APPEAL NO. 000063

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 December 15, 1999. The issues at the CCH were injury, timely report of injury, and disability. The hearing officer concluded that the appellant/cross-respondent (claimant) sustained an injury in the form of an occupational disease on _____, that the respondent/cross-appellant (carrier) was relieved of liability for this injury because of the claimant's failure to timely report it, and that the claimant did not have disability because her injury was not compensable due to her failure to timely report it. The claimant appeals, challenging a number of the hearing officer's findings of facts and conclusions of law. The crux of the claimant's appeal is that the evidence established her date of injury is _____, and not _____, as found by the hearing officer, and the claimant was unable to work after May 3, 1999, due to her injury, contrary to the finding of the hearing officer. The carrier replies that the evidence supported the hearing officer's determination regarding timely report of injury and disability. The carrier files a cross-appeal, arguing that the evidence did not support the hearing officer's finding of injury. There is no response from the claimant to the carrier's cross-appeal 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 summarized the evidence relevant to the issues before us on appeal in her decision as follows:

> Claimant testified she worked as a pre-collator for (Employer), whose duties included pulling stock from shelves, lifting, bending, pulling a cart and operating machinery. Claimant had worked for Employer since September 1998, with the last six months at her current assignment. Claimant testified she began having pain and numbness in her hands in mid-March 1999. She testified she had been treating with her family physician but only for gynecological problems. She testified she did not present for her hands until _____, and was told by [Dr. T] that she had tendinitis and it was work-related. Claimant did not offer medical records of her office visits on _____, and _____. Claimant reported her condition to Employer on April 11, 1999. Claimant asserted disability from April 15, 1999 to the date of hearing on December 15, 1999.

We first address the carrier's contention that there was insufficient evidence to support the hearing officer's finding of injury. 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). Generally, corroboration of an injury is not required and may be found based upon a claimant's testimony alone. Houston Independent School District v. Harrison, 744 S.W.2d 298, 299 (Tex. App.-Houston [1st Dist.] 1987, no writ). Here, there was certainly testimony from the claimant to support her claim of injury and, applying our standard of review, we find that this was sufficient to support the hearing officer's finding 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.).

In the present case, the claimant argues that she timely reported her injury on April 11, 1999. She argues that her date of injury was _____, so she reported her injury within 30 days and good cause was not really an issue. Thus, the issue of timely notice really turns on the issue of the date of the claimant's injury, which the hearing officer found to be _____, which is 31 days prior to the time the claimant asserts she reported the injury.

The hearing officer found that the claimant knew or should have known that her tendinitis was work related on _____. Section 408.007 provides as follows:

> For purposes of this subtitle, the date of injury for an occupational disease is the date on which the employee knew or should have known that the disease may be related to the employment.

Under Section 401.011(34), an occupational disease includes repetitive trauma injuries, which is essentially what the claimant is alleging here. The date of an occupational disease is a question of fact. Texas Workers' Compensation Commission Appeal No. 94415, decided May 23, 1994. We stated in Texas Workers' Compensation Commission Appeal No. 992783, decided January 26, 2000, "[t]he date is somewhat of a 'moving target,' but need not be as early as the first symptoms nor as late as a definitive diagnosis." Applying our standard of review set out above, we find sufficient evidence to support the hearing officer's factual determination concerning the date of injury. 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.).

Finally, with no compensable injury found due the fact the carrier is relieved of liability, there is no loss upon which to find disability. By definition, disability depends upon a compensable injury. *See* Section 401.011(16).

The decision and order of the hearing officer are affirmed.

Gary L. Kilgore
Appeals Judge

CONCUR:

Alan C. Ernst
Appeals Judge

Dorian E. Ramirez
Appeals Judge