APPEAL NO. 991625

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On July 6, 1999, a contested case hearing (CCH) was held. With regard to the issues before her, the hearing officer concluded that the appellant/cross-respondent (claimant) did not sustain a compensable injury in the form of an occupational disease known as carpal tunnel syndrome (CTS) on Injury 2; that the respondent/cross-appellant (carrier) was relieved from liability for the injury because the claimant failed to timely notify her employer of CTS; that the claimant was not barred from pursuing workers' compensation benefits due to an election of remedies; and that she had jurisdiction to determine the compensability of CTS as a result of the June 2, 1998, decision and order in a prior CCH. The claimant appeals, arguing that the evidence was contrary to the hearing officer's resolution of the injury and timely reporting issues. The carrier responds that there was sufficient evidence to support the hearing officer's findings regarding these issues. The carrier appeals, arguing that the hearing officer was barred from ruling on the issues of injury and timely report of injury by the doctrine of *res judicata* because these issues had been resolved at a prior CCH. There is no response from 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.

Since it is framed in terms of jurisdiction, we will first address the *res judicata* issue. An earlier CCH was commenced on April 29, 1998, with the record closing on June 18, 1998. BDM presided as the hearing officer. The issues before him dealt with an asserted repetitive trauma injury that the claimant contended she knew was related to her work on February 25, 1995. The asserted injury was to the claimant's neck, low back and left hand. The specific issues before the hearing officer were whether the claimant sustained an injury, the date of the injury, whether the carrier was relieved of liability because the claimant failed to timely report this injury, and whether the claimant had disability resulting from this injury. The hearing officer concluded that the claimant did not suffer a compensable injury on or about Injury 3, that the claimant did not timely report an injury to her employer without good cause for doing so and that the claimant did not sustain disability.[1] This decision was not appealed.

The carrier contends that the hearing officer's decision in the prior CCH is *res judicata* as to the issues in the present case. The claimant contended at the CCH presently under review that this decision was not *res judicata* because, while there was some evidence concerning the claimant's assertion of work-related bilateral CTS in the prior CCH, the hearing officer at the prior CCH specifically stated on the record that the issue of

[1]This was in a decision dated June 22, 1998, in Docket No.

a CTS injury was not before him and that it was still possible for the claimant to file for CTS as separate claim. The claimant relied on Texas Workers' Compensation Commission Appeal No. 982677, decided December 23, 1998.

In its appeal the carrier points to the following findings of fact and conclusions of law in the hearing officer's decision in the prior CCH as being the basis for its position that the prior decision was *res judicata* as to the issues of injury and disability in the present case:

FINDINGS OF FACT

9. The claimant had undergone right [CTS] surgery in 1994 and had some milder complaints of left hand problems. The Claimant did not claim this as work-related though she knew by 8/30/94 that work contributed to the [CTS] problems in both hands, and the Claimant did not report this as a work-related injury during her employment through 11/13/95.

15. The Claimant knew or should have known of the relation of any hand problems to her work no later than Injury 2.

CONCLUSIONS OF LAW

6. The claimant did not timely report the alleged injuries to her neck, low back, or either hand/wrist to the Employer, and good cause does not exist for this failure.

7. The Claimant did not sustain a compensable injury while working for the Employer from 1994 through November 13, 1995.

In the CCH decision under review, the hearing officer made the following findings of fact and conclusions of law concerning the *res judicata* issue:

FINDINGS OF FACT

11. During the [CCH], the hearing officer advised Claimant to file a separate claim for the bilateral [CTS].

12. The hearing officer in [CCH], made findings of fact regarding Claimant's bilateral [CTS] in the written decision and order.

13. Claimant relied upon the hearing officer's oral statements during the [CCH] No. to come back with a separate claim for the bilateral [CTS].

CONCLUSIONS OF LAW

6. The Commission has jurisdiction to determine bilateral CTS compensability as a result of the June 2,[2] 1998 decision and order of the [CCH] in Cause No.[3]

There is no dispute as to the accuracy of the hearing officer's factual findings in the present case cited above. Our review of the tape recording of the prior CCH, of which the hearing officer took official notice in the present case and which as included in the records of this appeal, shows that these factual findings are correct. Under these circumstances, we do not find error in the hearing officer's concluding that *res judicata* did not bar her from considering the issues of injury and timely reporting of injury in regard to the claimant's asserted bilateral CTS injury of Injury 2. While the hearing officer's decision in the prior CCH could be read to have decided these issues, it is clear from his entire decision and the record of the CCH that he did not intend to rule on these issues which were clearly outside the scope of the issues brought before him at the prior CCH. We decline to rule that as a matter of law the claimant's failure to appeal the hearing officer's decision in the prior CCH barred the hearing officer in the present case from considering the issues of injury and timely reporting in regard to the claimant's asserted bilateral CTS injury of Injury 2.

At the CCH in the present case, the claimant testified that she was employed as a title clerk for the employer on Injury 2. The claimant testified that she had been hired by the employer in April 1994. It was undisputed that the claimant had previously been employed by the employer's predecessor firm and suffered a back injury in injury 1. The claimant testified that the injury 1 back injury resulted in five back surgeries and in her being off work from injury 1 until April 1994. The claimant also testified that six weeks after returning to work she began experiencing pain to her hands, especially to the right hand. The claimant stated that she reported this to her supervisor, Ms. P, and that Ms. P knew the claimant's hand problems were related to the claimant's employment. Both the claimant and Ms. P testified that Ms. P had also been the claimant's supervisor at the time of her injury 1 injury. Ms. P denied that the claimant ever reported an injury to her hands to her or that she had actual knowledge of any relationship of the claimant's hand problems to work.

The claimant's duties included maintaining billing records by hand, some computer typing and pulling books for title research. The claimant described these books as being large and heavy. The claimant sought medical treatment for her hands with Dr. L on Injury 2. Dr. L diagnosed the claimant with bilateral CTS. The claimant underwent a CTS release to her right hand on October 14, 1994. The claimant continued to work after this

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[2]This is a typographical error. The date of the hearing officer's decision was June 22, 1998, and we reform the finding of the hearing officer in the present case to reflect this.

[3]This is also a typographical error. The case number of the previous CCH was CC/96-011661-02-CC-HD42, and we reform the finding of the hearing officer in the present case to reflect this.

surgery until November 13, 1995, when she quit her job. The claimant testified that she quit her job at her doctor's advice and because she was unable to continue to perform her job. Ms. P testified that the claimant resigned because the claimant was assigned to another position that she considered a demotion.

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 case, the hearing officer found no injury, contrary to the testimony of the claimant. The claimant had the burden to prove she was injured in the course and scope of her 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 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 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 a work-related CTS injury to her employer within 30 days of Injury 2, or at anytime through November 13, 1995, and did not have good cause for not timely reporting such an injury. The hearing officer also found that the employer did not have actual notice of such an injury through November 13, 1995. We do not find that these factual findings were contrary to the overwhelming evidence. The evidence as to when and if the claimant reported a bilateral CTS injury to the employer and the employer's knowledge of such an injury was conflicting. It was the province of the hearing officer to resolve these conflicts. The hearing officer's findings regarding the notice issue were sufficiently supported by the testimony of Ms. P.

The decision and order of the hearing officer are affirmed.

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Gary L. Kilgore
Appeals Judge

CONCUR:

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Susan M. Kelley
Appeals Judge

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Dorian E. Ramirez
Appeals Judge