APPEAL NO. 990369
AND
APPEAL NO. 990370

These appeals arise 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 27, 1999. The hearing officer consolidated the hearings on both cases, hearing testimony on both cases at the same CCH. The issues at the CCH in to regard to each date of injury were injury, date of injury, timely report of injury and disability. In regard to the case under review in Appeal No. 990369, the hearing officer determined that the appellant (claimant) did not sustain a compensable injury; that the date of the alleged injury is (alleged date of injury for Appeal No. 990369); that the claimant did not have disability within the meaning of the 1989 Act because he did not sustain a compensable injury; and that the respondent (self-insured) would be relieved from liability under Section 409.002, if the claimant had sustained a compensable injury, because he did not timely report his injury to the self-insured. In regard to the case under review in Appeal No. 990370, the hearing officer concluded that the date of injury was (date of injury for Appeal No. 990370), and the claimant timely reported an injury. However, the hearing officer found that the claimant did not sustain a compensable injury on or about (date of injury for Appeal No. 990370), and did not have disability. The claimant appeals both decisions challenging several of the hearing officer's factual findings contending that he did suffer the two injuries as he alleged and as a result has suffered disability since September 15, 1998. The self-insured replies that there is sufficient evidence to support the findings and the decisions of the hearing officer.

DECISION

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

The hearing officer summarizes the evidence in her decisions and we adopt her rendition of the evidence. We will therefore only briefly summarize the evidence germane to the appeal. This includes testimony by the claimant that he felt abdominal pain when he was picking up signs, which weighed 25 to 30 pounds, while working for the self-insured on (alleged date of injury for Appeal No. 990369). On August 27, 1998, the claimant consulted with Dr. S and was diagnosed with a left inguinal hernia. The claimant testified that he did not tell Dr. S about the incident at work on (alleged date of injury for Appeal No. 990369), because Dr. S did not handle work-related injuries.

The claimant testified that he continued to work after seeing Dr. S. The claimant testified that on (date of injury for Appeal No. 990370), he was shoveling hot heavy mix at work when he felt a pain in his lower right stomach. On (date of injury for Appeal No. 990369) he was diagnosed by Dr. O with a right inguinal hernia.

The claimant testified that he reported a left inguinal hernia injury to his supervisor on September 15, 1998. The claimant testified that he did not report his right inguinal hernia at that time because he was not given an opportunity to explain. According to both the claimant and his supervisor, their conversation began with the claimant asking for time off to take care of his wife who needed to undergo surgery to repair a hernia. It is undisputed that the claimant reported a right inguinal hernia injury to the self-insured on September 30, 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 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 cases 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.

Also, with no compensable injury found, there is no loss upon which to find disability. By definition disability depends upon a compensable injury. *See* Section 401.011(16). Thus there was no error in the hearing officer's finding no disability.

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 Texas Workers' Compensation Commission (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 no 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 determined that the claimant did timely report an injury in regard to Appeal No. 990370. This determination is not appealed by either party and has become final pursuant to Section 410.169. In regard to Appeal No. 990370 the hearing found as a matter of fact that the claimant did not report his (alleged date of injury for Appeal No. 990369), injury until September 15, 1998. The claimant appeals the hearing officer's determination contending that he reported the (alleged date of injury for Appeal No. 990369), when he had knowledge of it. The claimant appeard to believe that he has 30 days from the date he knew that he had a work-related injury to report it. He has 30 days from the date of the injury. As the claimant does not dispute that the date of the injury in question was (alleged date of injury for Appeal No. 990369), or that he did not report his injury until September 15, 1998, he obviously did not report his injury timely and we perceive no error in the hearing officer so finding. The claimant did not allege good cause or actual notice.

The decisions and orders of the hearing officer are affirmed.

Gary L. Kilgore
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

CONCUR IN THE RESULT:

Thomas A. Knapp
Appeals Judged