

APPEAL NOS. 991992
AND 992068

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 commenced on July 15, 1999, with a second session held on August 27, 1999. The hearing officer held a consolidated hearing on both the appellant/cross-respondent's (claimant) alleged _____, and _____, injuries. In regard to the _____, injury the issues were injury, timely report of injury, disability and whether the injury of _____, was the sole cause of the claimant's current condition. The hearing officer concluded that the claimant suffered a compensable injury in the form of an occupational disease in the course and scope of her employment on or about _____; that the sole cause of the claimant's condition is not a result of her alleged _____, injury; that the claimant does have disability due to the compensable injury suffered on or about _____; and that respondent/cross-appellant (Carrier 1) is relieved of liability for the _____, injury because the claimant failed to timely report it to (Employer 1). In regard to the alleged injury of _____, the issues were injury, date of injury, timely contest of injury, timely report of injury and disability. The hearing officer concluded that the date of injury was _____; that the claimant did not suffer a compensable injury on that date; that the respondent/cross-appellant (Carrier 2) did not waive the right to contest the compensability of the alleged injury; that Carrier 2 was relieved of liability because the claimant did not timely notify (Employer 2) of a work-related injury; and that the claimant did not have disability. The claimant appeals both decisions of the hearing officer. In regard to the _____, injury the claimant specifically argues that the evidence established that she timely reported her injury to a supervisor of Employer 1. The claimant also argues that the hearing officer erred in excluding the statement and testimony of a witness. Carrier 1 responds that the hearing officer did not abuse her discretion by refusing to admit evidence that was not timely exchanged. Carrier 1 also argues that there was sufficient evidence to support the determination of the hearing officer that the claimant did not timely report an _____, injury. Carrier 1 files a request for review, arguing that the hearing officer's determinations that the claimant suffered a work-related injury on _____; that the claimant sustained disability; and that the injury of _____, was not the sole cause of the claimant's condition are contrary to the evidence. The claimant responds that these determinations were supported by the evidence. The claimant also appeals the conclusion of the hearing officer that she did not suffer a work-related injury on _____, arguing that this determination was contrary to the evidence. Claimant further argues that as the hearing officer's resolution of the issues of timely dispute by the carrier and disability were predicated on her finding of no injury, these should also be reversed. The claimant appeals the hearing officer's determination that she failed to timely report her _____, injury, arguing that it was contrary to the evidence; she also argues that the hearing officer erred in excluding the testimony of witnesses whose testimony would have supported that the claimant timely notified the employer of her injury. Carrier 2 responds that the hearing officer did not err in excluding evidence from the witnesses in that neither the statement nor the identity of the witnesses were timely disclosed to Carrier 2 either pursuant to the rules of discovery or the hearing officer's pretrial order. Carrier 2 also argues that the exclusion

of this testimony, even if error, was harmless. Carrier 2 further argues that there was sufficient evidence to support the determinations challenged by the claimant regarding the alleged injury of _____. Carrier 2 files a conditional appeal challenging the hearing officer's finding as to when it first received written notice that the claimant was alleging an _____, injury and as to when Carrier 2 disputed the alleged injury. The claimant responds that Carrier 2's conditional appeal is untimely.

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 jurisdictional we will first address whether or not Carrier 2's conditional request for review was timely filed. We first note Carrier 2's appeal is conditioned on the claimant appealing the hearing officer's decision. Since the claimant did so, the condition was obviously met, and so we must address the issue raised by the claimant as to whether the request for review was timely filed. Records of the Texas Workers' Compensation Commission (Commission) show that the decision of the hearing officer was distributed to the parties on September 3, 1999. The attorney for Carrier 2 recites that he received the decision on September 10, 1999. We have held on numerous occasions that it is receipt by the parties and not the attorney that is relevant in determining timeliness. See Texas Workers' Compensation Commission Appeal No. 93327, decided June 3, 1993. Commission records reflect that Carrier 2's Austin representative received the hearing officer's decision on September 7, 1999. Carrier 2 mailed its request for review to the Commission postmarked September 22, 1999, and the Commission received it on September 24, 1999. Thus, since Carrier 2 mailed its request for review to the Commission within 15 days and it was received within 20 days of Carrier 2's receiving the hearing officer's decision, Carrier 2's request for review is timely. See Section 410.202(a); Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 143.3(c) (Rule 143.3(c)).

The evidence in this case is voluminous. However, the hearing officer effectively summarizes most of the relevant evidence in her decision and we adopt her rendition of the evidence. We will briefly summarize the evidence most germane to the appeals. This includes the fact that it was undisputed that the claimant went to work for Employer 1 in October 1996 and was assigned to work at the worksite operated by Employer 2. The claimant testified that her duties were performed at a die cutting machine where she picked up scraps from beneath the machine and caught materials coming from the machine. The claimant testified that these duties required a lot of bending and stooping to pick up scraps, as well as a lot of crawling on her hands and knees while working beneath the machine.

