

APPEAL NO. 990335

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 December 30, 1998, with the record closing on January 22, 1999. (Hearing officer presided as hearing officer. The issues at the CCH were injury and timely report of injury. The hearing officer concluded that the appellant (claimant) did not suffer a compensable right shoulder injury on or about _____, and on or about _____. The hearing officer also concluded that the claimant failed to timely report his alleged injury without good cause for failing to do so and that the employer did not have actual knowledge of an alleged work-related injury. The claimant appeals these determinations and specifically challenges certain of the hearing officer's fact findings. The respondent (carrier) responds that the hearing officer's findings and decision were supported by the evidence and should be affirmed.

DECISION

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

The hearing officer summarizes the evidence and we adopt the following rendition of the evidence from his decision:

The Claimant testified through an interpreter that he was 43 years old and had worked for the Employer doing reconstruction of starters and alternators for heavy equipment and that this was heavy work. The Claimant said that he hurt his right shoulder at work when he was changing a "field coil" inside a starter. The Claimant explained that he had to use an impact hammer hitting hard to loosen bolts that hold the field coil. The claimant said he is right handed. The Claimant believed when he was using the impact hammer was when the injury occurred. The Claimant stated his arm felt worse when raised not better. The Claimant agreed that he saw [Dr. W], his primary care doctor, on _____, a Friday, about his work injury. The Claimant explained that he listed _____, a Monday, on his TWCC-41 in error and that the injury happened on _____. The claimant stated that he used his hands to show [Dr. W] what was hurting. The Claimant said [Dr. W] referred him to [Dr. Wi], a specialist for shoulder injuries. The Claimant stated that [Dr. Wi] was in error in reporting that the shoulder pain had gone on for "several months" before 8/19/97. The Claimant also stated that he told [Dr. Wi] how he hurt his shoulder even though [Dr. Wi] on 8/19/97 reported that the Claimant denied any particular injury. The Claimant recalled he told his supervisor [Mr. S] that he had hurt his right shoulder. The Claimant said that [Mr. S] did not understand Spanish as why [Mr. S] did not remember an injury being

reported. The Claimant said he lived in the United States for the last seven years since 1991 and that the English he learned was from watching television. The Claimant said he has a mathematics degree and has been teaching as a substitute math teacher.

The claimant denied any prior work injuries before _____ and denied knowing about workers' compensation benefits when he was hurt. The claimant said he hurt his lumbar spine in March 1998 while working. The Claimant denied that he had ever hurt his back before March 1998.

We also note that there was a statement from Mr. S in evidence in which he stated that claimant mentioned a shoulder problem to him but did not relate it to work and stated that it had been going on for several months. We also note that there are medical records in evidence from Dr. Wi describing a history of injury similar to the claimant's testimony but that the first such history appears in a medical report in April 1998. Finally, there is evidence that the claimant first filed his TWCC-41, Employee's Notice of Injury or Occupational Disease and Claim for Compensation with the Texas Workers' Compensation Commission (Commission) in April 1998.

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. Houston Independent School District v. Harrison, 744 S.W.2d 298,299 (Tex. App.-Houston [1st Dist.] 1987, no writ). 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. Claimant had the burden to prove he was injured in the course and scope of his employment. Reed v. Aetna Casualty & Surety Co., 535 S.W.2d 377 (Tex. Civ. App.-Beaumont 1976, writ ref'd n.r.e.). We cannot say that the hearing officer was incorrect as a matter of law in finding that the claimant failed to meet this burden. The hearing officer was obviously concerned about the fact that the Dr. W and Dr. Wi did not initially include a history of injury. The hearing officer did not accept the claimant's explanation that the discrepancies in the medical record were due to the claimant's language limitation, noting that the claimant was able to teach mathematics.

The 1989 Act generally requires that an injured employee or person acting on the employee's behalf notify the employer of the injury not later than 30 days after the injury occurred. Section 409.001. The 1989 Act provides that a determination by the Commission that good cause exists for failure to provide notice of injury to an employer in a timely manner or actual knowledge of the injury by the employer can relieve the claimant of the requirement to report the injury. Section 409.002. 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 knowledge. 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 his shoulder condition was work related until April 1998. The hearing officer found that the claimant did not have good cause for not reporting an injury and that the employer did not have actual knowledge of the injury in _____. We cannot say that these findings were contrary to the overwhelming evidence. The hearing officer did not accept the claimant's contention that he reported an injury to Mr. S and Mr. S did not understand what he was saying because of the claimant's lack of facility in English. The hearing officer specifically points to the claimant's ability to teach mathematics as an indication of the claimant's ability to communicate in English.

The decision and order of the hearing officer are affirmed.

Gary L. Kilgore
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Thomas A. Knapp
Appeals Judge