different result. National Union Fire Ins. Co. v. Soto, 819 S.W.2d 619 (Tex. App.-El Paso 1991, writ denied).

In this instance, the hearing officer determined that the claimant did not sustain his burden of proving that he sustained a compensable injury. A review of the hearing officer's

decision demonstrates that he simply was not persuaded that the claimant injured his low back at work. The hearing officer was acting within his province as the fact finder in so finding. Our review of the record does not reveal that the hearing officer's determination that the claimant did not sustain a compensable injury is so against the great weight of the evidence as to be clearly wrong or manifestly unjust. Accordingly, no sound basis exists for us to reverse that determination on appeal. Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986); Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

The question of whether the claimant timely reported his injury to his employer was also a question of fact for the hearing officer. The claimant testified that he reported his injury to various supervisors, including Mr. D and Mr. Z. However, Mr. D and Mr. Z denied that the claimant had reported a work-related back injury to them. The hearing officer resolved the conflict in the evidence against the claimant and he was acting within his province as the fact finder in doing so. Nothing in our review of the hearing officer's notice determination demonstrates that it is so contrary to the great weight of the evidence as to compel its reversal on appeal. Pool; Cain.

Given our affirmance of the determination that the claimant did not sustain a compensable injury, we likewise affirm the hearing officer's determination that the claimant did not have disability. 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). Thus, the existence of a compensable injury is a prerequisite to a finding of disability.

The hearing officer's decision and order are affirmed.

Elaine M. Chaney
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Judy L. Stephens
Appeals Judge