APPEAL NO. 001573

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 24, 2000. The record was held open for the receipt of some medical records and was closed on June 9, 2000. With regard to the issues before him, the hearing officer determined that the appellant (claimant) had not sustained a compensable injury on or about _____ (all dates are 1999 unless otherwise noted), that the claimant did not timely give notice of his alleged injury to the employer and did not have good cause for failing to do so, and that the claimant did not have disability.

The claimant filed two appeals, asserting that he had sustained an injury on _____; that he had reported it to his supervisor, LS; and that he has had disability since September 14. Both at the CCH and on appeal, the claimant suggested that he both had timely reported the injury a few days after _____ and that he had good cause for not timely reporting based on trivialization until either August 26 or sometime in early September. The claimant requests that we reverse the hearing officer's decision and render a decision in his favor. The respondent (carrier) responds, setting out the facts from its perspective and urges affirmance.

DECISION

Affirmed.

It appears relatively undisputed that the claimant had an unrelated knee injury in _____ and had knee surgery in 1979. How much the claimant's knee continued to bother him over the years is not clear. The claimant was employed as a painter. The claimant testified that on _____ he was working on an interior painting/wallpapering job, a light was going on and off and as he was stepping down off a ladder, his foot slipped and his knee bent backward ("jack knifed"). A transcribed statement of a coworker, RH, seems to support that version in that RH states he heard the claimant say "oh, oh, oh sound or something like that . . . and he said 'man, it hurt my knee.'" Both the claimant and RH's statement said the claimant continued working that day and the next day. The claimant testified that three or four days later he was limping and LS asked him what was wrong and that he (the claimant) reported the incident of stepping off the ladder and injuring his knee. LS testified, denying that the claimant had reported an injury and stating that the claimant "walked with a limp anyway" and had a history of knee problems. Shortly thereafter, on or about March 15, the claimant changed jobs, leaving the employer's employment and began working for another (employer 2) on or about April 15 doing the same general work or perhaps a little lighter work. The claimant worked for employer 2 until August 26, when he stopped working. Initially, the claimant said that he stopped working because of his knee injury but apparently he did not see a doctor until September 13 and subsequently claimed disability beginning September 14.

The claimant's treating doctor is Dr. B, who is the claimant's primary care physician under the claimant's wife's health coverage. The claimant both testified that he was not having any problems with his knee before _____ and that he was seeing Dr. B about his knees prior to March. Dr. B's records had been subpoenaed but were not available at the CCH. The record was held open and the records were subsequently admitted as Carrier's Exhibit No. 9. Progress notes dated January 22 and 26 indicate complaints regarding both knees, "[left] knee swollen & feels weak, hurts to move" with the January 26 notes indicating "told has severe arthritis [or arthritic] knees." Radiographic testing performed on January 25 showed "three-compartment osteoarthritis bilaterally." Another progress note of April 6 showed treatment for another condition and no mention of a left knee injury. The next progress note is handwritten and dated October 7 and states:

> [The claimant] [s]ays he injured his [left] knee _____. Reported this to supervisor but did not see a Dr. Took off 2 weeks work–swelling went down & felt better. Was fine till 8/30/99–suddenly [left] knee got worse again [with] swelling & pain–tried to work on & off till 9/13/99 & he's not worked since.

Dr. B referred the claimant to an orthopedic specialist, Dr. K. (Dr. K had seen the claimant regarding the claimant's knees in June 1998.) In a consultation report dated October 18, Dr. K notes a history of "stumbled off a ladder" and has an impression of "Exacerbation of arthritis left knee secondary to fall." A November 1 note indicates continued complaints about the left knee and orders an MRI. An MRI was performed on November 10 and showed a posterior horn medial meniscal tear. Dr. K, in a progress note dated November 16, noted that the claimant's "knee continues to bother him" and references the MRI. Dr. K is concerned about some low back pain, not at issue here.

The hearing officer, in the Discussion portion of his decision, comments:

> Employer's take Employees as they find them. However, in this case, after hearing the testimony of the Claimant as well as his supervisor, there is simply insufficient evidence that the Claimant sustained an injury to his left knee in the manner he contends. Rather, the evidence shows that the Claimant has chronic pain in both knees and has had the pain for a long time.
>
> Although an MRI taken in November of 1999 does show a meniscal tear in the left knee, there is insufficient evidence that tear as well as the other degenerative conditions, are a result of a compensable injury sustained on the date and in the manner the Claimant contended.
>
> Regarding timely reporting, there is also insufficient evidence that the Claimant timely reported the injury in the manner he contends.
>
> Rather, I find that the first time the Claimant reported the injury was sometime in September, pursuant to the testimony of [LS].

The claimant, in his appeals, expounds on his testimony at the CCH that the incident occurred as he testified; that he told a number of people about the incident, including LS; and that the injury did not really manifest itself until August or early September.

Obviously the evidence is in conflict and it is the hearing officer, as the trier of fact, who resolves inconsistencies and conflicts in the evidence. (Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ)). 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.

Regarding notice to the employer, the claimant said that he reported the injury to LS in March and LS denied that the injury was reported to him at that time, testifying that he first became aware that the claimant was asserting a work injury in September. Section 409.001 requires that an employee notify the employer of an injury by the 30th day after the injury occurs. Failure to do so, absent a showing of good cause or actual knowledge of the injury by the employer, relieves the carrier and employer of liability for the payment of benefits for the injury. Section 409.002. Whether, and, if so, when, notice is given is a question of fact for the hearing officer to determine.

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.

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.

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:

Alan C. Ernst
Appeals Judge

Gary L. Kilgore
Appeals Judge