APPEAL NO. 990608

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 27, 1999. The issues at the CCH were injury, timely report of injury and disability. The hearing officer found that the appellant (claimant herein) sustained an injury on _____, but that he did not timely report this injury and did not have good cause for failing to do so, relieving the respondent (carrier herein) of liability. The hearing officer found that, with the carrier relieved of liability, the claimant did not suffer disability. The claimant appeals arguing that the evidence established that he timely reported his injury and had disability as a result of the injury. The carrier responds that there is sufficient evidence to support the hearing officer's decision. No party has appealed the hearing officer's finding that claimant sustained an injury on _____, and this finding has become final pursuant to Section 410.169.

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 parties stipulated that on _____, the claimant was an employee of (employer). The claimant testified that he was an owner/operator of a truck. The claimant stated that while returning to his terminal in (City 1) from a long haul he had stopped to rest at a truck stop. The claimant said that there was a bed in the truck and he was sleeping in it when his truck was struck by another truck. The claimant testified that he was injured during this accident. The claimant also testified that he called Mr. F, his dispatcher, right after the accident and reported the accident and his injury. Mr. F, in a statement admitted into evidence, said that the claimant reported an accident, but did not report an injury. The claimant testified that he also reported his injury to Mr. R, his supervisor. Mr. R, in a statement, denied that the claimant reported an injury to him. Mr. R said that the claimant continued to work for the employer after the accident until January 1998, when the claimant was discharged after disappearing for three weeks without explanation to the employer. Mr. R also stated that after the accident the employer only learned the claimant was alleging an injury when the claimant filed a claim. There was in evidence an Employer's First Report of Injury or Illness (TWCC-1) dated April 12, 1998, in which the employer stated that there has been no report of injury by the claimant and the employer was making a report only after receiving a telephone call from the Texas Workers' Compensation Commission (Commission). The claimant testified that he did not work after the accident, but that his brother drove the claimant's truck after it was repaired. Payroll records were admitted into evidence showing the claimant was paid wages after the accident and before his discharge in January 1998.

The claimant presented evidence that he consulted Dr. W, D.C., on August 14, 1997, concerning injuries from the accident of _____. Dr. W's history is consistent with the claimant's version of the accident. Dr. W diagnosed various strains and sprains. In

May 1998, Dr. G diagnosed the claimant with a herniated nucleus pulposus as a result of his _____, injury.

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.-(City 1) [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 an injury to the employer, who did not become aware that the claimant was alleging a work-related injury until April 1998. The hearing officer concluded that the carrier is relieved of liability because the claimant failed to timely report an injury to the employer without good cause. There was conflicting evidence as to whether or not the claimant timely reported an injury.

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.-(City 1) [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, we cannot say that the hearing officer erred in finding that the claimant did not timely report an injury. While the claimant testified that he reported an injury to both Mr. F and Mr. R within a short time of the accident, both Mr. F and Mr. R denied this. It was the province of the hearing officer to resolve this conflict in the evidence. We find no basis to reverse her determination as a matter of law. Nor do we find a sound basis for overturning the hearing officer's determinations of no good cause for the claimant not reporting timely and no actual knowledge by the employer of the injury.

Finally, with no basis to overturn the hearing officer's determination that the carrier is relieved of liability, there is no loss upon which to find disability.

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