

APPEAL NO. 000634

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 October 28, 1999, and a second session of the CCH was held on January 21, 2000, with the record closing on February 11, 2000. The issues at the CCH were whether the appellant (claimant herein) sustained a compensable injury on _____; whether the claimant timely reported the injury to her employer and, if not, whether good cause existed for not timely reporting; and whether the claimant had disability. The hearing officer determined that the claimant did not sustain a compensable injury; that she failed to timely report her injury to her employer; and that she did not have disability. The claimant appeals, requesting that we reverse the hearing officer=s decision and render a decision in her favor. The respondent (carrier herein) responds, urging affirmance.

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 in some detail in her decision. We adopt the following statement of the evidence from the decision of the hearing officer:

The Claimant testified that she worked as a packer at [employer] on _____ with duties of weighing and packing Portobelo mushrooms. According to her testimony, _____ had been a long workday for her, and at approximately 9:00 p.m., she first began feeling left shoulder and neck pain and itching@ due to the repetitive reaching involved in her work. The Claimant testified that she worked the remainder of the shift without reporting an injury. She testified that she did not go to work on January 6, 1999 because she was sick with flu. She testified that she returned to work on January 7, 1999 and told a supervisor, [Mr. H], of her work-related injury. According to her testimony, the Claimant again reported the injury to [Mr. H] on January 12, January 14, and February 18, 1999.

The Claimant went to the [clinic] on January 13 ,1999 complaining of left shoulder/arm pain for the previous two to three weeks that had become worse over the previous three days. [Dr. A], who examined the Claimant on January 13, 1999, released her to return to light duty work on January 14, 1999 with a restriction on the use of her left arm while in a sling for one week. The Claimant returned to work on January 14, but upon giving [employer] the light duty slip from [Dr. A], [employer] informed the Claimant that no light duty was available, according to the Claimant=s testimony. The Claimant testified that she has not worked since January 14, 1999. She began treatment with [Dr. P], D.C. on January 28, 1999, who placed her in an off work status.

If ever a case turned on the issue of credibility, this case is such a case. Several conflicts exist in the evidence and several facts were vigorously contested at the hearing, from whether the Claimant's arm/neck was actually injured at work; to whether the Claimant's complaints of arm pain were, in reality, her attempts to avoid being cross-trained to work on other product lines at [employer]; to whether the Claimant reached to shoulder level vs. waist level in wrapping and packing Portobelo mushrooms; to whether the Claimant, in reporting her arm problem to [employer] prior to February 12, 1999, actually denied that the problem was work-related; to whether, in connection with some of the Claimant's conflicting histories to doctors, the discrepancies (between her testimony and what is in their records) are truly due to a language barrier. This list is not exhaustive.

After a review of the entire record, it is determined that the credible evidence showed, among other things, that: 1) the Claimant did not injure her left arm/neck at work on or about _____, and she informed [Mr. H] and others at work prior to February 12, 1999 that her condition was not work-related; 2) the Claimant apparently was not interested in working on the bulk line or the pre-pack line at work, which are more demanding than the slow pace of the Portobelo line, and she lodged complaint(s) of arm pain in January 1999 to avoid being assigned duties on those two lines; 3) working on the Portobelo line generally involves reaching at waist level, not shoulder level; 4) when the Claimant first sought treatment for her arm on January 13, 1999, she complained of pain that had been preexisting as of _____, and she did not mention to [Dr. A] any history that related her condition to her work activity on _____; 5) when the Claimant first saw [Dr. P] on January 28, 1999, and at the Benefit Review Conference on August 30, 1999, she gave information (namely, that she reported a _____ injury to [Ms. T] at [employer] on _____) that is in sharp conflict with her testimony at the [CCH] (namely, that she did not inform anyone [emphasis in original] at [employer] of a _____ injury before January 7, 1999); 6) the Claimant also told [Dr. P] on January 28, 1999 that she did not work on January 6, 1999 because of the pain from her injury, but the evidence showed that she called in sick on January 6, 1999 solely because she had the flu; 7) [employer] was not notified that the Claimant was claiming an injury due to work until February 12, 1999; and 8) the discrepancies between the Claimant's prior statements and her testimony are not due to a language barrier or inaccurate translation. For the reasons stated, the Claimant did not meet her burden of proof on compensability or disability.

ALLEGED VIOLATION(S) OF THE RULE

The Claimant sought to admit the testimony of her sister, [Ms. R], to state that one or more of the Carrier's witnesses allegedly violated the rule on October 28,

1999 (see Texas Rules of Civil Procedure, Rule 267; Texas Rules of Civil Evidence, Rule 614). The Carrier's objection to this testimony was sustained based on the Claimant's failure to exchange [Ms. R's] identity as a person with knowledge of relevant facts prior to January 21, 2000. If the Claimant wishes to present this information to the Compliance and Practices Division of the Texas Workers' Compensation Commission [Commission] for investigation into whether an administrative violation was committed, she is free to contact that division. The Carrier's witnesses were credible, and those who were asked testified that no improper communications, per the rule, occurred on or after October 28, 1999.

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 contested case 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 which also found support in the medical evidence, including the report of Dr. S, a medical examination doctor chosen by the Commission. 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. 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 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. 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).

In the present case, the hearing officer found as a matter of fact that the claimant did not report a work-related injury to her employer prior to February 12, 1999. The hearing officer found that prior to this time the claimant had complained of left arm/shoulder pain to some of her supervisors but had not stated that it was work related. The claimant testified that she did timely report that she suffered a work-related injury. It was the province of the hearing officer to resolve these conflicts in the evidence. Nor was the hearing officer bound to accept evidence that the office of the claimant's doctor sent the employer information concerning her injury by facsimile transmission when the employer denied receiving this information and there was no facsimile transmission confirmation sheet in evidence. Applying the standard of review described above, we find sufficient evidence to support the hearing officer's determination that the claimant did not timely report her injury.

The claimant complains on appeal that her sister was not allowed to testify concerning alleged violations of the Rule of Sequestration by the carrier's witnesses. While we are not entirely persuaded that the identity of a witness who is called to testify concerning matters that arose during the course of a CCH could or must have been disclosed prior to the CCH, we note that each of the carrier's witnesses who were asked if a violation of the Rule of Sequestration occurred denied it and the hearing officer stated that she found this testimony credible. Under these circumstances, we find any error in not allowing the claimant's sister to testify concerning this matter was harmless error. Hernandez v. Hernandez, 611 S.W.2d 732 (Tex. Civ. App.-San Antonio 1981, no writ).

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).

The decision and order of the hearing officer are affirmed.

Gary L. Kilgore
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Tommy W. Lueders
Appeals Judge