APPEAL NO. 931124

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act) (formerly V.A.C.S., Article 8308-1.01 *et seq*.). A contested case hearing (CCH) was held on October 11, 1993, in (city), Texas, with the record reopened and additional evidence taken on November 15, 1993. (hearing officer) presided as hearing officer. The issues at the CCH on October 11, 1993, were whether the appellant (claimant herein) was injured in the course and scope of her employment on (date of injury), and whether the claimant timely reported her injury to the employer or had good cause for not doing so. At the November 15, 1993, session of the hearing the parties agreed that the hearing officer would also resolve the additional issue as to whether the two separate claim files for the same injury that the Texas Workers' Compensation Commission (Commission) showed pending in this case should be consolidated into one case.

The hearing officer found that the claimant was not injured in the course and scope of her employment and did not timely report her alleged injury without having good cause. The claimant requests we review the evidence and the hearing officer's decision. The respondent (self-insured herein), an agency of the ST which is statutorily self-insured, replies that the decision of the hearing officer was supported by sufficient evidence and should be affirmed. There was no appeal by either party of the decision of the hearing officer to consolidate the two separate Commission files into one.

DECISION

Finding no reversible error in the record and sufficient evidence to support the decision of the hearing officer, we affirm.

The claimant testified that on (date of injury), she injured her back while lifting a case of milk weighing 50 lbs., while working at the (hospital). The claimant testified that during her 14 years working for the self-insured at the hospital that this was the first time she had injured her back on the job. The claimant testified that she reported this injury to (PB), who was her supervisor at the time of her injury, but never completed any paperwork concerning the accident.

The claimant testified that she consulted her family doctor, (Dr. S), concerning her injury and that he placed on her on light duty. The claimant described a reinjury she alleged to have suffered on the job in September 1992 which she claims to have reported to her supervisor at the time, GG. Again no paperwork was ever filled out on this incident by either claimant or self-insured. The claimant testified that she was later terminated by the employer because, she was told, there was no longer light duty work for her to do.

(Ms. W), of the self-insured's Human Resources department, testified that the claimant was on light duty, but there was no indication that this was due to an on-the-job injury. Ms. W testified that it was the policy of the employer for a written report of any on-the-job injury to be made as soon as the supervisor received a report of any such injury. Ms. W also testified that there was no such report of injury regarding the claimant and that

there was no indication from the claimant's supervisors that she had ever reported an on-the-job injury. The carrier introduced a transcript of a tape recorded interview with PB in which she stated that the claimant had never reported an on-the-job injury to her.

Ms. W testified that the claimant had applied for non-occupational disability retirement and this had been granted. Ms. W testified that the self-insured was unaware that the claimant was alleging an on-the-job injury until some months after she applied for non-occupational disability retirement in December 1992. Ms. W testified that the claimant's husband, who had also worked for the self-insured, had claimed an on-the-job injury several months previous after he had applied for and received non-occupational disability retirement and, as a result, had received a workers' compensation settlement as well as disability retirement.

The question of whether an injury occurred is one fact. Texas Workers' Compensation Commission Appeal No. 93854, decided November 9, 1993; Texas Workers' Compensation Commission Appeal No. 93449, decided July 21, 1993. Section 410.165(a) provides that the contested case hearing officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence as well as of the weight and credibility that is to be given the evidence. It was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701, 702 (Tex. Civ. App.-Amarillo 1974, no writ). This is equally true regarding medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286, 290 (Tex. App.-Houston [14th Dist.] 1984, no writ). The trier of fact may believe all, part, or none of the testimony of any witness. Taylor v. Lewis, 553 S.W.2d 153, 161 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.); Aetna Insurance Co. v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, 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). When reviewing a hearing officer's decision for factual sufficiency of the evidence we should reverse such decision only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986).

A finding of injury may be based upon the testimony of the claimant alone. Gee v. Liberty Mutual Insurance Co., 765 S.W.2d 394 (Tex. 1989). However, as an interested party, the claimant's testimony only raises an issue of fact for the hearing officer to resolve. Escamilla v. Liberty Mutual Insurance Company, 499 S.W.2d 758 (Tex. Civ. App.-Amarillo 1973, no writ). In the present case the hearing officer found no injury contrary to the testimony of the claimant and there was sufficient evidence to support her decision in the testimony of Mr. W and PB as well as the fact that documents were presented showing that the claimant herself filed for non-occupational disability retirement. The claimant was unable to explain satisfactorily why she had filed a claim for non-occupational disability retirement while now alleging an on-the-job injury.

Nor do we find any error in the hearing officer's findings that the claimant failed to notify the employer of her injury within 30 days without good cause. The burden is on the claimant to prove the existence of notice of injury. Travelers Insurance Company v. Miller, 390 S.W.2d 284 (Tex. Civ. App-El Paso 1965, no writ). To be effective, notice of injury needs to inform the employer of the general nature of the injury and the fact it is job related (emphasis added). DeAnda v. Home Ins. Co., 618 S.W.2d 529, 533 (Tex. 1980). Thus where the employer knew of a physical problem but was not informed it was job related, there was not notice of injury. Texas Employers' Insurance Association v. Mathes, 771 S.W.2d 225 (Tex. App.-El Paso 1989, writ denied). Also, the actual knowledge exception requires actual knowledge of an injury. Fairchild v. Insurance Company of North America, 610 S.W.2d 217, 220 (Tex. Civ. App.-Houston [1st Dist] 1980, no writ). The burden is on the claimant to prove actual notice. Miller v. Texas Employers' Insurance Association, 488 S.W.2d 489 (Tex. Civ. App.-Beaumont 1972, writ ref'd n.r.e.).

In the present case, the hearing officer found as a matter of fact that the claimant did not report to the employer that her back condition was work related within 30 days of the date of the alleged injury.[1] There is testimony, which the hearing officer may believe as finder of fact, that the employer did not have actual notice of injury. We cannot say there was insufficient evidence to support the findings of the hearing officer as to notice.

The 1989 Act provides that the Commission may determine that good cause exists for failure to provide notice of injury to an employer in a timely manner. Section 409.002(3). It is also the claimant's burden to prove the existence of good cause for failing to give the employer notice. Aetna Casualty & Surety Company v. Brown, 463 S.W.2d 473 (Tex. Civ. App.-Fort Worth 1971, writ ref'd n.r.e.). In the present case the claimant presented no evidence of good cause as she was claiming that she provided timely notice. Under the circumstances, it would be improper for us, under the standard of review described *supra*, to overturn the decision of the hearing officer in this regard.

The decision of the hearing officer is affirmed.

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Gary L. Kilgore
Appeals Judge

CONCUR:

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Philip F. O'Neill
Appeals Judge

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Lynda H. Nesenholtz
Appeals Judge

[1]Notice within 30 days is required under Section 409.001.