APPEAL NO. 001424

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on May 22, 2000. The hearing officer determined that the respondent (claimant herein) sustained a compensable repetitive trauma injury; that the date of injury was _____; that although the claimant failed to report such injury to the employer within 30 days of the occurrence of the injury, she had good cause which remained in effect until she reported her injury to the employer on or about April 19, 1999; that the claimant had disability; and that the appellant (carrier herein) did not waive its right to dispute this claim on the basis of untimely reporting. The carrier appeals the hearing officer's resolution of the timely report of injury and disability issues. The carrier argues that the evidence does not support the hearing officer's finding that the claimant reported her injury on April 19, 1999, and that the claimant had good cause for her delay in reporting her _____, injury to her employer. The appeals file does not contain a response from the claimant.

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 claimant testified that she was employed as an endoscopy assistant with the employer for approximately four and one-half years and indicated that her duties in this position required her to look over her right shoulder in order to observe the monitor for a total of four to six hours per day. In _____, the claimant began to notice some symptoms which she later realized were due to the awkward body mechanics required by her employment; however, the claimant stated that at that time, her symptoms were not serious; that she was not sure that they were job related; and that she did not make an injury report at that time for that reason. The claimant testified that she initially believed that she had sustained carpal tunnel syndrome from gripping the scope and began wearing a wrist brace, but she stated that she was unaware of any pathology in her neck until after she consulted Dr. H, a chiropractor recommended by a coworker in April 1999. The claimant testified that she reported a job injury to her employer on April 19, 1999.

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 hearing officer found as a matter of fact that the claimant did not report her injury to the employer until April 19, 1999. The carrier argues that the evidence failed to establish the claimant reported an injury on this date. 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). Applying this standard, we find there was sufficient evidence to support the finding of the hearing officer that the claimant reported her injury on April 19, 1999.

The carrier argues that even if the claimant did report her injury on April 19, 1999, such report was more than 30 days after her date of injury of _____, and that the hearing officer erred in finding the claimant had good cause not to report her injury timely. We have held that good cause for failure to timely report an injury can be based upon the injured worker's not believing the injury is serious and his initial assessment of the injury as being "trivial," but this belief must be based upon a reasonable or ordinarily prudent person standard. Texas Workers' Compensation Commission Appeal No. 91030, decided October 30, 1991; Texas Workers' Compensation Commission Appeal No. 93184, decided April 29, 1993; Baker v. Westchester Fire Insurance Co., 385 S.W.2d 447 at 449 (Tex. Civ. App.-Houston 1964, writ ref'd n.r.e.). Good cause exists for not giving notice until the injured worker realizes the seriousness of his injury. Baker. In the present case, the hearing officer found that the claimant did not believe her injury was serious until April 19, 1999, and concluded the claimant had good cause for failing to timely report her injury. We

find sufficient evidence to support the hearing officer's finding that the claimant did not think her injury was serious and no abuse of discretion in the hearing officer determining the claimant had good cause for failing to timely report her injury.

The carrier's argument that the claimant did not have disability is premised on its argument that it should be relieved of liability for the claimant's failure to timely report her injury. Having found no error in the hearing officer's finding that the carrier is not relieved of liability, we likewise find no error in her finding of disability.

The decision and order of the hearing officer are affirmed.

Gary L. Kilgore
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Robert W. Potts
Appeals Judge