APPEAL NO. 94228

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 February 1, 1994, in (city), Texas, with (hearing officer) presiding as hearing officer. The issues at the CCH were injury, timely reporting, and disability. The hearing officer ruled that the appellant (claimant herein) was not injured in the course and scope of her employment and failed to timely report her injury to her employer, without good cause for such failure. The hearing officer also concluded that the claimant had no disability because a compensable injury is a necessary prerequisite to having disability. The claimant appeals requesting that we review the decision of the hearing officer. The respondent (carrier herein) files a response arguing that the decision of the hearing officer was supported by sufficient evidence and urging us to affirm his decision.

DECISION

We find that the hearing officer erred in his decision regarding timely reporting, reverse his decision regarding this issue and render a decision that the claimant timely reported an injury to her employer. Finding sufficient evidence to support the findings of the hearing officer as to injury and disability, we affirm these findings.

The claimant testified that she had been employed by the (employer), as a waitress since March 1993. The claimant alleged that she injured her back on (date of injury), while lifting and emptying five-gallon buckets of ice (which she alleged weighed approximately 40 lbs.) to refill a salad bar and beverage bin. The claimant testified that she attempted to report the injury to (Ms. H), her supervisor. The claimant testified that she worked the rest of shift and part of the next day's shift, but stated that she was in such pain she could not finish that shift notifying her supervisor that she was not well and going home. The claimant testified that she had the next two days off and then worked a full shift on November 3, 1993. The claimant testified that shortly before her next day's shift was to begin, Ms. H called her and terminated her employment saying that there were "too many problems."

The claimant basically took the position that her supervisor, coworkers, and even some customers were aware that she had injured her back at work. The claimant subpoenaed two coworkers and one customer to testify at the CCH. The customer, who testified that he was a daily customer of the restaurant, could not recall anything about the injury. The two coworkers testified that they knew the claimant was having back pain, but were unaware of any injury.

Ms. H testified that the claimant never told her that she was injured on the job, but it was her understanding that the claimant had aches and pains, including back pain, because she had the flu. A number of statements from coworkers to this effect were admitted into evidence. Ms. H testified that the first notice the employer had of the injury occurring was when the carrier sent the employer a copy of the claimant's Employee's Notice of Injury or Occupational Disease and Claim for Compensation (TWCC-41) by facsimile transmission on (date). This TWCC-41 indicated it was filed with the Texas Workers' Compensation

Commission (Commission) on November 15, 1993. This led the employer to complete an Employers' First Report of Injury or Illness (TWCC-1) on November 17, 1993.

The claimant testified that she delayed going to a doctor for her injury as she had no insurance and hoped her condition would improve. She further testified when it did not she spoke to personnel at the Commission on November 12, 1993, and was told the employer had workers' compensation insurance coverage. On November 15, 1993, the claimant saw (Dr. G) who prescribed medication and referred her to (Dr. W). Dr. W treated the claimant primarily with physical therapy. Dr. W placed the claimant off work on November 16, 1994, and released her from his care on January 11, 1994.

Much, if not most, of the evidence in the case revolved around whether or not the claimant timely reported her injury. Section 409.001 requires that an employee or a person acting on the employee's behalf notify his or her employer of an injury not later than the 30th day after the injury occurs. Section 409.002 provides that if the employee fails to notify the employer then the employer's carrier is relieved of liability under the 1989 Act unless: (1) the employer or the employer's carrier had actual knowledge of the employee's injury; (2) the Commission determines that good cause exists for failure to provide notice in a timely manner; or (3) the employer of the employer's insurance carrier does not contest the claim.

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. 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.).

The hearing officer made findings concerning the claimant's failure to notify the employer of her injury at certain points and concluded that the claimant did not notify the employer on or before the 30th day after the date of injury and had no good cause for her failure to timely report the injury. This is simply contradicted by the evidence. Certainly there is evidence from the claimant's supervisor, Ms. H, that the claimant failed to tell her of the injury the day it happened, contradicting the testimony of the claimant to that effect. Certainly there is testimony from Ms. H, and the claimant, that the claimant did not mention the injury during the telephone conversation a few days after the injury during which she was terminated. Certainly the witnesses subpoenaed by the claimant failed to corroborate her testimony concerning discussions of her injury prior to her discharge.

