

APPEAL NO. 001509
FILED AUGUST 9, 2000

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 June 8, 2000, in _____, Texas, with _____ presiding as hearing officer. She determined that the respondent (claimant herein) sustained a compensable injury; that the claimant had disability from _____, to _____, and from _____, to _____; and that the appellant (carrier herein) is not relieved from liability under Section 409.002 because of the claimant's failure to timely notify the employer of the injury. The carrier appeals the hearing officer's determinations of injury, timely report of injury and disability as being contrary to the evidence. The claimant argues that the findings and decision of the hearing officer are supported by the evidence.

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.

Both parties state on appeal that they generally agree with the hearing officer's Statement of the Evidence in which she summarizes the evidence as follows:

While working as a counselor for the Employer, which operates a facility permitting persons in need of treatment to reside in a group home, the Claimant was confronted during a meal by a resident holding a chair above his head and threatening to throw the chair at another resident. The Claimant reached across the table and grasped the chair legs with both hands, preventing the threatened act. She convinced the resident to lower the chair. Thereafter, the Claimant began to experience headaches and neck pain, but health care providers told he [sic] that her problems were due to arthritis. After reviewing the results of an MRI from a [(city 1, state)], facility, the Claimant determined that the herniated disc in her neck was probably the result of grasping the chair on _____; she made this determination while she was en route to [(city 2)] on a flight from [(state)]. Prior to the date of injury, she had experienced no problems with her neck. She attempted to report the injury that day, _____, but was unable to speak with a supervisor until _____, because she had to make an appointment. Surgery was performed on October 20, 1999, and the Claimant returned to work on March 20, 2000.

The carrier specifically challenges the following findings of fact and conclusions of law in the hearing officer's decision:

FINDINGS OF FACT

4. As a result of grasping the chair, the Claimant injured her neck, but she was unaware that grasping the chair caused an injury because the healthcare provider she consulted stated that she was suffering from arthritis, an ordinary disease of life.

* * * *

7. A reasonably prudent person in the same situation as the Claimant would not have realized that she had sustained a cervical injury on _____, until she learned of the results of an MRI, discussed those results with a doctor, and contemplated her activities to ascertain the probable cause.
8. The Claimant did not report her injury to the Employer in the thirty (30) days following _____, but she had good cause for failing to report it timely as she did not know she was injured.

CONCLUSIONS OF LAW

3. The Claimant sustained a compensable injury on _____.
4. The Carrier is not relieved from liability under Texas Labor Code, Section 409.002 because of Claimant's failure to timely notify her Employer pursuant to Section 409.001.
5. The Claimant had disability resulting from the injury sustained on _____, beginning _____, and ending _____, and beginning _____, and ending _____.

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. 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). In the present case, the carrier's essential argument is that the evidence that the incident at work on _____, caused the claimant's injury is too attenuated and not sufficiently supported by the medical evidence. It was up to the hearing officer to look at the

evidence as a whole, including the testimony of the claimant, to make a factual determination as to whether an injury occurred.

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 of review, we find sufficient evidence 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. 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 within 30 days. The hearing officer found that the claimant did have good cause for her failure not to timely report her injury. 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 claimant realized she was having physical problems, but did not relate them to an injury at work until _____. The claimant then reported an injury as soon as she was able to meet on _____, with the proper authority at the employer to whom injuries were to be reported. Under these circumstances, we find no abuse of discretion by the hearing officer in determining the claimant had good cause for not timely reporting her injury. We note that in Texas Workers' Compensation Commission Appeal No. 94875, decided August 19, 1994, and in Texas Workers' Compensation Commission Appeal No. 941187, decided October 21, 1994, we stated that reliance on statements of a physician could be the basis for a determination of good cause.

As far as the issue of disability is concerned, the primary thrust of the carrier's argument in regard to disability is that the claimant did not have disability because she did not suffer a compensable injury and because the carrier was relieved of liability because of the claimant's failure to timely report an injury. Having affirmed the hearing officer's findings of injury and of good cause for timely reporting, we reject these arguments. We note, as the claimant points out in her response, that the hearing officer's finding of the periods of disability is supported by the claimant's testimony. Disability is a question of fact to be determined by the hearing officer and may be based on the testimony of the claimant alone.

The decision and order of the hearing officer are affirmed.

Gary L. Kilgore
Appeals Judge

CONCUR:

Robert E. Lang
Appeals Panel
Manager/Judge

Tommy W. Lueders
Appeals Judge