APPEAL NO. 002354

Following a contested case hearing held on September 18, 2000, pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act), the hearing officer, resolved the disputed issues by determining that the respondent/cross-appellant (claimant) sustained an injury to his left knee in the course and scope of his employment on _____; that the claimant had not timely reported the injury to his employer; and that the claimant did not have disability resulting from the injury of _____, because the injury was not compensable. The appellant/cross-respondent (carrier) appealed the hearing officer's determinations that the injury occurred in the course and scope of the claimant's employment and that the claimant had been unable to obtain and retain employment as a result of the injury from March 29, 2000, through the date of the hearing, asserting that those determinations were against the great weight of the evidence. The carrier's appeal was conditioned upon the claimant's prosecuting an appeal of the determination that he did not timely report the injury, thereby relieving the carrier from liability. The claimant appealed the determination that he did not timely report the injury, asserting that the hearing officer's determination that the claimant did not report the injury within 30 days of the date of injury was against the great weight of the evidence and further asserting that, even if the injury was not reported as work related until March 28, 2000, the hearing officer should have found that the claimant had good cause for failing to report the injury up to the date it was actually reported. The carrier responded to the claimant's appeal, stating that the hearing officer's determination that the claimant did not report the injury in a timely manner was supported by the evidence and further asserting that the claimant's assertion of good cause for failing to report within 30 days was advanced for the first time on appeal and should not be considered. The carrier further asserted that the claimant's appeal was untimely and that the Appeals Panel is without jurisdiction to consider it. The carrier urges that the hearing officer's decision be affirmed. The claimant responded that the hearing officer's decision regarding notice to the employer was against the great weight of the evidence and the decision and order should be reversed and a new decision rendered in his favor.

DECISION

Affirmed.

Each party in this matter has appealed the determinations unfavorable to it. The carrier has further asserted that the hearing officer's decision was received by the claimant no later than September 29, 2000, and the appeal filed by the claimant on October 17, 2000, is untimely. The carrier's argument is predicated on the assertion by the carrier that it received the hearing officer's decision on September 29, 2000, and that the claimant's attorney's office in the same city also received the hearing officer's decision on September 29, 2000, rather than on October 2, 2000, the date the claimant asserts that he received the hearing officer's decision. We note that the hearing officer's decision was sent by the Texas Workers' Compensation Commission (Commission) to the parties on September 27, 2000. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 102.5(d) (Rule 102.5(d)) provides

that a communication from the Commission is deemed to have been received by the intended recipient on the fifth day after the date it was mailed by the Commission. Since the decision and order were mailed to the parties on September 27, 2000, it was deemed received on October 2, 2000, unless the great weight of the other evidence established a different date. The carrier's contention that because it received the decision and order on September 29, 2000, a Friday, the claimant's attorney also received it on that date does not overcome the presumptive date of receipt. Rule 143.3(a)(3) provides that an appeal is timely if it is filed with the Commission's central office on or before the 15th day after receipt of the hearing officer's decision. The claimant's appeal was received in the Commission's central office on October 17, 2000. The appeal is timely.

The claimant testified that he injured his left knee when he stepped out of the truck he drove for employer on _____. He did not mention the injury to the employer that day, but asked his wife to buy him a knee brace. The knee brace was purchased on January 26, 2000, and the claimant wore it to work the following day. The claimant testified that on _____, he walked into the employer's office and KF asked him about his knee. The claimant told her that he had hurt it at work. The claimant testified that after telling KF that he had hurt his knee at work, he was called into the operations manager's office and the operations manager, SF, asked him about his knee. He told her that he had hurt it at work. The claimant testified that after talking to KF and SF on _____, he did not mention his knee to anyone else at work until March 28, 2000. He testified that it had become increasingly painful from January through March and on March 28, 2000, he was no longer able to depress the clutch in the truck without unbearable pain. The claimant radioed in to the office, was asked if he could bring the truck in, did so, then left to go to the doctor. He was seen by Dr. C the same day.

SF testified that she had asked the claimant what was wrong with his left leg on _____, and the claimant had replied that it was an old injury, not related to work, and that it did not hurt much. SF testified that she questioned the claimant specifically about whether the problem was work related, that the claimant had insisted that it was not, and that she had made a notation of the conversation in her day planner. A copy of the day planner sheet was admitted into evidence. A written statement from KF was admitted into evidence which rebutted the claimant's testimony that he had spoken to her about his knee on _____, stating that the only information she knew about the claimant's knee was obtained from SF. KF's statement supported SF's testimony in that it stated that SF had told her that the claimant had attributed the knee problem to an old injury.

It was undisputed that the claimant has a knee injury and because of the knee injury he was unable to obtain and retain employment at wages equivalent to his preinjury wage from March 29, 2000, through the date of the hearing. The hearing officer resolved the dispute regarding whether the claimant had sustained the injury in the course and scope of his employment in favor of the claimant. That determination is not so against the great weight of the evidence as to be clearly wrong and manifestly unjust.

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. 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. The hearing officer was faced with conflicting testimony regarding whether the claimant had told KF and SF on _____, that he had hurt his knee at work or whether on that day the claimant had told SF that the knee injury was not related to his employment. If the hearing officer chose to believe SF's testimony, which was supported by her documentation of the conversation in her day planner and the written statement of KF, that is a matter within the province of the hearing officer as the finder of fact. 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).

At the hearing, the claimant argued that although he was not asserting that he had delayed in giving notice of the injury to his employer until March 28, 2000, if the hearing officer believed that he did there was also some evidence from which the hearing officer could conclude that he had good cause up through March 28, 2000, for his failure to give notice.[1] The hearing officer does not make a specific finding on whether or not she found the claimant had good cause for his failure to report his injury, but that finding can be implied by the hearing officer's determination that the claimant did not give timely notice of the injury to his employer and the carrier was relieved of liability as a result. There was adequate evidence in the record on which such a finding could be based.

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 manifestly 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 Company, 715 S.W.2d 629, 635 (Tex. 1986). Since we find the evidence sufficient to support the

[1] It was the claimant's unwavering position that he gave timely notice to the employer and the claimant's mention of good cause in the argument below was almost an aside.

determinations of the hearing officer, we will not substitute our judgement for hers. Texas Workers' Compensation Commission Appeal No. 94044, decided February 17, 1994.

The decision and order of the hearing officer are affirmed.

Kenneth A. Huchton
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Robert W. Potts
Appeals Judge