APPEAL NO. 93997

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 4, 1993, in (city) Texas, with (hearing officer) presiding as hearing officer. The issues at the CCH were: 1. whether the appellant (claimant herein) suffered a repetitive injury to her right hand in the course and scope of her employment; 2. whether the respondent (carrier herein) was excused from liability because the claimant failed to timely report her injury to her employer or to have good cause for not doing so; 3. whether the claimant made an election of remedies by filing a claim for benefits under the group insurance policy; and 4. whether the claimant's injury resulted in any disability. The hearing officer held that the claimant did not suffer a repetitive injury which caused her carpal tunnel syndrome in the course and scope of employment, that the carrier was excused from liability because the claimant failed to timely report her injury without good cause for not doing so, that the claimant did not make an election of remedies by filing a claim for benefits under her group insurance policies, and that since there was no compensable injury the claimant did not have any disability as defined under the 1989 Act. The claimant appeals alleging that she did not receive a fair hearing due to the number of interruptions in the hearing, that she did prove she was injured in the course and scope of employment and that she did timely report her injury or had good cause for not doing so. The claimant requests we either reverse the decision of the hearing officer or grant her a new hearing. The carrier responds that there was sufficient evidence to support the findings of the hearing officer and requests that we affirm his decision.

DECISION

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

The claimant had worked for the employer for approximately 13 years as a secretary. The claimant testified that her job duties included typing, operating a computer, xeroxing, telephone work, sorting mail, and filing. The claimant stated that she began having problems with her wrists in late 1989. In 1990 she had a carpal tunnel release in her left wrist. She testified that in the summer of 1992 she had increased pain and numbness in her right hand and went to see (Dr. S) on (date of injury). Dr. S told the claimant that she had two problems--a possible brain tumor and carpal tunnel syndrome. The claimant testified that Dr. S told her that he would initially concentrate on treating the brain tumor as it was the more serious problem. It was later determined that the claimant did not suffer from a brain tumor, but from obstructive apnea.

The claimant testified that on or about (date of injury), she told her supervisor at work that she had carpal tunnel syndrome, but did not indicate that she told the supervisor that it was work related. The claimant testified that on November 9, 1992, Dr. S told her that as long as she worked as a secretary her carpal tunnel syndrome would not get better. The claimant in her testimony, her notice of claim, and her tape-recorded interview with the carrier's representative alleged that she knew her carpal tunnel syndrome was work related

from the time of this conversation with Dr. S (although at times she had indicated that the date of this conversation was November 11, 1992, rather than November 9th).

On November 19, 1992, the claimant had a carpal tunnel release on her right hand. After the surgery she continued in physical therapy for several months, returning to work on May 10, 1993. The claimant testified that on January 27, 1993, a physical therapist said that carpal tunnel syndrome was an injury. The claimant testified that this was the first she knew that carpal tunnel syndrome could, as an injury, be covered by workers' compensation. The claimant called the Texas Workers' Compensation Commission, filed a Notice of Claim, and notified her employer of her claim. The claimant testified that she had used her group health and disability insurance prior to filing her claim because she did not know that she could file a workers' compensation claim for benefits related to carpal tunnel syndrome.

The first question the claimant raises concerns telephone interruptions during her hearing. The claimant seems to imply these interruptions prevented the hearing officer from giving her case the attention it deserved and she therefore thought his decision should be voided or she should be entitled "at the very least" to a new hearing. The claimant cites various discrepancies between the record and the hearing officer's decision, presumably to show his inattention. For example, she cites the fact that the hearing officer in his decision recites that the hearing took place on October 5, 1993, when the record shows that the hearing took place on October 4, 1993. The claimant also alleges that these interruptions affected her own ability to concentrate as a witness and led to her giving erroneous testimony.

Our review of the tape of the proceedings shows there were telephone interruptions during the hearing. We do realize, however, that there are likely going to be some, and in some cases numerous, interruptions during the course of any adjudicative proceeding. During the course of a jury trial, for instance, it is common that the jury will be taken out of the courtroom while legal and evidentiary matter are being discussed. These interruptions can take place during the testimony of witnesses. Similar interruptions take place during bench trials and administrative hearings. Such interruptions are indeed part and parcel of the adjudicative process.

We have examined the discrepancies in the decision of the hearing officer to which the claimant points and do not find that any of them affecting the substance of the evidence relevant to the controlling issues in this case. While we think that the taking of telephone calls at the bench should be avoided, if possible, since any adjudicative officer should be attentive and above reproach, we cannot say that these interruptions affected the ability of the very experienced and capable hearing officer in the present case to digest and properly weigh the evidence. As for the claimant's testimony, as she points out in her request for review, she later corrected her erroneous testimony. We fail to find any harm resulting from the telephone interruptions during the hearing.

Injury in the course and scope of employment is a question of fact. 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).

The burden to prove a compensable injury was the claimant's. The claimant points to statements of the surgeon who performed her carpal tunnel release, (Dr. M), stating that her carpal tunnel was "work related." The hearing officer points to a statement by Dr. M in his report of April 29, 1993, which was transcribed May 3, 1993, wherein he states:

> Patient did not give me a history of her trauma at work that could have caused her to have carpal tunnel syndrome. I don't have any further history that I can use to determine whether this is a work-related injury or not.

It was up to the hearing officer to reconcile the contradictory statements of Dr. M, and under the standard of appellate review outlined above, we will not disturb his determination. Nor do we find the argument of the claimant that the article she placed into evidence necessarily proved that her carpal tunnel syndrome was work related. It is the province of the hearing officer to decide what weight to give to this evidence.

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).

In the present case, the hearing officer found as a matter of fact that the claimant did not report to the employer that her carpal tunnel syndrome was work related until January 29, 1993. This is essentially undisputed. The hearing officer also found that the claimant

should have known that her carpal tunnel syndrome was work related on November 9, 1992. This is well supported by the testimony as well as oral and written statements of the claimant admitted into evidence. Clearly the claimant did not report the injury to the employer within 30 days as required by Section 409.001.

The 1989 Act provides that the Texas Workers' Compensation Commission (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.). Good cause must be shown to exist up to the time the claimant gives notice of the claim. Lee v. Houston Fire & Casualty Company, 530 S.W.2d 294, 296 (Tex. 1975); Farmland Mutual Ins. Co. V. Alvarez, 803 S.W.2d 841, 843 (Tex. App.-Corpus Christi 1991, no writ). Here, the claimant's evidence fell short of proving continuous good cause until her report of injury on January 29, 1992.

Finally, we turn to the claimant's contention that she was unaware that repetitive trauma could constitute a compensable injury. Texas courts have consistently held that ignorance of the workers' compensation law is not good cause for failure to comply with the law. Texas Workers' Compensation Commission Appeal No. 93551, decided August 19, 1993. Thus, in Applegate v. Home Indemnity Company, 705 S.W.2d 157 (Tex. App.-Texarkana 1985, writ dism'd), it was held that ignorance of the notice and filing provisions of the workers' compensation law were not good cause for failing to comply with those provisions.

We affirm the decision of the hearing officer.

Gary L. Kilgore
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Lynda H. Nesenholtz
Appeals Judge