The claimant testified that on _____, she slipped and fell at work and reported an injury to the lead machine operator. The claimant consulted Mr. N, a physician's assistant, who noted in a May 23, 1997, progress note that the claimant had repetitive trauma to her knee secondary to her job which required her to kneel and crawl on rollers. The claimant testified that she continued working and on June 2, 1997, she was hired by Employer 2 to continue doing the same job she had been doing while she was an employee of Employer

1. The claimant testified that she again slipped and fell at work on _____. A progress note dated August 21, 1997, showed that the claimant was examined by Mr. O, a physician's assistant, who noted a swollen right knee and opined claimant was suffering from chronic knee swelling secondary to her occupation. The claimant testified that she gave notice of injury to supervisory personnel with Employer 2 of this injury on August 21, 1997. On October 22, 1997, the claimant was referred to Dr. O, an orthopedic surgeon, who stated that the claimant probably had a ganglion cyst on her right knee and recommended arthroscopic surgery. Dr. O stated that the cyst was probably related to the claimant's work duties.

At the second session of the CCH, the claimant sought to admit a statement from Ms. F. The hearing officer excluded this testimony because she found that the statement was not timely exchanged with opposing counsel and that Ms. F was not disclosed as a person with knowledge of relevant facts in interrogatories propounded to the claimant. The claimant contended that Ms. F's statement and identity was disclosed once it was known to her. The hearing officer found there was no cause for the failure to timely disclose Ms. F's statement and identity.

Much of the claimant's appeals in regard to both injuries revolved around the claimant's contention that the hearing officer erred in excluding evidence from Ms. F. We review such an evidentiary ruling under the abuse of discretion standard. There was a pretrial order in the present case stating that all discovery would be completed by August 18, 1999. The claimant failed to exchange the statement of Ms. F or her identity as a person with knowledge of relevant facts within this deadline. Under these circumstances, we find no abuse of discretion.

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 the claimant suffered an injury on or about _____. This was supported by both the testimony of the claimant and medical evidence. Applying the above standard, we do not find error in the hearing officer's finding of an _____, injury.

The hearing officer found no injury on _____, contrary to the testimony of the claimant. 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. This is so even though another fact finder might have drawn other inferences and reached other conclusions. Salazar v. Hill, 551 S.W.2d 518 (Tex. Civ. App.-Corpus Christi 1977, writ ref'd n.r.e.).

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.-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 timely report her _____, injury to Employer 1 or her _____, injury to Employer 2. The claimant contends that her testimony established she timely reported these injuries. There was conflicting evidence concerning whether or not these injuries were timely reported and the claimant bore the burden of proof to establish timely reporting. In light of the hearing officer's role as the finder of fact and applying our standard of appellate review, we do not find error in the hearing officer's findings that the claimant did not timely report either injury. Section 409.002 specifically provides that a carrier is relieved of liability if an

employee fails to timely file notice of injury. We find no error in the hearing officer relieving both Carrier 1 and Carrier 2 of liability in light of her factual findings that the claimant failed to timely report either injury.

Disability is a question of fact to be determined by the hearing officer and may be based on the testimony of the claimant alone. Texas Workers' Compensation Commission Appeal No. 93560, decided August 19, 1993. The hearing officer found that the claimant suffered disability as a result of her _____, injury. Carrier 1 appeals this finding as contrary to the evidence, but we find sufficient evidence in the testimony of the claimant and the medical evidence to support this finding. We also find sufficient evidence to support the hearing officer's finding that the alleged _____, injury was not the sole cause of the claimant's condition, particularly in light of the hearing officer's finding of no _____, injury. However, neither of these findings result in the claimant being entitled to income or medical benefits in light of the hearing officer's determination that Carrier 1 is relieved of liability for the failure of the claimant to timely report her _____, injury.

The hearing officer found no disability resulting from the claimant's alleged _____, injury. 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).

Section 409.021 provides as follows, in relevant part:

- (a) An insurance carrier shall initiate compensation under this subtitle promptly. Not later than the seventh day after the date on which an insurance carrier receives written notice of an injury, the insurance carrier shall:
 - (1) begin the payment of benefits as required by this subtitle; or
 - (2) notify the commission and the employee in writing of its refusal to pay and advise the employee of:
 - (A) the right to request a benefit review conference; and
 - (B) the means to obtain additional information from the commission.
- (b) An insurance carrier shall notify the commission in writing of the initiation of income or death benefit payments in the manner prescribed by commission rules.
- (c) If an insurance carrier does not contest the compensability of an injury on or before the 60th day after the date on which the insurance carrier is notified of the injury, the insurance carrier waives its right to contest compensability. The initiation of payments by an insurance carrier

does not affect the right of the insurance carrier to continue to investigate or deny the compensability of an injury during the 60-day period.

- (d) An insurance carrier may reopen the issue of the compensability of an injury if there is a finding of evidence that could not reasonably have been discovered earlier.

Both the claimant and Carrier 2 appeal the hearing officer's resolution of the issue of whether Carrier 2 timely disputed the claimant's _____, injury. The claimant's appeal of this issue is solely hinged on her contention that we should reverse the hearing officer's finding that the claimant did not suffer injury on _____. Having affirmed the hearing officer's determination as to injury, we necessarily reject the claimant's argument. Carrier 2 challenges the hearing officer's factual findings as to when it received notice of injury and whether it timely disputed. We find sufficient evidence in the record to support the hearing officer's factual findings in regard to this issue.

Both decisions and orders of the hearing officer are affirmed.

Gary L. Kilgore
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Alan C. Ernst
Appeals Judge