APPEAL NO. 000444

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 14, 1999. The case involved two carriers at the CCH, concerning two injuries, and whether respondent's (claimant) current back condition resulted from the _____ injury (for which an insurance company was carrier) or whether a new injury was sustained on _____ (for which the appellant school district/employer (self-insured) was self-insured). At issue also in the claim involving the self-insured was whether the claimant timely filed her Employee's Notice of Injury or Occupational Disease and Claim for Compensation (TWCC-41) within one year after her injury, or whether she had good cause for any failure to file. However, at the CCH, the claimant did not advance a theory of good cause, but argued instead that the employer/self-insured failed to timely file an Employer's First Report of Injury or Illness (TWCC-1) until mid-1999, and therefore the one-year time period for filing her claim for compensation had been tolled.

The hearing officer held that the claimant sustained a new injury on _____, and that the one-year time period for filing her claim did not begin until August 12, 1999, in accordance with Section 409.008. He determined that the claimant did timely file her claim for compensation in accordance with Section 409.008.

There is apparently no appeal involving the decision between the insurance company for the _____ injury and the claimant. However, in this decision, the self-insured has appealed, arguing that the evidence is insufficient to support a finding that claimant sustained a new injury to her lower back (as opposed to a continuation of her previous injury). The self-insured also points out that the tolling provision does not apply unless the carrier has the duty under Section 409.005 to file a TWCC-1, and the self-insured points out that no such duty arose here because the claimant had not missed a day of work, and was only off for isolated doctor's appointments. The claimant responds that the decision on the new injury is supported by the record. The claimant appears to argue that the duty to file the TWCC-1 derives from "knowledge" of the injury.

DECISION

Affirmed in part, reversed and rendered in part.

The claimant sustained a lifting injury in _____, while employed by (earlier employer). She was found to have a herniated disc at L5-S1, which was treated conservatively. Her doctor for this injury was Dr. P, whom she last saw for this injury on August 17, 1995. She was off work until 1994, when she returned to light duty. Her impairment rating from her injury was 12%. The claimant left the earlier employer in 1995. She began working for the self-insured on January 17, 1996.

Her job was to act as bus driver assistant, which meant that she sat on the bus (not driving) to assist the students, who were special needs children. A day of her work entailed

two shifts--one for the morning bus run, one for the afternoon. Claimant did not work during the middle of the day.

The claimant said she had two injuries, in _____ and _____, which entailed back strains. The self-insured arranged and paid for treatment for these injuries with a clinic, which treated claimant with medication and physical therapy. The claimant said she had just returned from a leave of absence when she was injured during the morning bus run on _____. Her account of the injury was that she was sitting over the rear wheels, the bus went over a bump, and she came up out of her seat and back down. Both the bus driver, who also testified, and the claimant agree that at the end of the run, she could not rise from her seat and had to be assisted into the office, where she reported the incident with the bus driver's assistance. The statement filed that day did not mention a bump, but the bus driver said that the statement she helped prepare was to get something on file and did not include all details. While the bus driver did not recall a specific bump, she said that bumps were numerous. The claimant said that she returned to work that afternoon, after laying down at home during the middle of the day.

As the hearing officer noted in his discussion, the claimant testified that she figured she had missed 13 days of work from the date of injury "until now" (the date of the CCH). At one other point, she indicated that the 13 days spanned the date of her injury until December 6, 1999, the date she was taken off work. She made clear several times that this 13-day figure included two entire days missed in October 1999, but consisted only of hours taken off for doctor's appointments prior to those days. She specifically testified that she did not miss entire days at all, but may have missed a morning shift or an afternoon shift, and that such time as needed for medical treatment was paid for through her sick leave or personal leave. Claimant said that she had her calculations out in her car; no recess was requested in order for her to retrieve these. Only two Absence from Duty Reports, signed by the claimant, were admitted into evidence: one for two hours missed on December 15, 1998, for "personal business," and the second dated February 9, 1999, for two hours due to an injury on the job.

The claimant said that she worked her first two summers but did not work in summer 1998 or summer 1999. She said that she did not work in summer 1999 due to her choice, not because of her back injury.

The claimant was first treated by Dr. P on September 24, 1998. She said she went back to him because she knew she did not have a sprained muscle. Dr. P's records note that claimant had a "symptomatic flareup" of her herniated disc. She was given an excuse for a doctor's appointment that day, plus a release back to full duty. Dr. P noted on October 20, 1998, that claimant had a lumbar strain. She was to continue working. The records in the CCH show that the next report of Dr. P is dated February 9, 1999, and that she had herniation with intermittent symptomatic flare-up. He next saw her on October 5, 1999, and recommended an MRI at that time. Claimant did not have an MRI until after the October 19, 1999, benefit review conference (BRC). She said she did not request the BRC and

believed it was requested by Dr. P, who was seeking payment for his treatment. Dr. P took claimant off work in December 1999.

According to claimant, Dr. P told her that her MRI showed the same L5-S1 herniation as existed after her _____ injury, but that she now had a L4-5 herniation. Dr. P told her that surgery might be required if conservative treatment did not work. Dr. P's answers to interrogatories state that he believed claimant sustained a new injury, and that she has the additional herniation at L4-5.

The leave of absence that the claimant had taken was from August 10th through August 26th, and involved driving to (state) to attend an ailing relative. The claimant maintained that the car drive to and from (state) caused no pain to her back.

