APPEAL NO. 001665

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 June 26, 2000. The hearing officer determined that the appellant (claimant) did not sustain a compensable injury on _____; that the claimant did not report the alleged injury in a timely manner; that the claimant established "good cause" for not reporting the alleged injury in a timely manner; that the claimant did not have disability; and that the respondent (self-insured) did not waive the right to contest compensability of the claimed injury. The claimant appealed Findings of Fact Nos. 2, 4, 6, 7 and 12 specifically regarding the issues of compensability, disability and timely notice on grounds of sufficiency of the evidence. The claimant appealed Conclusions of Law Nos. 1, 2 and 5. The findings of fact and conclusions of law regarding whether the claimant had good cause for his failure to give timely notice to the employer were not appealed and have become final. Section 410.169.

The claimant also urged that the hearing officer erred in admitting the self-insured's exhibits, contending that the self-insured's exchange of documents was untimely and without good cause for the untimely exchange. The self-insured responded that the hearing officer's decision was supported by sufficient evidence and should be affirmed and that the hearing officer did not err in admitting the documents offered by the self-insured because the last day for exchange fell on June 3, 2000, a Saturday, and the documents were exchanged on the next working day, Monday, June 5, 2000.

DECISION

Affirmed.

We first address the claimant's contention that the hearing officer erred in admitting the self-insured's exhibits. The claimant objected at the CCH that the self-insured's exhibits should not be allowed because they were not exchanged within 15 days of the benefit review conference. The hearing officer overruled the objection without making any ruling as to whether the exhibits had been timely exchanged or whether, if not timely exchanged, the self-insured had good cause for the failure to timely exchange. Rather, he admitted the exhibits because he had done so for the claimant and it was "fair" to do so.

We review the admission and/or exclusion of evidence on an abuse of discretion standard. To obtain a reversal of a decision based upon the hearing officer's abuse of discretion in the admission or exclusion of evidence, an appellant must first demonstrate that the admission or exclusion was, in fact, an abuse of discretion, and then show that the error was reasonably calculated to cause, and probably did cause, the rendition of an improper decision. Texas Workers' Compensation Commission Appeal No. 980639, decided May 14, 1998; *see also* Hernandez v. Hernandez, 611 S.W.2d 732 (Tex. Civ. App.-San Antonio 1981, no writ). We cannot agree that the hearing officer committed reversible error in admitting the exhibits although his reason for doing so was not in accordance with Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 142.13(c)(1) and

142.13(c)(3) (Rule 142.13(c)(1) and (3)). The self-insured established at the CCH that the last day for exchange occurred on June 3, 2000, which was a Saturday. Rule 102.3(a)(3), provides that if the last day of any period is not a working day, the period is extended to include the next day that is a working day. The self-insured established that the exhibits were mailed on the following Monday, which would have been June 5, 2000, and the claimant acknowledged receipt on June 8, 2000. Rule 102.4(h)(2) provides that unless the great weight of the evidence indicates otherwise, written communications shall be deemed to have been sent on the date postmarked if sent by mail, or, if the postmark date is unavailable, the later of the signature date on the written communication or the date it was received minus five days. If the date received minus five days is a Sunday or legal holiday, the date deemed sent shall be the next previous day which is not a Sunday or legal holiday.

The claimant offered a letter from the self-insured dated June 5, 2000, as the cover letter for the exhibits objected to at the CCH. Pursuant to the provisions of Rules 142.13 and 102.4, the self-insured timely exchanged all the documents offered at the CCH. We do not find the hearing officer improperly admitted the self-insured's exhibits.

The claimant testified that on _____, he and another co-employee lifted and rearranged several suit racks at the employer's request. The claimant testified that he worked as a sales associate and later that day after lunch he began to feel "strained and overexerted" in his groin area. He noted that he had a slight rash but no bulges in the inguinal area so he continued at his regular work duties and finished his shift. The claimant was not scheduled to work for the next four days and when he did return he completed his regular and customary work assignments as scheduled although he had increasing pain until March 9, 2000.

