APPEAL NO. 991981

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing was held on August 11, 1999. With respect to the issues before him, the hearing officer determined that the appellant (claimant) did not sustain a compensable injury on _____; that the claimant did not timely report his alleged injury to his employer, without good cause for his failure to do so; that the respondent (carrier) did not waive its right to contest compensability by failing to do so within 60 days of the date it received written notice of the claimed injury; and that the claimant did not have disability because he did not sustain a compensable injury. In his appeal, the claimant essentially argues that those determinations are against the great weight of the evidence. In its response, the carrier urges affirmance.

DECISION

Affirmed.

The claimant testified that on _____, he was working as a maintenance man for a fitness club. He stated that on that date, he was racking weights that had been left on the floor and when he picked up a 120-pound weight, he felt a "pop" and pain in his low back. The claimant testified that he injured his neck, back and right ankle in the lifting incident. He stated that he first sought medical treatment at an emergency room on January 6, 1998; that he delayed in seeking treatment because he thought the pain would subside; and that he reported his injury to the general manager of the fitness club on either January 6th or 7th. He testified that he began missing time from work after his injury on (2nd date of injury), but that he did not seek medical treatment for his injuries after the January 6th emergency room visit until March 26, 1998, when he began treating with Dr. D, a chiropractor. On cross-examination, the claimant stated that he had previously treated for low back and neck pain at the hospital, acknowledging that January 7, 1997, and August 5, 1997, records from the emergency room diagnose chronic low back and neck pain.

The carrier introduced the records from the claimant's January 6, 1998, visit to the emergency room, which include a history of the claimant's having fallen off a ladder three days ago. The claimant denied that he fell off a ladder or that he told anyone at the emergency room that he had done so. The carrier also introduced a Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) dated March 25, 1998, contesting the compensability of the claimed injury to the claimant's back, neck and ankle. That TWCC-21 is date-stamped as having been hand delivered to the central office of the Texas Workers' Compensation Commission (Commission) on March 26, 1998.

Mr. H testified at the hearing that he was the claimant's supervisor at the time of his alleged injury. Mr. H stated that he did not learn that the claimant was claiming a work-related injury until February 24, 1998; that he understood at that time that the claimant was alleging he had sustained an injury over time and not in a specific incident; and that he does not recall the claimant's having told him that he had reported his injury to a supervisor with the employer before February 24th.

The claimant has the burden to prove by a preponderance of the evidence that he sustained a compensable injury. Johnson v. Employers Reinsurance Corp., 351 S.W.2d 936 (Tex. Civ. App. -Texarkana 1961, no writ). In addition, he must prove that he timely reported his injury to his employer or that he had good cause for his failure to do so. Those issues presented the hearing officer with questions of fact for him to resolve. The hearing officer is the sole judge of the relevance, materiality, weight, and credibility of the evidence before him. Section 410.165. The hearing officer resolves conflicts and inconsistencies in the evidence and determines what facts have been established. Texas Employers Ins. Ass'n v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). To that end, the hearing officer may believe all, part, or none of the testimony of any witness. The testimony of the claimant, as an interested party, raises only an issue of fact for the hearing officer to resolve. Campos; Burelsmith v. Liberty Mut. Ins. Co., 568 S.W.2d 695 (Tex. Civ. App.-Amarillo 1978, no writ). An appeals level body is not a fact finder and it does not normally pass upon the credibility of the witnesses or substitute its judgment for that of the trier of fact, even if the evidence would support a different result. National Union Fire Ins. Co. v. Soto, 819 S.W.2d 619 (Tex. App.-El Paso 1991, writ denied).

In this instance, the hearing officer determined that the claimant did not sustain a compensable injury and that he did not timely report his injury to his employer, without good cause for his failure to do so. A review of the hearing officer's decision demonstrates that he simply was not persuaded by the claimant's testimony and evidence that he sustained an injury lifting weights at work on _____, or that he reported his injury to the employer within the 30-day period provided for doing so. In addition, the hearing officer was not persuaded by the claimant's testimony that he trivialized his injury until February 24, 1998, the date the hearing officer found the claimant reported his injury to the employer. He specifically noted that the "numerous inconsistencies in the claimant's story and testimony cast doubt on his credibility." The hearing officer was acting within his province as the fact finder in deciding to reject the claimant's testimony that he was injured at work and that he timely reported his injury, or had good cause for not timely reporting. Our review of the record does not reveal that the hearing officer's injury and notice determinations are so against the great weight of the evidence as to be clearly wrong or manifestly unjust. Pool v. Ford Motor Co.,15 S.W.2d 629, 635 (Tex. 1986); Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986). Accordingly, no sound basis exists for us to reverse those determinations on appeal.

Given our affirmance of the determination that the claimant did not sustain a compensable injury and that he did not timely report his alleged injury to his employer, we

likewise affirm the hearing officer's determination that the claimant did not have disability. 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). Thus, the existence of a compensable injury is a prerequisite to a finding of disability.

Finally, we briefly consider the claimant's challenge to the hearing officer's determination that the carrier did not waive its right to contest the compensability of the alleged injury by failing to do so within 60 days of the date it received written notice thereof. The claimant did not appeal the determination that the carrier received its first written notice of the injury on March 12, 1998. As noted above, the carrier filed a TWCC-21 in the Commission's central office contesting compensability of the claimed injury on March 26, 1998, well within 60 days of March 12th. Thus, the hearing officer properly determined that the carrier timely contested compensability in this instance and did not waive its right to do so.

The hearing officer's decision and order are affirmed.

Elaine M. Chaney
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Tommy W. Lueders
Appeals Judge