However, the fact remains that Ms. H testified that the employer received notice of the injury on (date), when the carrier faxed a copy of the claimant's TWCC-41 to the

employer. The TWCC-41, which was admitted into evidence, clearly shows that the claimant was alleging an injury at work on (date of injury). Both the employer and the carrier, according to the testimony of Ms. H and confirmed a number of times in the documentary evidence, knew of the claimant's allegation of injury by (date). The employer filed its TWCC-1 on (date). All of this took place well within 30 days of the claimant's alleged injury. The hearing officer's holding that the claimant did not report her injury within 30 days is erroneous and we reverse it, rendering a finding that the employer was notified of the injury within 30 days.

The hearing officer's finding in regard to notice may be partly explained by the fact that the evidence at the hearing was so concentrated regarding this issue. This may be because this appears to be the only defense originally raised by the carrier in its Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21), which states as the reason for disputing the claim, "[n]o injury reported to employer by employee. No complaints of any injury to fellow employees." This TWCC-21 indicates it was sent to the Commission on December 3, 1993. Admitted into evidence also was an earlier TWCC-21 which indicated that it was sent to the Commission on November 23, 1993, and which indicated no reason for dispute but states under remarks "[w]e have no medical indicating claimant is not able to work or due to his [sic] injury." In spite of the relevant provisions of the 1989 Act, the Commission's own rules and our prior decisions,[1] the issues coming out the Benefit Review Conference (BRC) are injury, timely notice and disability. The unrepresented claimant, not surprisingly, failed to respond to the BRC report pursuant to Rule 142.7(c) or to request additional issues pursuant to either Rule 142.7(d) or (e). The result is that the hearing officer was faced with a compensability issue (injury) which was not properly raised and upon which the evidence is not well developed. However, this issue is not before us on appeal and has at this point in the process been waived. *See* Texas Workers' Compensation Commission Appeal No. 91016, decided September 3, 1991. We discuss it to observe that the multitude of problems presented by this situation could be avoided if a the Benefit Review Officer (BRO) would vigilantly make certain that only a compensability issue (including injury) actually covered by the TWCC-21 is allowed to be determined to be a disputed issue and if there is any question as to whether an issue was raised by the TWCC-21, insure an issue of waiver be included in the disputed issues. It would be helpful in situations where the BRO fails to do this, if an ombudsman assisted the claimant in requesting that issues not properly raised be deleted or that, where appropriate, the issue of waiver be added.

In any case, the evidence on the issue of injury was somewhat confusing. The claimant testified that she was injured on the job, while most of the defense testimony centered on the contention that the claimant did not report that she was injured at work. As explained, *supra*, the claimant reported an injury within 30 days as required by law. The hearing officer found that the claimant was not injured at work. In reviewing the decision of the hearing officer on this issue, we must apply the proper standard of appellate review.

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[1]*See* Section 409.021(c); Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 124.6(a)(9) (Rule 124.6(a)(9)); Texas Workers' Compensation Commission Appeal No. 931131, decided January 26, 1994.

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).

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 applying the standard of appellate review discussed, *supra*, we cannot substitute our judgment for his, even were we to have weighed the evidence differently had we been the trier of fact.

Finally, with no compensable injury found, there is no basis upon which to find disability. By definition disability depends upon a compensable injury. *See* Section 401.011(16).

For the foregoing reasons, we reverse the decision of the hearing officer regarding timely reporting of injury and render a new decision that the claimant did timely report her alleged injury. We affirm the decision of the hearing officer in regard to the issues of injury and disability.

Gary L. Kilgore

Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Lynda H. Nesenholtz
Appeals Judge