APPEAL NO. 990828

This appeal is considered in accordance with the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On March 1, 1999, a contested case hearing (CCH) was held. The issues concerned whether the appellant/cross-respondent, who is the claimant, sustained a compensable injury on _____, and had disability as a result for the specific period of August 14th through 30th, 1998, and whether the respondent/cross-appellant (carrier) is relieved from liability for the failure of the claimant to notify his employer of his alleged injury within 30 days.

The hearing officer held that the claimant sustained an injury to his chest wall, but that he failed to notify his employer within 30 days about the injury and did not have good cause for this failure. The hearing officer found that, because the injury was not a compensable injury (one for which the carrier was liable), no period of disability could be established. However, she factually found that he could not work from August 14 to August 24, 1998, as a result of his chest wall injury.

The claimant and carrier have each appealed aspects of the decision not favorable to that party's position. The claimant asserts that he agrees that notice of injury was not given until September 1998, but that he did not know he had a work-related injury until then, and that he reported it within 30 days of the date he knew. The claimant also argues that he also suffered a shoulder injury. The claimant states generally that he claims further disability than the period found by the hearing officer. The carrier responds that the claimant's position at the CCH was that he timely reported within 30 days of his asserted _____, date of injury, and that the position that he was not aware until September 1998 that he was injured is a new argument raised for the first time on appeal. The carrier argues that the determination on the period that claimant was off work due to the injury, and no more, was supported. The carrier also questions the timeliness of the appeal. The carrier has appealed the determination that the claimant sustained a chest wall injury in the course and scope of employment. There is no response from the claimant.

DECISION

Affirmed.

We have ascertained that, applying the date of deemed receipt under Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 102.5(h) (Rule 102.5(h)), the appeal has been timely filed. The claimant was employed by (employer); he said that on _____, at about 6:00 in the morning, he was moving and lifting a heavy valve with two other workers and it slipped while they were doing this. According to the claimant, he felt some pain, but was able to finish his shift (which had begun at 3:00 a.m. that morning). That day he was supervised by Mr. G. He agreed that he did not report an injury to Mr. G, although he said that the pain in his chest area was enough so that he could not pull on a wrench to tighten the valve.

The claimant continued to work; he said that weekend, he noticed an indentation in his chest. Claimant made an appointment with his family doctor, Dr. S, whom he first consulted on July 28, 1998. Dr. S wrote that claimant presented on that day with a tear in his chest wall muscle, and that he did not recall any specific injury. Dr. S said that it was his medical opinion that the tear happened during heavy lifting. Claimant testified that Dr. S referred him to Dr. H, and that when he saw Dr. H on August 4th, Dr. H asked him if he did heavy lifting, and it was at this point that he recalled two occasions when he had been lifting valves (the most recent being _____). He said that Dr. H put him on "one arm" duty for a few weeks, which he worked. Claimant was taken off work entirely effective August 14th, however.

There was some conflicting evidence about when he was released back to work by Dr. H on "one arm" duty following his time off. Claimant said that an off-work slip he had from Dr. H, the doctor's copy of which released him August 24th, was in his pocket and became wet; he said he darkened it with a pen because of this, and then turned it over to his employer. He denied that he altered the slip, although it then said that the release began August 29th. He said he was unable to recall what he had done the week from August 24th through August 30th, but he returned to work on September 1st. The release is written in ball point ink.

At the CCH, the claimant stated that he told both Mr. G and the plant safety supervisor, Mr. BK, about his work-related injury after either the first or second appointment he had with Dr. H, which occurred on August 4th and August 12th, respectively. He said that Mr. BK told him he would in turn report the injury to the plant supervisor, Mr. B. However, claimant agreed that the medical bills continued to be filed under his wife's health insurance policy. Dr. H's August 4th notes reflect that claimant does vigorous lifting and pulling at work.

A letter from Dr. H on September 10, 1998, stated that claimant had begun complaining about shoulder symptoms consistent with bursitis and tendinitis, and that he informed claimant that it may or may not be related to the initial injury. Dr. H stated that it would be unusual for this to manifest over a month after injury.