The self-insured disputed the claim through filing a Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) on November 5, 1998. The basis for dispute was that claimant had a preexisting back condition, and that no "injury" had resulted from the _____, incident. The claimant said that Dr. P's treatment was not paid for after this and he would not accept her HMO coverage. On October 7, 1999, the self-insured amended its TWCC-21 to deny the claim on the further basis of the failure of the claimant to file a TWCC-41. The claimant thereupon filed a TWCC-41 on October 18, 1999. Her explanation for not filing one earlier was that she thought she had done all she had to when she reported the injury to the employer.

The hearing officer admitted the TWCC-1 as a hearing officer exhibit. It shows that the director of transportation for the self-insured completed a TWCC-1 on September 21, 1998; however, it did not show that any time was lost as a result of the injury. The TWCC-1 states, however, that the cause of the injury, described as "pain" in the back, is unknown, and the mechanism of injury was that the claimant was unable to get out of her seat due to back pain. This form was filed by the self-insured with the Texas Workers' Compensation Commission (Commission) on August 12, 1999. There is no indication on the form as to when it was forwarded to the division of the self-insured that is responsible for processing claims. However, the TWCC-21 filed by the self-insured in November 1998 stated that it first received written notice of the injury from the person who signed the TWCC-1 on September 22, 1998.

We will briefly affirm the determination that claimant had a new injury. Plainly, there is sufficient support for the hearing officer's decision on this issue. The fact that there may not have been an original MRI or report in evidence does not preclude the hearing officer from believing Dr. P's sworn answers on written questions, or his records, stating that a new herniation exists. 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 more problematic finding is his determination that the tolling provisions of the 1989 Act apply to render claimant's October 18, 1999, claim for compensation timely. This claim should have been filed by August 28, 1999. Section 409.003(1) (the counterpart provision for filing a claim for death benefits is set out in Section 409.007). The two exceptions for late filing are set out in Section 409.004, and consist of good cause, or the fact that the insurance carrier or employer does not contest the claim. Good cause was not urged by the claimant or found by the hearing officer and the self-insured contested the claim.

The tolling provision, on which the hearing officer relies to find a timely filing, is contained in Section 409.008:

> If an employer or the employer's insurance carrier has been given notice or has knowledge of an injury to or the death of an employee and the employer or insurance carrier fails, neglects, or refuses to file the report under Section 409.005, the period for filing a claim for compensation under Sections 409.003 and 409.007 does not begin to run against the claim of an injured employee or a legal beneficiary until the day on which the report required under Section 409.005 has been furnished.

The tolling provision does not apply unless there is first the duty to file the first report of injury. Camarillo v. Highlands Underwriters Insurance Co., 625 S.W.2d 11 (Tex. Civ. App.-Beaumont 1981, no writ); Lowe v. Pacific Employers Indemnity Co., 559 S.W.2d 370 (Tex. Civ. App.-Dallas 1977, writ ref'd n.r.e.). The Appeals Panel has applied this law to the tolling provisions under the 1989 Act. Texas Workers' Compensation Commission Appeal No. 982243, decided October 30, 1998 (Unpublished); Texas Workers' Compensation Commission Appeal No. 950187, decided March 21, 1995. Both of these cases also make clear that it is not only knowledge of a specific injury that is required by the employer to invoke the tolling provision; rather, the employer must also have knowledge that time missed was due to this injury.

Section 409.005 was amended effective September 1, 1995, to place the obligation of filing a TWCC-1 with the Commission on the carrier, rather than the employer. The employer is only required to report to the carrier if an injury is either an occupational disease, or results in the absence from work "for more than one day due to an injury." Section 409.005(a) and (b). Section 409.005(d) requires the insurance carrier to file the report it receives from the employer "not later than the seventh day after the date on which the carrier receives the report from the employer." Although it appears from this that the self-insured 's action is purely a ministerial one, and could extend to all reports received, whether or not required, Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 124.2(c)(1) (Rule 124.2(c)(1)) obligates the carrier to file not later than the seventh day after:

(A) receipt of a required report where there is lost time from work or an occupational disease; or

(B) notification of lost time if the employer made the [TWCC-1] prior to the employee experiencing absence from work as a result of the injury[.]

Presupposing that an aggregation of doctor's appointments could be said to fulfill the requirement of absence of more than one day to trigger the self-insured's obligation to report to the Commission, we agree that there was no evidence that this occurred more than seven days prior to the date that the self-insured filed the information with the Commission (August 12, 1999). With no evidence or finding by the hearing officer that the duty to report was triggered at a specific earlier date, there can be no basis for finding a failure, neglect, or refusal to comply with that duty. The first TWCC-1 that is in evidence indicates no lost time. The claimant did not prove that any time was lost up to that point; her first appointment with Dr. P was not until a few days later, and she returned to work that same day. The only absence records in evidence prior to August 12, 1999, do not comprise in excess of one day, and claimant's global testimony that she lost 13 days up to either December 6th or the date of the CCH are insufficient to establish the point at which the duty of the self-insured to report to the Commission was triggered.

We therefore reverse the determination that the claimant's obligation to file her TWCC-41 within one year was tolled, such finding being unsupported by the evidence as well as against the great weight and preponderance of the evidence, and render a decision that the tolling statute did not absolve the claimant from the necessity of filing a claim for compensation by August 28, 1999. As her claim was untimely, the self-insured is not liable for compensation.

Susan M. Kelley
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Philip F. O'Neill
Appeals Judge