APPEAL NO. 94381

This appeal is considered in accordance with the Texas Workers' Compensation Act (1989 Act), TEX. LAB. CODE ANN. 401.001 *et seq.* On March 1, 1994, a contested case hearing was held. The issues were whether appellant, AP, who is the claimant herein, sustained a compensable injury on _____; whether he gave timely notice of that injury to his employer in accordance with Section 409.001 of the 1989 Act; and whether he had, as a result of such injury, the inability to obtain and retain employment equivalent to his pre-injury wage (disability). It was stipulated that if claimant was found to have disability, the periods of disability would be April 16 through 19, 1993, and May 28, 1993, through June 7, 1993.

The hearing officer determined that claimant had not proven that he sustained a compensable injury on the date in question, that he did not give timely notice to a person in a supervisory or management position for the employer within 30 days of his injury, that none of the exceptions to timely notice applied, and that claimant did not have disability.

The claimant appeals, arguing that he was injured and that the person whom he told about the injury was a supervisor. He asks for payment of medical and income benefits. The carrier responds that the hearing officer's decision is correct, noting that the person claimant says he told about his injury was a more senior coworker, but not a person in a supervisory position.

DECISION

Affirmed.

The claimant was a laborer for (employer) whose job involved laying pipes in the ground. He stated that he strained his neck and shoulders on _____, while moving a large wood frame dirt sieve that leaned away at an awkward angle. He stated that it fell on his foot, and two days later his neck began to hurt. He continued to work until seeing a doctor on April 16, 1993. Claimant said that the afternoon of the incident, he told Mr. D, whom he considered to be his second supervisor. Claimant acknowledged he had hypertension prior to the injury. Claimant reported the injury to the site foreman on May 14, 1993. He said he did not report the injury sooner for fear of losing his job. Since leaving the employer in May 1993 (the date is not clear from the testimony), he had performed odd jobs.

Mr. D agreed he had been told of the incident, but he did not understand claimant's injury to be serious. Through claimant's and Mr. D's testimony, it came out that Mr. D did not hire, fire, promote, or discipline workers, although he did direct and oversee the work of

people in his group. He had worked for the employer a little longer than the claimant, beginning in the fall of 1992. He did not have the title of supervisor, but was a pipe layer. Mr. D stated that everyone knew when to take lunch breaks and he did not decide that. Mr. D said that Mr. W, the foreman, occasionally left him in charge when he was away from the job site. On _____, Mr. D recalled that Mr. W was present at the job site.

Medical records do not state a clear diagnosis, although further testing through MRI was recommended by one doctor. On April 16, 1993, claimant saw Dr. G, who noted his condition as generalized muscular discomfort. He was released to work on April 19, 1993, by Dr. G. It appears that claimant was given a light duty release for one week beginning April 30, 1993. In June 1993, Dr. H indicated that claimant had a "possible cervical disc sx."

The hearing officer is the sole judge of the relevance, the materiality, weight, and credibility of the evidence presented at the hearing. Section 410.165(a). A claimant's testimony alone may establish that an injury has occurred, and disability has resulted from it. Houston Independent School District v. Harrison, 744 S.W.2d 298, 299 (Tex. App.- Houston [1st Dist.] 1987, no writ). A trier of fact is not required to accept a claimant's testimony at face value, even if not specifically contradicted by other evidence. Bullard v. Universal Underwriters' Insurance Co., 609 S.W.2d 621 (Tex. Civ. App.- Amarillo 1980, no writ). There are conflicts in the record, but those were the responsibility of the hearing officer to judge, considering the demeanor of the witnesses and the record as a whole.

The trier of fact may believe all, part, or none of the testimony of any witness. Taylor v. Lewis, 553 S.W.2d 153, 161 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.). An appeals level body is not a fact finder, and 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 Co. of Pittsburgh, Pa. v. Soto, 819 S.W.2d 619, 620 (Tex. App.- El Paso 1991, writ denied).

The fact that a senior employee directs coworkers does not automatically mean that such a person works in a "supervisory position" as that term is used in Section 409.001(b)(2). Texas Workers' Compensation Commission Appeal No. 92125, decided May 4, 1994. This was a determination of fact, and the hearing officer's conclusion that Dr. D was not a supervisor eligible to accept notice is sufficiently supported in the evidence.

We affirm the hearing officer's decision and order.

Susan M. Kelley
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Joe Sebesta
Appeals Judge