APPEAL NO. 000507

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 February 10, 2000. The issues at the CCH were whether the appellant (claimant) sustained a compensable injury in the form of an occupational disease on _____; whether the claimant had disability resulting from the injury; whether the claimant reported an injury to the employer not later than 30 days after the injury; and whether the claimant is barred from pursuing Texas workers' compensation benefits because of an election to receive benefits under a group health insurance group. The hearing officer determined that the claimant did not sustain a compensable injury in the form of an occupational disease on _____, or any other date. He also determined that the claimant did not timely report his claimed injury and did not have good cause for failing to report his claim. Therefore, he concluded that the claimant did not have disability. Finally, the hearing officer concluded that the claimant was barred from pursuing workers' compensation benefits because he had made a binding election to receive group health benefits. Claimant appeals the decision of the hearing officer. The claimant argues that the evidence established that he suffered a compensable injury, timely reported this injury and had disability. The claimant argues that the hearing officer's ruling contrary to this evidence indicated bias or prejudice against the claimant and that the hearing officer did not apply the correct standard of proof. The claimant also argues that filing on his group health insurance does not constitute an election of remedies under the relevant case law. Respondent (carrier) replies that there was sufficient evidence to support the findings of the hearing officer regarding no injury, no timely report of injury and no disability. The carrier argues that the case law cited by the claimant regarding election of remedies is not applicable to the present case.

DECISION

Affirmed in part; reversed and rendered in part.

The hearing officer summarizes the evidence in his decision and we adopt his rendition of the evidence. We will only touch on the evidence germane to the appeal. This includes testimony by the claimant that he underwent a physical examination prior to working for the employer in March 1999. The claimant testified that his job for the employer involved cleaning large plastic tubs with a high pressure hose. The claimant testified that he began experiencing pain in his right hand on _____. The parties stipulated that if the claimant sustained a compensable injury it was not disputed that the date of such injury was _____. The claimant testified that he reported his injury to his supervisor, Mr. R, on several occasions. Mr. R testified the claimant never reported an injury to him. The carrier's position was that the claimant first reported his injury on August 20, 1999, when he reported to the employer's nurse's station that he had undergone a carpal tunnel release due to overexertion of his right hand at work.

There is conflicting medical evidence concerning whether the claimant's right hand carpal tunnel problems were related to his work. The claimant initially saw Dr. C on July 13, 1999, who diagnosed the claimant with arthritis of the right hand and referred him to Dr. O. Dr. O performed an EMG and opined the claimant should undergo a right carpal tunnel release. The claimant testified that Dr. O provided him the name of three surgeons and he selected Dr. V. Dr. V took the claimant off work on August 12, 1999, and performed a carpal tunnel release on August 19, 1999. After his surgery the claimant switched his follow-up treatment to Dr. L. Dr. O stated in a letter dated December 1, 1999, to Dr. V that it was his opinion that the claimant's work for the employer "most likely caused the carpal tunnel symptoms." Dr. V stated in response to written questions from the claimant's attorney "I think it is possible for any job in which repetitive use of the hands is involved may cause carpal tunnel syndrome [CTS]." Dr. Ob, who examined the claimant on November 18, 1999, at the carrier's request, stated he thought it was not likely that the claimant's right CTS was caused by the claimant's work for the employer.

Dr. C filed an insurance claim with the claimant's group health carrier. There was also in evidence a "presurgery letter" signed by the claimant which indicated that the carpal tunnel surgery would cost $1,100.00 and that the claimant would be responsible for all amounts not paid by insurance.

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. Gee v. Liberty Mutual Fire Insurance Co., 765 S.W.2d 394 (Tex. 1989). 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 which had some support in the medical evidence. There was, however, conflicting medical evidence. Claimant had the burden to prove he was injured in the course and scope of his 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 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 timely 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 report an injury to the employer until August 20, 1999. There was conflicting evidence concerning when the claimant first reported an injury, but it was the province of the hearing officer to resolve the conflicts in the evidence. The hearing officer could believe the testimony of Mr. R over that of the claimant. The hearing officer also found no good cause for late reporting of the claimant's _____, injury. Given that the claimant relies upon his contention on appeal that he timely reported the injury rather than had good cause for reporting it late, we find no basis for overturning the hearing officer's finding of no good cause.

The Appeals Panel in Texas Workers' Compensation Commission Appeal No. 92273, decided August 7, 1992, set forth the four-prong conjunctive test stated in Bocanegra v. Aetna Life Insurance Company, 605 S.W.2d 848 (Tex. 1980) (hereinafter Bocanegra) concerning election of remedies as follows:

> The election doctrine . . . may constitute a bar to relief when (1) one successfully exercises an informed choice (2) between two or more remedies, rights, or states or facts (3) which are so inconsistent as to (4) constitute manifest injustice.

The Appeals Panel has also noted that the election of remedies doctrine is not a favored one and that its scope should not be extended. Texas Workers' Compensation Commission Appeal No. 93155, decided April 14, 1993. In the present case, the hearing officer fails to make findings concerning all four prongs of the Bocanegra test. There is insufficient evidence in the record to support that all four of these prongs were met in the present case. We therefore reverse the decision of the hearing officer in regard to the election of remedies issue and render a new decision that the claimant was not barred from pursuing workers' compensation benefits because of an election of remedies.

Finally, 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).

We affirm the decision of the hearing officer in regard to his resolution of the injury, timely report of injury and disability issues. In regard to the election of remedies issue, we reverse and render a new decision that the claimant is not barred from pursuing workers' compensation benefits because of an election of remedies.

Gary L. Kilgore
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

CONCUR IN THE RESULT:

Joe Sebesta

Appeals Judge