APPEAL NO. 950313

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 in (city), Texas, on January 11, 1995, with (hearing officer) presiding as hearing officer. With respect to the two issues before him, the hearing officer determined that the claimant did not sustain a compensable injury on (date of injury 1), and that since he did not sustain a compensable injury he has not had disability. The appellant (claimant) appealed arguing that the determinations of the hearing officer are contrary to the great weight of the evidence. The respondent (self-insured) replied urging that the Appeals Panel affirm the decision of the hearing officer.

DECISION

We affirm.

The claimant testified that he began working for the self-insured in its waste water treatment plant on April 1, 1994. On (date of injury 2), he was injured in an automobile accident when the car he was in was struck from the rear. He said that he missed work for a day and one-half because of the automobile accident. He was treated by (Dr. D), a chiropractor. On August 15, 1994, Dr. D reported:

> Patient having a lot of back and leg pain. Assessment: Pt's right achilles is somewhat diminished today, which is the first time I've noticed the loss in achilles reflex since we've been treating him, he's had difficulty getting out of a car. Pt. has also had increasing leg and back pain. I may send him out to see an orthopedist or neurologist very soon if condition keeps regressing.

On September 15, 1994, Dr. D reported that the claimant "reaggravated his lower back last night upon stepping off a curb." On September 23, 1994, Dr. D reported "[claimant's] back and leg pain is severe. He has much difficulty rising out of bed in the mornings." On September 26, 1994, he reported that the claimant's back pain is much improved and that he will hold off on an orthopedic referral. The next day Dr. D reported "[p]atient reports severe lower back, hip, neck and shoulder pain" and under "treatment" wrote "[f]ull spine adjustments are utilized three to four times weekly, depending on patient's work schedule." The claimant testified that on (date of injury 1), shortly after 9:00 p.m., he hurt his back at work. He said that he went up three metal steps to get a sample, was descending the steps when the second step began to bend, that he fell forward, twisted to the right to keep from falling on his face, and landed on his feet. He said that he felt a little pain in his right leg, but did not think much about it. He said that he was alone when the accident happened, but that he told his supervisor about it and his supervisor made an entry in the log which first said that he almost fell and was changed to show that he fell. He said that his friend, (Ms. M), brought him lunch about 11:00 p.m. and that he told her about the accident and showed her where it happened. Ms. M testified, and her version of what happened is consistent with the testimony of the claimant on how the accident happened. The claimant testified

that his shift ended at 8:00 a.m.; that he went home, took medicine for pain, tried to sleep, was not able to sleep, went to the house of another supervisor, told him what happened; and that the two of them went to an emergency room. He said that the doctor gave him some medication and took him off work for 10 days. He said that his father advised him that his mother was very sick and that he drove from (city) (City 1) to (city) (City 2) to visit. The claimant returned to City 1 and saw (Dr. W) on October 11, 1994. The claimant said that Dr. took him off work and referred him to (Dr. C), but that he did not see (Dr. C). He said that he went to (Dr. L) because Dr. L was recommended by members of his family who had been treated by Dr. L. An entry in Dr. L's records dated October 12, 1994, states that the claimant had been injured in an automobile accident about four and one half months ago, that the claimant had been treated by Dr. D, was seeing Dr. D about every two or three weeks, was pronounced almost totally fit by Dr. D, and was about to be released by Dr. D when he was injured. Dr. L took the claimant off work, placed him on physical therapy, and asked him to return in two weeks. On October 27, 1994, Dr. L noted that the claimant had not improved and ordered an MRI. On November 10, 1994, Dr. L recorded that the claimant was not improving and that the MRIs were sent to (Dr. F). (Dr. A) reported that the MRI revealed spinal stenosis as the result of a disc bulge and bilateral facet joint hypertrophy at L4-5.

The claimant introduced a statement signed by 33 people. The statement says that each knew the claimant before (date of injury 1); that he did not appear to be suffering from any kind of injury before (date of injury 1); that since (date of injury 1), he walks with a forward flexed position and seems to be in great pain. The self-insured introduced statements of two coworkers in which they indicated that after the automobile accident on (date of injury 2), and prior to (date of injury 1), the claimant constantly complained that he was experiencing back and leg pain from a prior injury and that he wore a TENS unit to manage the pain.

The burden of proof 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, 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-(city) [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). In the case before us, the hearing officer determined that the claimant did not suffer an injury in a fall or near-fall at work on (date of injury 1), and that he did not sustain a compensable injury. 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 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.

Disability is defined as "the inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage." Section 401.011(16). Since we have found the evidence to be sufficient to sustain the determination that the claimant did not sustain a compensable injury, he cannot have disability under the 1989 Act. Texas Workers' Compensation Commission Appeal No. 92640, decided January 14, 1993.

The claimant also sent additional documents that were filed too late to be considered as a timely appeal. Also, as a general rule, the Appeals Panel considers only the record developed at the hearing, the request for review, and the response to the request for review. Section 410.203(a); Texas Workers' Compensation Commission Appeal No. 91121, decided February 3, 1992. A review of the documents revealed that the claimant underwent apparently successful back surgery performed by (Dr. L) on February 24, 1995, and was discharged on February 26, 1995. The report contains a history apparently given by the claimant that includes the references to the automobile accident and an injury on (date of injury 1). Even if we were to consider the documents, they are not such that would require that we reverse and remand for the hearing officer to consider the documents because they are not so material that they would probably produce a different result. The issue before the hearing officer was not the need for surgery, but whether the claimant sustained a compensable injury on (date of injury 1). *See* Texas Workers' Compensation Commission Appeal No. 931099, decided January 11, 1994.

We affirm the decision and order of the hearing officer.

Tommy W. Lueders
Appeals Judge

CONCUR:

Lynda H. Nesenholtz
Appeals Judge

Gary L. Kilgore
Appeals Judge