APPEAL NO. 002386

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 (CCH) was held on September 11, 2000. He determined that the appellant (claimant) was not injured in the course and scope of his employment on _____; that the claimant was able to obtain or [sic, should have been "and"] retain employment at wages equivalent to his preinjury wage after May 19, 2000, to the date of the CCH; that the claimant did not have disability; and that the respondent (carrier) is relieved of liability because of the claimant's failure timely to notify the employer of the claimed injury. The claimant appealed, contended that the evidence supports determinations in his favor on the issues, and requested that the decision of the hearing officer be affirmed. The carrier responded, urged that the determinations of the hearing officer are not so against the great weight and preponderance of the evidence as to be manifestly erroneous or unjust, and requested that his decision be affirmed.

DECISION

We affirm.

The claimant testified that he worked for an employer that grew tomatoes; that on _____, he slipped while pushing a cart used to gather tomatoes; that he fell on his back, injuring it; that no one saw him fall; that he told Mr. G, who was in charge at the time, about falling and hurting his back; that Mr. G told him there was no one there to treat him, he could continue working, or he could go home; that he was in pain, needed the money to support his family, and continued to work; that he took pain pills that he obtained in Mexico; that after he was injured he could pick only about one-third of the amount of tomatoes he picked before he was injured; that Mr. G asked him why he could not pick more tomatoes and he told him it was because of the pain in his lower back; that in May 2000, he told Mr. G that he had to be off three or four days to go to another city to see about documents needed to become a resident alien; and that the following Friday he was sent his check and a notice that he no longer had a job. He said that on May 26, 2000, he went to Dr. D and that Dr. D had x-rays taken, told him that he had injured his lower back and left leg, and took him off work.

Ms. B testified that she oversees safety programs for the employer; that in July 2000, when she received a call from the carrier, she first learned that the claimant was claiming that he was injured at work; that Mr. G checks the quality of tomatoes picked, but is not a supervisor and does not have the authority to give an employee a day off from work; that he sometimes trained employees on picking tomatoes; that Mr. G told her that the claimant did not tell him that he had been hurt and that the claimant did not appear to be hurt; and that many employees live in Mexico and go to doctors there. On July 21, 2000, Mr. G and two employees, who were in supervisory positions in the area in which the claimant worked, were questioned and transcripts of the questions and their answers to the questions signed by them were admitted into evidence. Each stated that they did not see

an accident involving the claimant on _____; that he did not tell them that he had been injured at work; and that after _____, they saw him at work and he looked fine.

An Initial Medical Report (TWCC-61) from Dr. D dated May 26, 2000, contains a history of an accident consistent with the testimony of the claimant; lists eight diagnostic codes concerning the shoulder, elbow, and cervical, thoracic, and lumbar spine; and indicates an eight-week treatment plan.

The hearing officer made a finding of fact that Mr. G was not a supervisor, but did not specifically find that Mr. G was not in a management position as stated in Section 409.001 concerning notice of injury to the employer. The evidence is sufficient to support an implied determination that Mr. G was not in a management position, and in view of the other determinations made by the hearing officer, there is no need to remand for the hearing officer to make a determination whether Mr. G was in a management position.

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; that the claimant had disability, Texas Workers' Compensation Commission Appeal No. 93953, decided December 7, 1993; and that the claimant timely reported the injury to the employer, Texas Workers' Compensation Commission Appeal No. 94114, decided March 3, 1994. 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 evidence. 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). The hearing officer did not find the testimony of the claimant to be persuasive. 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). Only were we to conclude, which we do not in this case, that the hearing officer's determinations are 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 those determinations. 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 the determinations of the hearing officer, we will not substitute our judgment for his. Texas Workers' Compensation Commission Appeal No. 94044, decided February 17, 1994.

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

Tommy W. Lueders
Appeals Judge

CONCUR:

Kathleen C. Decker
Appeals Judge

Susan M. Kelley
Appeals Judge