APPEAL NO. 001887

This appeal is brought 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 27, 2000. The hearing officer determined that the appellant (claimant) did not sustain an injury in the course and scope of his employment on _____; that the claimant did not report the claimed injury to the employer not later than 30 days after _____, but had good cause for not timely reporting the claimed injury; and that since the claimant did not sustain a compensable injury, he did not have disability. The claimant appealed, stated evidence favorable to his position, and requested that the Appeals Panel reverse the decision of the hearing officer and render a decision that he sustained an injury in the course and scope of his employment on _____, and had disability from April 29, 1999, through June 10, 1999. The respondent (carrier) replied, urged that the decision of the hearing officer is not so against the great weight and preponderance of the evidence as to be clearly wrong or unjust, and requested that it be affirmed.

DECISION

We affirm.

The claimant testified that about three years before _____, he began working for the employer as a long-haul truck driver; that before he began working for the employer, he had a physical examination which he passed; and that on _____, while unloading plants and trees, he felt a burning in the "middle of his stomach." He said that he had previously had such burning, that he thought taking Rolaids would make it go away; that the Rolaids helped, but did not make it go away; that he called the employer's driver manager and told him that he had a burning in his stomach and could not make it go away; that the manager told him to take some Rolaids; that the pain got better, but never went away; and that he continued to work. The claimant stated that on Saturday, April 24, 1999, his wife noticed a bulge at his navel; that on Monday, April 26, 1999, he reported it to his employer and was told to go to a doctor; that he went to Dr. P that day; that she thought that he had an umbilical hernia and referred him to another doctor for a second opinion; that tests confirmed that he had a hernia; that surgery was performed on May 3, 1999, and he returned to work on June 11, 1999. The claimant testified that Dr. P had difficulty understanding him; that on the first visit he told her that he had been doing heavy lifting; that after he had surgery, he told a nurse that he wanted to talk with Dr. P to tell her that he injured himself lifting; and that on May 6, 1999, he told Dr. P about the lifting and she entered it into his medical records.

In a report dated April 26, 1999, Dr. P stated that the claimant was there for evaluation of a possible umbilical hernia; that it had been going on for the last two or three days; that he had some pain, but it had not lasted for a significant amount of time; that he had no chills or fever; that he had a prior inguinal hernia that he had repaired several years ago; that he works as a truck driver; that he denied any heavy lifting or straining; that he had an increased amount of tissue in the umbilical area at the noon to two o'clock aspect and a questionable defect; that her assessment was a possible umbilical hernia; that an ultrasound would be obtained; and that depending on the results, he would be referred to a surgeon. The report of the ultrasound contains:

> The ultrasound findings are consistent with herniation of the mesentery, into the superficial tissues near the umbilicus, through a defect of 9 to 13 mm diameter. There was no evidence of abnormal appearing bowel within the area, and no related fluid accumulation was shown.

In a note dated May 6, 1999, Dr. P stated that she discussed the situation with the claimant and that he told her that he did lift trees and freight out of a trailer the day that he noticed the hernia in his abdomen.

In his appeal, the claimant contends that the determinations of the hearing officer concerning timely reporting of a claimed injury and good cause for not timely reporting a claimed injury and the determination that the claimant was not injured in the course and scope of his employment are not consistent. Hearing officers are required to make determinations that resolve all disputed issues. The findings of fact in question are:

FINDINGS OF FACT

> 10. Claimant's umbilical hernia injury was not caused by his work activities on _____.
>
> 11. Claimant did not timely notify the Employer that he was alleging a work related injury of _____.
>
> 12. Claimant continued to perform his regular truck driving duties after _____ and to the extent that he believed he sustained an injury on that date, he reasonably believed the injury was a minor muscle pull that would heal over time.

Finding of Fact No 12 contains "to the extent that he believed he sustained an injury on that date" and is not inconsistent with Finding of Fact No. 10 that the "umbilical hernia injury was not caused by his work activities on _____."

The burden is on the claimant to prove by a preponderance of the evidence that an injury occurred in the course and scope of employment. Texas Workers' Compensation Commission Appeal No. 91028, decided October 23, 1991. The testimony of the claimant alone may be sufficient to satisfy the burden of proof. Texas Workers' Compensation Commission Appeal No. 91013, decided September 13, 1991. 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 a claim, 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 because the finder of fact judges the credibility of each and every witness, determines the weight to assign to each witness's testimony, and resolves conflicts and inconsistencies in the 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). An appeals level body is not a fact finder, and it does not normally pass upon the credibility of witnesses or substitute its own judgment for that of the trier of fact even if the evidence would 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). That different factual determinations could have been made based upon the same evidence is not a sufficient basis to overturn factual determinations made by a hearing officer. Texas Workers' Compensation Commission Appeal No. 94466, decided May 25, 1994. Only were we to conclude, which we do not in this case, that the hearing officer's determination that the claimant's umbilical hernia injury was not caused by his work activities on _____, is so against the great weight and preponderance of the evidence as to be clearly wrong or unjust, would there be a sound basis to disturb that determination. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986). Since we find the evidence sufficient to support that determination of the hearing officer, we will not substitute our judgment for his. 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). Disability, by definition, depends upon there being a compensable injury. Since we have found the evidence to be sufficient to support the determination that the claimant did not sustain a compensable injury, the claimant cannot have disability.

We affirm the decision and the order of the hearing officer.

Tommy W. Lueders
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Philip F. O'Neill
Appeals Judge