APPEAL NO. 94166

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 January 14, 1994, in (city), Texas, with (hearing officer) presiding as hearing officer. The issues at the CCH were whether the appellant (claimant herein) had sustained an injury from an occupational disease and whether he had timely reported his injury to his employer or had good cause for not doing so. The hearing officer ruled that the evidence failed to establish injury, that the claimant did not timely report an injury and that the claimant failed to show good cause for failing to timely report. The claimant appeals contending that he did not report his injury because he had no reason to know he suffered from hepatitis until (month year)and after that it took him months to gather evidence to prove that the only place he could have been infected was while working for respondent's (carrier herein) insured. The carrier files a response to the claimant's request for review arguing that the hearing officer correctly found that the evidence did not establish a causal connection between the claimant's employment and hepatitis. The carrier also maintains that the claimant has failed to show good cause for failure to timely report.

DECISION

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

The claimant went to work as a carpenter foreman for the employer at a prison construction site beginning in September of 1991. He filed workers' compensation claims for a (date of injury), inhalation injury and a (date of injury), neck and back injury. The claimant ceased working for the employer in late January 1992.

In December 1992 while undergoing blood work for his lung inhalation injury, tests revealed that the claimant had an immunity to hepatitis A (which meant he had the disease at sometime in the past). Claimant stated that he did not realize until this time that he had suffered from hepatitis, but after the results of the blood work realized that in the preceding year he had many of the symptoms of hepatitis which he had attributed to his lung injury or to other things. Claimant testified that he started calling around to doctors' offices, inquiring how hepatitis A was transmitted and was told by a nurse in January or February 1993 that one could be infected from drinking contaminated drinking water. The claimant testified that when he worked at the prison site there were rumors that someone had urinated in the drinking water and that as a result that supervisors were ordered to duct tape the tops of the water containers. The claimant stated that he probably was infected with hepatitis on the prison construction job because of the contaminated water and there was no other place where he could have contracted it.

The claimant obtained statements from coworkers at the prison site stating that the water cans had to be duct-taped to prevent contamination from urine and fecal matter. The claimant testified at the CCH he was not aware of the water ever having been tested for contamination. The claimant began treating with (Dr. G) on July 27, 1993, for liver

problems. Dr. G stated, based on the claimant's historical report, that the claimant's hepatitis "apparently resulted from exposure to drinking water that had been contaminated with fecal matter."

The claimant filed an Employee's Notice of Injury or Occupational Disease and Claim for Compensation (TWCC-41) dated July 1, 1993, that he had been injured on January 5, 1992, by contracting hepatitis A. This TWCC-41, which was file-marked as being received by the Texas Workers' Compensation Commission (Commission) on July 12, 1993, stated that the claimant first knew the disease was work related on June 15, 1993.

The hearing officer made the following Findings of Fact:

FINDINGS OF FACT

10. The credible evidence (medical and otherwise) fails to establish evidence of probative force of a causal connection between claimant's employment and his hepatitis A.

11. The credible evidence does not reflect that hepatitis A was present in his workplace or that the claimant contracted the disease in his workplace.

12. Claimant did not report his injury to his employer until (date) (after learning that his hepatitis A may be related to his employment in January or February of 1993) and has not shown a good reason for failing to timely report the injury.

The question of whether an injury occurred is one of 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).

Applying this standard of review we cannot say that the hearing officer erred in the present case in refusing to find that the claimant suffered an injury at work. The claimant's contention in the present case is similar to that of the claimant in Texas Workers' Compensation Commission Appeal No. 92093, decided April 24, 1992. In Appeal No. 92093, the claimant, a nurse, claimed her only possible exposure to hepatitis was when she recalled sticking herself with a lancet (a sharp device used to prick a finger to a certain depth to get a small sample of blood). The claimant and others observed symptoms in the patient that were consistent with hepatitis. The patient was never tested for hepatitis. In Appeal No. 92093, we rejected the claimant's contention that the finding of the hearing officer was against the great weight and preponderance of the evidence stating:

> The appellant asserted that a particular patient caused her Hepatitis B. No evidence was presented that that patient . . . had Hepatitis B. No evidence was presented that Hepatitis B was present at [the hospital] or had ever been present there. *See* Schaefer v. TEIA, 612 S.W.2d 199 (Tex. 1980). The Schaefer court added that an opinion that said there was a "mere possibility" of disease constituted no evidence.

In the present case there was at most a possibility that the claimant was exposed to hepatitis at work. While there was some evidence that some of the drinking water at the claimant's workplace may have been contaminated with urine and/or feces, the water was never tested to show that it contained hepatitis C nor was there any evidence that the claimant actually imbibed contaminated water. Such evidence simply does not constitute the overwhelming weight of contrary evidence.

As to the report of Dr. G, the hearing officer was not required to accept his opinion. *See* Texas Employers Insurance Association v. Campos, *supra*; Taylor v. Lewis, *supra*. In fact in his discussion of the evidence the hearing officer discounts Dr. G's opinion as being based upon the history provided to him by the claimant. The history of an incident given by a patient to a doctor is not proof of the truth of the patient's statements to the doctor. Texas Workers' Compensation Commission Appeal No. 93672, decided September 16, 1993; Texas Employers' Insurance Association v. Butler, 483 S.W.2d 530, 534 (Tex. Civ. App.-Houston [14th Dist.] 1972, writ ref'd n.r.e.). Under the circumstances, we cannot substitute our opinion for that of the hearing officer.

On the issue of timely notice of injury, the hearing officer found that by January or February 1993 the claimant knew his hepatitis might be related to his employment. Section 409.001(a) requires that an employee notify the employer of an occupational disease not later than the 30th day after the date on which the employee knew or should have known the injury may be related to his employment. The claimant admitted that he did not report the occupational disease until July 1, 1993. The claimant contends on appeal that this delay was due to trying to prove to himself that he contracted hepatitis on the prison

construction job. It is difficult to understand why this process would have taken so long since this was the only possible place the claimant believes he could have contracted hepatitis. Nor is there any requirement that the claimant have all of his evidence collected prior to notifying his employer of a claim. Under the circumstances, we do not find good cause for the delay in providing notice.

The decision and order of the hearing officer are affirmed.

Gary L. Kilgore
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Thomas A. Knapp
Appeals Judge