Mr. B's recollection of events was different. He said that on the 28th or 29th of July, he saw claimant outside of work and was surprised because he thought that claimant was at work. He asked claimant what happened, and claimant told him he had gone to the doctor about an indentation in his chest, which Mr. B said was indeed visible. In response to Mr. B's questions, the claimant said he did not know how he did it but that it did not happen at work. Mr. B said it was not until September 3rd, when he saw claimant at work favoring his shoulder, that he was aware that claimant was asserting a work-related injury. The claimant told Mr. B's boss (who was with Mr. B) that he had hurt himself lifting a valve, and as they walked away, Mr. B told his boss that this was the first he knew of it. While Mr. B did not actively investigate the claim, he testified that Mr. BK indicated he had not been told about the injury, and that Mr. G told him that the injury was not reported until after claimant returned to work in September.

Mr. B said that sometime during the weekend of August 28-30, 1998, he saw claimant surfing at the beach. Claimant agreed he was physically active prior to his injury, and said that he might have been surfing or fishing during the period between August 24-30, 1998. According to a statement from Mr. V, who was lifting the valve with claimant, claimant did not say he was hurt at the time, although claimant told Mr. V a week to two weeks later that he was. A second coworker, Mr. L, filed a statement to this same effect although he did not find out until claimant returned to work that he had been hurt.

The hearing officer is the sole judge of the relevance, materiality, weight, and credibility of the evidence presented at the hearing. Section 410.165(a). The decision should not be set aside because different inferences and conclusions may be drawn upon review, even when the record contains evidence that would lend itself to different inferences. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, 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); American Motorists Insurance Co. v. Volentine, 867 S.W.2d 170 (Tex. App.-Beaumont 1993, no writ). The hearing officer, who had a chance to observe the demeanor of the claimant during testimony, evidently found the evidence against him more credible, as is indicated in her decision, on matters relating to notice, disability, and the shoulder injury. Her decision concerning occurrence of a chest wall injury is likewise sufficiently supported by the testimonial and medical evidence. A trier of fact may credit some of a witness' testimony but need not believe all of it. Taylor v. Lewis, 553 S.W.2d 153 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.).

Section 409.001(a)(1) and (b) require that the injured employee give notice of an accidental injury to a person in a supervisory or management capacity within 30 days after the date of injury. The concept that notice may be given within 30 days after one knows or should have known that injury has occurred applies to occupational diseases. Section 409.001(a)(2). While subjective appreciation of a work-related injury may be a factor in considering good cause for not timely reporting an injury to the employer, it does not shift the deadline for notice of an accidental injury forward in time. In this case, claimant's testimony at the CCH was that he discussed with Dr. H either on August 4th or 12th, (the first or second visit), that he believed the injury occurred from lifting a valve at work. This was within the 30-day period after the date of the injury. The notice given, while it need not be fully detailed, should at a minimum apprise the employer of the fact of an injury and the general area of the body affected. Texas Employers' Insurance Association v. Mathes, 771 S.W.2d 225 (Tex. App.-El Paso 1989, writ denied). Claimant appears to now acknowledge that this did not occur until September.

Temporary income benefits are due when an injured worker has not reached maximum medical improvement and has disability. Section 408.101(a). Section 401.011(16) defines "disability" as: "the inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage." Without a finding of

compensable injury, there can be no disability. In this decision, whether it was compensable ultimately revolved on whether there was timely reporting, rather than whether an injury in the course and scope of employment occurred.

The decision of the hearing officer will be set aside only if the evidence supporting the hearing officer's determination is so weak or against the overwhelming weight of the evidence as to be clearly wrong or manifestly unjust. Atlantic Mutual Insurance Company v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.). We affirm the decision and order.

_____
Susan M. Kelley
Appeals Judge

CONCUR:

_____
Tommy W. Lueders
Appeals Judge

_____
Dorian E. Ramirez
Appeals Judge