APPEAL NO. 001710

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 28, 2000. The hearing officer determined that the respondent (carrier herein) is relieved of liability because the appellant (claimant herein) did not timely report her injury and did not have good cause for this failure. Based on this, the hearing officer determined that the claimant's injury was not compensable and the claimant did not have disability. The claimant appeals arguing that she did timely report her injury to the supervisor under whom she was working and was told by this supervisor that if she reported the injury to the employment service by whom she was employed she would be fired. The carrier argues that the claimant merely reargues the evidence from the hearing, asking us to reweigh 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.

The claimant began employment with the employment service on November 28, 1999. The claimant was assigned to work at a tortilla factory. The claimant testified that she injured her right shoulder on _____, while lifting a box of tortillas. The hearing officer found that this injury took place and neither party has appealed that finding. The claimant testified that she informed Mr. R, her immediate supervisor at the tortilla factory, of her injury on _____. The claimant testified that Mr. R told her not to report the injury to the employment service and that if she did she would be fired. Mr. R testified and denied the claimant told him she was injured. A personnel manager for the employment service testified that the first report the employer received of the claimant's injury was on January 6, 2000.

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 to the employer that her shoulder condition was work related until _____, which was more than 30 days after her injury. The hearing officer also found the claimant did not have good cause for failing to report her injury and the employer did not have actual notice. 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 no grounds for reversal. The hearing officer clearly believed the testimony of Mr. R, which he specifically cites as being credible in his decision, over that of the claimant. It was his province to determine the credibility of the witnesses.

The decision and order of the hearing officer are affirmed.

Gary L. Kilgore
Appeals Judge

CONCUR:

Alan C. Ernst
Appeals Judge

Thomas A. Knapp
Appeals Judge