APPEAL NO. 991026

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 April 8, 1999. The issues concerned whether the appellant, who is the claimant, sustained an injury in the course and scope of employment and whether he had the inability to obtain and retain employment equivalent to his preinjury average weekly wage as the result of a compensable injury (*i.e.*, disability).

The hearing officer determined that the claimant did not injure his left knee in the course and scope of employment and did not sustain a compensable injury. He found as fact that claimant had the inability to obtain and retain employment for a period beginning December 16, 1998, and continuing through the date of the CCH, but that, as there was no compensable injury, this did not constitute "disability" (as defined by the 1989 Act). In his order, the hearing officer also states that the claimant did not sustain an injury to his left knee, his right elbow, his right arm, or his right hip.

The claimant has appealed, arguing that the decision of the hearing officer is against the great weight and preponderance of the evidence. Facts in support of injury and disability are recited in the appeal. The claimant argues that it is irrelevant for the hearing officer to have considered the size of the hole into which the claimant asserted he fell. The claimant argues that the decision goes against the doctrine of liberal construction. The respondent (carrier) responds that the decision is sufficiently supported by the evidence and the Appeals Panel should not second guess resolutions of conflicting evidence.

DECISION

Affirmed.

The claimant worked on different job sites for (employer). He stated that on _____, as he was operating a jackhammer to dig exploratory holes seeking utility lines, the jackhammer dropped into the hole unexpectedly and he followed it in. Claimant said while his left leg stayed on the side of the hole, his right side fell into the hole, and he hit his shoulder on its edge. He stated that the hole was about 12 to 18 inches in diameter and eight feet deep.

The claimant contended his knee was twisted and his arms were pulled. The claimant contended that his knee swelled up from that day on. Claimant said he reported his accident to Mr. A, who was working with him. He said that Mr. A did not offer to send him to a doctor; however, he also agreed that he did not ask to go to a doctor. He said that when the accident happened, he tried to report it but Mr. A said there were no injury forms available. Claimant said he finished out the week doing essentially light-duty work. He was then home in (city 1) for a week and then began work on a project in (city 2). The claimant said he was only able to perform at this job a few days before his injuries made him unable to continue, and he left.

Claimant said he saw a doctor for the first time on October 6, 1998, at an employer-referred clinic. Claimant had not returned to work and contended that he had not been told what his job status was nor had he been offered light duty. It was determined that the day claimant left city 2 (his last day of work) was on or about September 26th.

Mr. A testified that he saw the incident that claimant alleged was injurious. Mr. A said that the hole at that time was about three feet deep. He said claimant was widening the hole and jackhammering on the top of it, not into it. He agreed that the jackhammer slipped a little and claimant was jerked somewhat, and then he dropped the jackhammer into the hole. Mr. A said that claimant stumbled a little on the edge of the hole but did not fall. Mr. A said he and claimant retrieved the jackhammer. He said that when claimant said his arm was sore, Mr. A offered to send him to a doctor but claimant declined, and said he would get over it. Mr. A said that the claimant finished out this job, and then was off work for a week. Mr. A said that claimant came to him on a Saturday night after the job in city 2 was started. He believed that the crew had worked half a day that day. According to Mr. A, claimant asked to go home to city 1 to attend to unspecified "family problems." Mr. A said that he told claimant unless the family problem was an emergency, he could not go. He said that claimant went to his hotel room, then returned about 30 minutes later, claiming that he had hurt both knees three weeks ago when he slipped at the hole. Mr. A said the report of which knee was hurt seemed to change. Mr. A said he would contact his supervisor and then send the claimant to a city 2 doctor, but that claimant said he wanted to see a city 1 doctor. Mr. A said that the next morning, when he went to the claimant's hotel room, he found out from claimant's roommate that he left at 2:00 a.m. on the bus. The claimant denied this and characterized the conversation as one in which he went to report his inability to continue working and was not offered medical assistance.

Mr. A's statement to the adjuster also stated that claimant reported his shoulder hurt the morning after the incident, but that he declined Mr. A's offer to write it up or send him to a doctor. Mr. A said that the first time claimant asserted injury to his knee was in city 2.

The October 6th medical record from the clinic recorded an impression of knee contusion. Claimant was returned to work with restrictions. He was returned to regular duty by the clinic on October 21, 1998, but then put back on restricted duty on October 30th.

Claimant was examined on December 11, 1998, by Dr. G, complaining of a painful right elbow and left knee. Dr. G said that claimant appeared to have a soft tissue injury to the elbow and possible meniscal pathology with some underlying degenerative changes in his knee. An MRI of the left knee reported a complete chronic anterior cruciate ligament tear and complex tears of both menisci. He was also found to have moderate effusion and severe osteoarthritis. Claimant had surgery on his knee. His treating doctor was Dr. B.

The dispute involved resolution of conflicting evidence and assessment of the credibility of the various witnesses rather than legal issues. The hearing officer is the sole judge of the relevance, materiality, weight, and credibility of the evidence presented at the

hearing. Section 410.165(a). Although the record here could lend itself to different inferences, the decision should not be set aside because different inferences and conclusions may be drawn upon review. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). It was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence. Garza. This is equally true of medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286, 290 (Tex. App.-Houston [14th Dist.] 1984, no writ). 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 Company of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied); American Motorists Insurance Co. v. Volentine, 867 S.W.2d 170 (Tex. App.-Beaumont 1993, no writ). It is clear that claimant had an objective injury to his knee. However, in determining whether the knee was injured at the time and in the incident related by the claimant, the hearing officer could consider that the claimant continued to work and that he was then off a week. He could choose to believe that the purported injury was not reported until Mr. A denied the claimant's request to return home. Consideration of the dimensions of the hole was certainly relevant to understanding the mechanics of the slip that claimant contended gave rise to an injury. We cannot agree that the resolution of the evidence by the hearing officer in this case is so against the great weight and preponderance of the evidence as to be manifestly unfair or unjust. The doctrine of liberal construction does not require that factual conflicts are always resolved in favor of a claimant.

When there is no finding of a compensable injury, an essential part of the finding of disability is not present. The hearing officer's finding that the alleged injury did not cause a loss of ability to obtain and retain employment is supported by the evidence. We cannot agree that the decision is against the great weight and preponderance of the evidence and affirm the decision and order.

For these reasons, we affirm the hearing officer's decision and order.

_____
Susan M. Kelley
Appeals Judge

CONCUR:

_____
Robert W. Potts
Appeals Judge

CONCUR IN THE RESULT:

I disassociate myself from the comment that the doctrine of liberal construction does not require that factual conflicts are always resolved in favor of a claimant. Whatever the "doctrine" means in construing the law, I believe it has no application whatsoever to findings of fact.

_____
Stark O. Sanders, Jr.
Chief Appeals Judge