APPEAL NO. 001651

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 21, 2000. With regard to the issues before her, the hearing officer determined that the appellant (claimant) had not sustained a compensable (low back) injury on _____ (all dates are 1999 unless otherwise noted), and that the claimant did not have disability.

The claimant appeals, contending that "[a]lthough there were inconsistencies" in her testimony, that testimony was nonetheless more credible than the respondent's (carrier) witness' testimony to the contrary and emphasizes evidence that supports her position. The claimant requests that we reverse the hearing officer's decision and render a decision in her favor. The carrier responds, pointing to evidence that supports its position and urges affirmance.

DECISION

Affirmed.

The hearing officer summarizes the testimony and evidence in some detail and discusses some of the contradictory evidence. Briefly, the claimant testified that she was a machine operator working on an assembly line and that on _____ she injured her low back lifting some boxes. Although timely notice is not at issue, there was considerable disputed testimony whether the claimant reported her injury to her supervisor, Ms. N, at the time and on occasions throughout the summer. The claimant testified variously that she continued to complain of back pain and that her back pain completely resolved. Undisputedly, the claimant did not seek medical treatment until October. The claimant continued to work through the summer and testified that in October her back began hurting again and that on October 6 "she hurt her back again . . . while pulling barrels of parts." The claimant sought treatment from Dr. B on October 7 and Dr. B took the claimant off work. The claimant's testimony is somewhat supported by a statement from a coworker, Ms. PH, who said she could "attest to [the claimant] reporting to [Ms. N] about hurting her back after pulling drums . . . ." This apparently refers to the October incident. Another coworker wrote that Ms. N "was aware of the problem [the claimant's back hurting], she asked me to help [the claimant] lift the box of heads when needed." A postscript adds "It was in the summer not sure which month." Ms. N testified and generally denies the claimant's assertions and states her first knowledge of the claimed _____ injury was on October 6 or 7.

Dr. B's records show an initial visit on October 8, daily therapy, and a diagnosis for various cervical and lumbar ailments (the claimant makes clear she is only alleging a lumbar injury). The claimant was eventually referred to Dr. F, a Texas Workers' Compensation Commission-appointed independent medical examination doctor. The history recited by Dr. F in a report dated February 29, 2000, only includes the box-lifting incident of _____ and notes that there is no MRI; Dr. F comments:

> The question I was asked to answer was to determine if the medical complaints could be caused by the injury of _____ and the extent of the injury. While low back pain could certainly be caused by heavy lifting or aggressive physical activity, it normally does not last for seven months. She did initially have symptoms suggesting a radiculopathy, which is not resolving. It is difficult to assess this without an MRI or myelogram, which might show a structural abnormality such as a disc or spondylolisthesis.

An MRI was performed on April 10, 2000, which showed a central disc protrusion at L5-S1 and a mild diffuse bulge at L4-5 without focal protrusion. In a follow-up note dated April 13, 2000, Dr. F comments:

> Although it is always impossible to speculate on when a herniated disk first appeared, given her story of lifting some heavy boxes and then developing pain down both legs, which has improved with time and stretching exercises, it is reasonable to suspect that this herniated disk is, in fact, a result of that accident.

This report again only references the _____ incident.

The hearing officer, in a detailed Statement of the Evidence and Discussion, comments:

> The claimant's witness, [Ms. PH], her aunt, stated on May 18, 2000 that she could attest to the claimant reporting to [Ms. N] that she hurt [her] back after pulling drums filled with assembled parts which is inconsistent with the claimant's testimony of the injury [lifting boxes] and subsequent discussions with [Ms. N]. The claimant's own accident/incident report indicates that the pain occurred on 10/6/99 and that it was a result of pulling barrels which was inconsistent with her testimony. Based on the totality of the evidence, claimant did not establish that she had a compensable injury on _____ nor that she had any disability from 10/8/99 to the date of the hearing.

The claimant points to evidence which supports her contentions.

Clearly, the evidence is in conflict and apparently Dr. F was unaware that the claimant had testified that her _____ back pain had largely resolved and that there had been a subsequent barrel-pulling incident on October 6. The claimant in a workers' compensation case has the burden to prove by a preponderance of the evidence that she sustained a compensable injury in the course and scope of employment. Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, 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). 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.

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:

Susan M. Kelley
Appeals Judge

Philip F. O'Neill
Appeals Judge