APPEAL NO. 001698

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 July 10, 2000 The hearing officer determined that the appellant (claimant) did not sustain a compensable injury and did not have disability and that the respondent (carrier) had not waived the right to dispute compensability of the claimed injury. The claimant appealed the adverse determinations on the grounds of sufficiency of the evidence, contending that he was a credible witness and that his supervisor had incorrectly interpreted from Spanish to English his report of injury. The claimant urged the Appeals Panel to follow Texas Workers' Compensation Commission Appeal No. 000433, decided April 12, 2000, and reverse the hearing officer's determination that the carrier had timely disputed compensability of the claimed injury. The carrier filed a response urging that the decision was sufficiently supported by the evidence and should be affirmed.

DECISION

Affirmed.

The claimant testified that he had worked for the employer for nine years as a material handler and that on _____, a Friday, while driving a pallet jack he injured his lower back. The claimant explained that he was driving backwards, attempting a turn to go into the cooler, when he hit the corner of a large metal tub with the pallet jack and felt pain on the left side of his lower back. According to the claimant, he was driving no faster than a person would usually walk; his body did not hit against anything when he collided with the metal tub; and he did not fall off the machinery. The claimant testified that he immediately reported the incident to his immediate supervisor, Mr. E, who filed a report of injury and asked him whether he needed medical treatment. The claimant declined treatment and finished his shift.

The claimant testified that he decided he needed medical treatment over the weekend and when he reported to work the following Monday, on March 6, 2000, he asked his supervisor to send him to a doctor. Mr. E sent the claimant to (clinic) where he was examined by Dr. P, who diagnosed him with a lumbar strain. The claimant was treated and released with orders for physical therapy and returned to work on a light-duty status through March 14, 2000.

On March 15, 2000, the claimant presented to Dr. Y, whose records reflect that the claimant gave a history of twisting his lower back when the pallet jack hit something. A diagnosis of lumbar syndrome was made and chiropractic modalities were initiated. Dr. Y released the claimant from work. The claimant contended that he was in too much pain to work and asserted disability from March 15, 2000, to the date of the CCH.

Mr. E testified that the claimant reported to him on _____, that he was struck in the lower back by the metal bin when the pallet jack collided with the tub and that he

sustained a bruise to his back. Mr. E reported that he took the claimant to the area where the injury occurred but could not see any indication on either the pallet jack or the metal bin that a collision had occurred because there were no dents or paint scrapes. According to Mr. E, the claimant returned the next Monday and changed his story as to how he was injured. Mr. E said the claimant told him that his back was not struck by the metal tub when the collision occurred, but that he was injured by the jarring impact of the pallet jack with the metal tub. Mr. E testified that he was fluent in both Spanish and English and had been raised in a bilingual family.

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.

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).

The hearing officer determined that the claimant was not credible and failed to sustain his burden to prove that he sustained a compensable injury. She chose to believe the testimony of Mr. E which controverted the testimony of the claimant. 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 determination of the hearing officer that the claimant did not sustain a compensable injury, we will not substitute our judgment for hers. Texas Workers' Compensation Commission Appeal No. 94044, decided February 17, 1994.

"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). 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).

The parties stipulated that the carrier received its first written notice of the claimed injury on March 6, 2000, and the hearing officer found that the carrier contested compensability of the claimed injury on March 14, 2000, which was well within 60 days of the date written notice was received. The claimant contended that Downs v. Continental Casualty Co., No. 04-99-00111-CV (Tex. App.-San Antonio August 16, 2000, no pet. h.) was controlling and urged that the Appeals Panel follow Appeal No. 000433, *supra*. We decline to follow Downs or Appeal No. 000433. Downs has not become final and based on consultation with the Office of the Attorney General "the Commission [Texas Workers' Compensation Commission] understands that the August 16th decision in the Downs case should not be considered precedent at least until it becomes final upon completion of the judicial process." (Texas Workers' Compensation Commission Advisory 2000-7, August 28, 2000.)

We affirm the hearing officer's decision and order.

_____
Kathleen C. Decker
Appeals Judge

CONCUR:

_____
Robert E. Lang
Appeals Panel
Manager/Judge

CONCUR IN RESULT:

_____
Gary L. Kilgore
Appeals Judge