APPEAL NO. 001879

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 24, 2000. The hearing officer determined that the respondent (claimant) sustained a compensable injury on _____, and that he had disability beginning January 20, 2000, and continuing through the date of the CCH as a result of the compensable injury of _____. The appellant (carrier) appealed the adverse determinations on the grounds of sufficiency of the evidence contending that the hearing officer should not have found the testimony of the claimant credible. The appeals file does not contain a response from the claimant.

DECISION

Affirmed.

The claimant testified that he worked as a full-time truck driver for the employer and on Saturday, _____, while picking up a tractor out of town he sustained an injury to his lower back. The claimant explained that he worked alone and while he was loading "booming down" the tractor (tying it down with chains) he felt a tingling in his back on the right side. He continued to work, then felt a sharper pain but made the pickup and returned to his home base where he dropped the tractor off. He did not report an injury and went home after he unloaded the tractor. The claimant stated that he did not work on Sunday. He returned to work on Monday and Tuesday and performed his regular duties stating that he had pain in his lower back radiating into his right leg. He still did not report an injury.

On Wednesday, January 19, 2000, the claimant related that the pain increased so he told Mr. S, the dispatcher, that he was having back problems from an incident that had occurred on _____. The claimant testified that Mr. S told him to take some over-the-counter medication and he would be alright. The claimant did so and returned to work. The next morning, on January 20, 2000, the claimant stated that he called in and told the employer he was going to his doctor, Dr. A, later that day. After an examination, the claimant testified, Dr. A told him he had hurt one of the vertebra in his back. Dr. A did not release the claimant from work. Records from Dr. A dated January 20, 2000, reflect that the claimant was diagnosed with a pinched nerve at L4-5.

The claimant testified that after he saw Dr. A, Mr. S referred him to Dr. J, whom he saw the next Friday. The claimant related that Dr. J took him off work and gave him some muscle relaxers. Medical records from Dr. J reflect that he diagnosed a lumbar strain and released the claimant from work for two weeks. He continued to treat with Dr. J rather than Dr. A. The claimant was returned to work at light duty for four hours on January 28, 2000, and was taken back off work on February 9, 2000, until he was checked again and released. On February 18, 2000, the claimant was referred to Dr. G for a consultation. The claimant apparently did not return to Dr. J.

A letter from Dr. G dated March 8, 2000, reflects that imaging studies indicated the claimant had spondylolysis at L5 with a grade II spondylolisthesis at L5-S1. Dr. G speculated that these conditions were the cause of the claimant's pain. He opined that they predated his injury and were asymptomatic until the event of _____. The MRI report of February 17, 2000, was interpreted by Dr. M. Dr. M found subluxation at L5-S1 creating stenosis and compression on the L5 nerve but no abnormal disc protrusions. Dr. G recommended eight weeks of physical therapy and steroid injections. The claimant testified that he did not receive therapy because the carrier denied the claim.

The claimant asserted disability from January 20, 2000, to the date of the CCH on July 24, 2000, alleging that he was unable to work due to pain and being unable to sleep at night. The claimant denied that he worked or earned wages anywhere else during this period of time and admitted that he had been on felony probation for the last nine years. As part of his probation he was required to maintain full-time employment. The claimant admitted that an offer of light duty had been made by the employer to him, but stated that he did not accept the offer because he had been told by Dr. J that if he did not feel "up to standard," he did not have to work. The claimant acknowledged that he did not call the employer back to let them know why he was not accepting the offer, and admitted that he "just ignored the letter."

Ms. T testified that she was the adjuster assigned to the file and that she had hired a private investigator to document the claimant's activities. Ms. T stated that the investigator reported to her that on the day of the benefit review conference, which the claimant attended via telephone asserting that he was too ill to attend in person, he had observed the claimant driving around performing various errands, getting his hair cut, walking his dogs, and loading canisters used for welding purposes into the back of a truck. The activities were videotaped and offered into evidence but not admitted due to failure to timely exchange. Ms. T stated that the investigator also observed the claimant welding the next day at an automobile body shop. The carrier called the investigator to the stand to testify; however, he was not allowed to testify as the carrier had not timely exchanged the investigator's name. A bill of exceptions was made to preserve the testimony and videotape for appeal, but the carrier did not assert error on appeal.

The claimant in a workers' compensation case has the burden to prove by a preponderance of the evidence that he 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). Since we find the evidence sufficient to support the determinations of the hearing officer, we will not substitute our judgement for hers. Texas Workers' Compensation Commission Appeal No. 94044, decided February 17, 1994.

We affirm the hearing officer's decision and order.

Kathleen C. Decker
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Tommy W. Lueders
Appeals Judge