APPEAL NO. 001566

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 June 13, 2000. With regard to the issue before her, the hearing officer determined that the appellant (claimant) did not sustain a compensable injury on _____ (all dates are 2000 unless otherwise noted) and that the claimant did not have disability. The claimant appeals, contending that his testimony and evidence was credible and that the evidence to the contrary was not credible. The claimant suggests that the hearing officer was less than objective in the weighing of the evidence and requests that we reverse the hearing officer's decision and render a decision in his favor. The respondent (carrier) responds, urging affirmance.

DECISION

Affirmed.

This case basically turns on the credibility of the witnesses, with both parties challenging the credibility of the opposing witnesses. The claimant was employed as a printer trainee and worked the second shift, from about 3:00 p.m. to 11:00 p.m. The claimant testified that on _____, toward the end of his shift, he sustained a low back injury lifting a box overhead. It is relatively undisputed that the claimant told JB, a coworker, about the injury at that time and that JB called and told ML, the second shift supervisor, about the injury. (Reporting is not an issue.) It is also relatively undisputed that ML told the claimant to go to a hospital emergency room (ER) for treatment but that the claimant went home instead. The claimant testified that he was in such severe pain that he was unable to go to the ER, which was three or four miles away, and went home, which was only 12 blocks, or about a mile away, instead. It is also relatively undisputed that the claimant did not go to work the next day, January 6 (the claimant testified that his back pain was so severe he could not get out of bed) and that ML called during the evening asking about the claimant's condition and what the doctor had said. The claimant told ML that he had not yet seen a doctor and ML told the claimant that he would need a doctor's excuse for missing work because of the alleged injury. The claimant went to the ER on January 7; then went to the employer's premises to pick up his check; met with his supervisors; went to the (clinic) on Monday, January 10; treated with the clinic about a week; and then began treating with Dr. H.

The big area of dispute is whether the claimant told JB and another coworker, Robert Hewitt (RH), that he had hurt his back at home wrestling or "playing around" with his brothers prior to _____. The claimant has three brothers, ages 11, 14, and 24 years old. The claimant adamantly denied that he had ever wrestled with his brothers (the hearing officer said she found this testimony simply "not believable") and that he was "shocked" when it was alleged that this was how he hurt his back. JB, who testified that the claimant told him about hurting his back wrestling with his brothers, was very vague as to when he was told this and when the alleged wrestling took place. There are also some

discrepancies between JB's testimony and an undated handwritten statement he had prepared. No statement or testimony from RH was presented. ML testified that about a week after the alleged injury occurred the claimant admitted that he had hurt his back playing with his brothers, testimony which is denied by the claimant.

The ER record of January 7 notes the lifting a box incident, states that the claimant "denies trauma," and diagnoses an "acute lumbar strain." The claimant was taken off work for two days and placed on light duty for five days and was given medication. The clinic record of January 10 just takes the claimant off work. Dr. H's Initial Medical Report (TWCC-61) of a January 19 visit recites the box lifting, orders diagnostic studies, and takes the claimant off work. A lumbar spine MRI performed on February 11 and EMG and nerve conduction studies (NCV) performed on March 21 were all interpreted as "normal." The EMG/NCV studies had a diagnosis of lumbosacral strain and neuritis. Dr. H has continued to keep the claimant off work although he had not seen the claimant for a number of weeks prior to the CCH. The hearing officer commented that she did not find Dr. H's records credible.

The claimant appealed the hearing officer's decision, contending that JB's testimony about the wrestling and ML's statement were not credible and that the hearing officer "uses her expertise against the claimant ALL THE TIME" (emphasis in the original). The carrier contends that the claimant's testimony is not credible because the claimant asserts he was in severe pain yet failed to go to the doctor until told by ML that he would need an off-work slip, that all of the claimant's diagnostic testing was negative, and that the claimant's testimony about the wrestling was not believable. We have frequently noted that 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 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 judgment for hers. Texas Workers' Compensation Commission Appeal No. 94044, decided February 17, 1994.

In that we are affirming the hearing officer's decision that the claimant did not sustain a compensable injury, the claimant cannot, by definition in Section 401.011(16), have disability.

We will reverse a factual determination of a hearing officer only if that determination is so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool, *supra*. Applying this standard of review to the record of this case, we decline to substitute our opinion of the credibility of the respective witnesses for that of the hearing officer. Accordingly, the hearing officer's decision and order are affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Alan C. Ernst
Appeals Judge

Susan M. Kelley
Appeals Judge