The claimant testified that on March 9, 2000, his pain had increased to the point where he needed medical care so he called his family physician, Dr. C, and made an appointment that same day. Medical records from Dr. C reflected that the claimant presented on this date with complaints of left groin pain and contained the following notation, "with his exercise and weight lifting he has noted a little bulging in his left inguinal region." Dr. B removed hemorrhoids for him several months ago." Dr. C diagnosed a left inguinal hernia, suggested a surgical referral back to Dr. B and placed the claimant on a retroactive off-duty status as of March 4, 2000. The hearing officer found that the claimant reported an alleged injury to the employer on March 16, 2000, and that the claimant had good cause continuing until March 16, 2000, for his failure to timely report. These findings have not been appealed and thus have become final. Section 410.169.

The claimant returned to Dr. C on April 12, 2000, for medical treatment with additional progressing complaints of right inguinal pain and back pain as of March 12, 2000. Dr. C was unable to confirm the presence of a right inguinal hernia. The claimant admitted at the CCH that he had been on an exercise program for 10 to 12 years which required him to do bench presses and leg lifts of 132 pounds three times a week which he continued to do after _____, until the pain had increased and he sought medical

attention. Dr. C continued the claimant in an off-work status. X-rays of the lumbar spine were taken on April 12, 2000, and were interpreted as mild degenerative changes. On June 13, 2000, the claimant was referred by Dr. C to Dr. Be to discuss and examine whether the claimant was a candidate for surgical repair.

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 an injury, 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. 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).

In a case such as the one before us where both parties presented evidence on the disputed issues, the hearing officer must look at all of the relevant evidence to make factual determinations and the Appeals Panel must consider all of the relevant evidence to determine whether the factual determinations of the hearing officer are so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. Texas Workers' Compensation Commission Appeal No. 941291, decided November 8, 1994. An appeals level body is not a fact finder, and it does not normally pass upon the credibility of witnesses or substitute its own judgement for that of the trier of fact even if the evidence could 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).

The hearing officer wrote that the claimant failed to sustain his burden of proving a causal connection between his work and the subsequent development of an inguinal hernia and that it was just as likely that some nonwork-related event had caused the claimant's left inguinal hernia; and entered findings of fact that the claimant had not sustained damage or harm to the physical structure of his body on _____, while working for the employer. The matter of whether the claimant sustained an injury on _____, involved credibility and fact issues, which the hearing officer resolved. Only were we to conclude, which we do not in this case, that the hearing officer's determination that the claimant did not sustain a compensable injury on _____, was so against the great weight and preponderance of the evidence as to be manifestly unjust would there be a sound basis to disturb that determination. In re King's Estate, 150 Tex. 662, 224 S.W.2d 660 (1951); Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986). Since we find the evidence sufficient to support the determination of the hearing officer, we will not substitute our judgement for his. Texas Workers' Compensation Commission Appeal No. 94044, decided February 17, 1994.

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). Disability, by definition, depends upon there being a compensable injury. *Id*. Since we have found the evidence to be sufficient to sustain the determination of the hearing officer that the claimant did not sustain a compensable injury, the claimant cannot have disability under the 1989 Act. Texas Workers' Compensation Commission Appeal No. 92640, decided January 14, 1993.

The hearing officer found that the self-insured received written notice of the injury on March 16, 2000, and that it did not file a dispute with the Texas Workers' Compensation Commission (Commission) until May 3, 2000. These findings were not appealed and have become final. Section 410.169. The claimant contended that Downs v. Continental Casualty Co., No. 04-99-00111-CV (Tex. App.-San Antonio August 16, 2000, no pet. h.) was controlling and urged that the Appeals Panel follow Texas Workers' Compensation Commission Appeal No. 000433, decided April 12, 2000. We decline to follow Downs, or Appeal No. 000433. Downs has not become final and based on consultation with the Office of the Attorney General "the Commission understands that the August 16th decision in the Downs case should not be considered precedent at least until it becomes final upon completion of the judicial process." (Texas Workers' Compensation Commission Advisory 2000-7, August 28, 2000.)

We affirm the hearing officer's decision and order.

Kathleen C. Decker
Appeals Judge

CONCUR:

Tommy W. Lueders
Appeals Judge

CONCUR IN RESULT:

Gary L. Kilgore
Appeals Judge