APPEAL NO. 001589

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 June 13, 2000. The hearing officer determined that the appellant (claimant) did not sustain a compensable injury on _____; did not timely report the claimed injury; and did not have disability. The claimant appeals, expressing his disagreement with these determinations. The respondent (carrier) replies that the decision is correct, supported by sufficient evidence, and should be affirmed.

DECISION

Affirmed.

The claimant was a bulldozer operator. He testified that on _____, he put the bulldozer in reverse and it backed down a steep hill causing the front to rise at about a 45E angle. When he drove it forward, he said the front slammed down on the ground knocking off his safety helmet and glasses. Because he was wearing a seatbelt, he did not fall out. In the process, he contended, he injured his back. The claimant further testified that he immediately told Mr. M, a supervisor (not the claimant's immediate supervisor), but Mr. M only replied with epithets and walked away. He then said he told Mr. MS, another supervisor, that "I broke my neck" at which Mr. M scoffed and did not complete an accident report.

Mr. E, the claimant's son-in-law and coworker, testified that he observed the claimant's bulldozer at about a 90E angle with the claimant in it. He testified that later that day, the claimant told him about the accident and that he hurt himself. Mr. E also said he told Mr. M a few days later that the claimant was not at work because of the accident.

Mr. M testified that he did not recall the claimant or Mr. E telling him the claimant was injured and that if either had done so, Mr. M would have completed an accident report. Mr. MS testified similarly that if an accident was reported to him, he would have called the claimant's immediate supervisor. Both said they were aware of the claimant's problems with diabetes and high blood pressure and his need to take time off from work due to these conditions.

The claimant saw Dr. C on March 29, 1999. In his report of this visit, Dr. C stated the claimant denied any specific trauma or injury. His diagnoses included spondylitic change of the lumbar spine. Dr. C also completed a short-term disability request for the claimant and indicated the claimant's condition was not due to an injury, but was an illness. Dr. C referred the claimant to Dr. P, who diagnosed a "multi level degenerative condition." On May 24, 1999, the claimant underwent a lumbar laminectomy for multilevel stenosis.

The claimant had the burden of proving he sustained a compensable injury as claimed. Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). Whether he did so presented a question of fact for the

hearing officer to decide. Texas Workers' Compensation Commission Appeal No. 93449, decided July 21, 1993. The hearing officer commented that "[a]lthough the incident described by the Claimant may have occurred, there was little credible evidence to suggest that the Claimant sustained an on the job injury to multiple levels of his lumbar spine." He went on to note that the medical records reflected that the condition of the claimant's spine was due to illness, not to trauma. He therefore found that the claimant was not injured in an incident at work on _____. The claimant appeals this determination, arguing that the hearing officer did not take into consideration his evidence and the difficulty he had in communicating with his doctors because he does not speak English.

Section 410.165(a) provides that the hearing officer is the sole judge of the weight and credibility of the evidence. As fact finder, he had the responsibility to evaluate the evidence, assign it the credibility he believed it deserved, and determine what facts had been established. In this case, the hearing officer simply was not persuaded that the claimant sustained an injury of the kind claimed in a bulldozer incident on _____, especially in light of the medical evidence which referred to degenerative changes and not a traumatic incident as the cause of the claimant's back condition. 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 v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986). 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. Rather, we find the evidence sufficient to support the determination that the claimant did not sustain a compensable injury.

Section 409.001 requires that an employee notify the employer of an injury by the 30th day after the day 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 decide. Texas Workers' Compensation Commission Appeal No. 94114, decided March 3, 1994. The claimant did not rely on good cause for untimely notice, but insisted he reported the injury to two supervisors right after it occurred and that his son-in-law also reported the injury within a few days. The supervisors involved all denied receiving such notice and mentioned that the claimant was often not at work because of unrelated health problems. The hearing officer found the carrier's evidence more persuasive on the notice issue than the claimant's evidence. Under our standard of review, we affirm the determination that the claimant did not timely report his claimed back injury.

We also find no error in the hearing officer's determination that the claimant did not have disability, as the 1989 Act requires a finding of the existence of a compensable injury as prerequisite to a finding of disability. Section 401.011(16).

For the foregoing reasons, we affirm the decision and order of the hearing officer.

Alan C. Ernst
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Robert W. Potts
Appeals Judge