APPEAL NO. 001716

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 28, 2000. The hearing officer determined that the appellant (claimant) did not sustain an injury in the course and scope of his employment on _____; that the claimant did not timely report the claimed injury to his employer and did not have good cause for not timely reporting the claimed injury; and that the respondent (self-insured) is relieved from liability under Section 409.002 because of the claimant's failure to timely notify the employer of the alleged injury under Section 409.001. The claimant appealed, stated his disagreement with the determinations of the hearing officer and a comment in her statement of the evidence in her Decision and Order, and requested that the Appeals Panel reverse the decision of the hearing officer and render a decision in his favor. The self-insured responded, urged that the evidence is sufficient to support the decision of the hearing officer, and requested that it be affirmed.

DECISION

We affirm in part and reverse and render in part.

The Decision and Order of the hearing officer contains an accurate statement of the evidence. In his appeal, the claimant stated his disagreement with the hearing officer's statement that he met with Ms. W for an hour after the claimed incident. He contended that he spoke with Ms. W for about 10 minutes. The transcript of the CCH on page 17 indicates that the claimant said "[w]e talked for an hour or so . . . ." The hearing officer's statement about the meeting is accurate.

On February 9, 1990, the claimant had an AMS inflatable penile prosthesis implanted. A medical report dated May 28, 1997, states that the prosthesis spontaneously deflates; that about a month ago the claimant fell; that there was no direct trauma to the area; but that the claimant had sudden, sharp pain in the area. The report indicates that the doctor recommended that the claimant consider replacing the pump release valve and the two cylinders because of the lapse of time since the implantation. The claimant testified that on _____, he struck the area on the edge of a leaf of a desk that is used to place papers on when he stood up and began walking. On December 29, 1999, the claimant called the doctor's office and obtained a January 4, 2000, appointment. A report dated that day says that the prosthesis was in a normal anatomic position and unchanged as compared to the previous position in 1997 and that the claimant probably had ecchymosis of the penile prosthesis cylinder. In a letter dated December 21, 1999, the doctor said that physical examination showed the left cylinder was 2-3mm distal to the right cylinder and was approximately 2-3mm longer than the space it occupies. He recommended that the right cylinder be replaced with the same sized cylinder and that the right cylinder by replaced with a cylinder 1cm shorter than the current cylinder.

We first address the determination that the claimant was not injured in the course and scope of his employment. The burden 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, determines 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.-Houston [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 her statement of the evidence, the hearing officer said that she did not find the claimant's accounting of the mechanism of the claimed injury to be credible and provided reasons for so concluding. The hearing officer's determination that the claimant was not injured in the course and scope of his employment on _____, is not so against the great weight and preponderance of the evidence as to be clearly wrong or unjust and is affirmed. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951); Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986).

We next address the determinations that the claimant did not timely report the claimed injury to his employer, that he did not have good cause for not timely reporting the claimed injury, and that the self-insured is relieved of liability. The claimant contended that since he was the city manager and he knew of the injury, the city had knowledge of the injury. The city charter provides that the city manager is the chief administrative and executive officer of the city and is responsible to the city council. In Texas Workers' Compensation Commission Appeal No. 992577, decided January 6, 2000, the claimant, the chief executive officer and president of the employer, was injured in an aircraft accident. The Appeals Panel held that under the circumstances there was no requirement that notice be provided to the carrier rather than the employer within 30 days. In the case before us, the claimant did not report the claimed injury to the Municipal Utility League with which the city had a self-insurance arrangement as he would have if another city employee had been injured. But that was not required to comply with notice requirements because the claimant and chief executive officer of the employer had knowledge of the claimed injury. We reverse the determinations of the hearing officer concerning notice of the

claimed injury to the employer and render a decision that the employer had actual knowledge of the claimed injury and the self-insured is not relieved of liability because of the claimant's failure to timely notify the self-insured of the claimed injury.

We affirm the part of the decision and order of the hearing officer that the claimant was not injured in the course and scope of his employment on _____, and that the claimant did not sustain a compensable injury.

Tommy W. Lueders
Appeals Judge

CONCUR:

Kathleen C. Decker
Appeals Judge

Robert E. Lang
Appeals Panel
Manager/Judge