

APPEAL NO. 990978

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 April 5, 1999. The issues at the CCH were injury, date of injury, timely report of injury, and disability. The hearing officer determined that the respondent (claimant) suffered a compensable injury, that the date of this injury was _____, that the appellant (carrier) is not relieved of liability for the claimant's failure to timely report the injury because the claimant had good cause not to timely report his injury, and that the claimant had disability from November 20, 1998, continuing through the date of the CCH. The carrier contends that these determinations of the hearing officer were contrary to the great weight and preponderance of the evidence. There is no response by the claimant to the carrier's request for review in the appeal file.

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 sets out the essential facts of the case in his opinion and we adopt his rendition of the evidence. We will therefore only briefly touch on the facts most germane to the appeal. This includes the fact the claimant testified that he was injured on _____, while working with I-beam at a particular job site. The claimant testified that he reported back pain to his employer and sought medical treatment from Dr. M on May 20, 1998. The claimant testified that he continued working for the employer and that his back pain became progressively worse, leading him to seek additional medical treatment from his family doctor on November 6, 1998. The claimant testified that his family doctor put him on light duty and ordered an MRI which was performed on November 20, 1998, and which was positive. The claimant testified that his family doctor sought to refer him to a neurosurgeon but that the carrier denied treatment.

The owner of the employer testified that the employer was unaware that the claimant was asserting a job injury until November 6, 1998. The carrier also showed that the claimant had reported at various points different dates of injury. The claimant testified that he was unclear of the exact date until he checked to find out the date he first sought treatment from Dr. M.

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 great weight and preponderance 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). In the present case, the hearing officer found an injury and there was evidence to support in this finding in the testimony of the claimant and medical evidence.

The date of an injury is also a question of fact. The carrier argues that the claimant reported various dates of injury, but the claimant explained that his memory of the exact date of the injury was unclear and he was only certain of the date after he checked and found the date of his first treatment which he recollects took place one week after the date of the injury. We also note that there was evidence in the record from the employer that the claimant only worked on the job site on which the claimant testified he was injured on _____ and (alleged date of injury). We find sufficient evidence to support the hearing officer's finding of _____, to be the date of 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 Texas Workers' Compensation 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.).

We have held that good cause for failure to timely report an injury can be based upon the injured worker's not believing the injury is serious and his initial assessment of the injury as being "trivial," but this belief must be based upon a reasonable or ordinarily prudent person standard. Texas Workers' Compensation Commission Appeal No. 91030, decided October 30, 1991; Texas Workers' Compensation Commission Appeal No. 93184, decided April 29, 1993; Baker v. Westchester Fire Insurance Co., 385 S.W.2d 447 (Tex. Civ. App.-Houston 1964, writ ref'd n.r.e.). Good cause exists for not giving notice until the injured worker realizes the seriousness of his injury. Baker, at 449. In the present case, the hearing officer found that the claimant had good cause for failure to report his injury prior to the MRI on November 20, 1998. We find sufficient evidence to support this determination.

On appeal, the only attack the carrier makes on the hearing officer's finding of disability is based upon its position that the hearing officer erred in finding injury and good cause for failure to timely report an injury. After rejecting the carrier's position in regard to these issues, we necessarily reject its attack on the hearing officer's finding of disability.

The decision and order of the hearing officer are affirmed.

Gary L. Kilgore
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Alan C. Ernst
Appeals Judge