APPEAL NO. 002055

Following a contested case hearing (CCH) held on July 20, 2000, pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act), the hearing officer, resolved the disputed issue by determining that the appellant (claimant herein) sustained a low back injury; that the date of injury was _____; that the respondent (carrier herein) was relieved from liability because the claimant failed to timely report her injury; and that the claimant did not timely file a claim for compensation with the Texas Workers' Compensation Commission (Commission) without good cause for failing to do so. The claimant appeals, contending that she was injured on _____, and reinjured on _____. She contended that she timely reported her injury and timely filed her claims for compensation so the carrier should not be relieved of liability. The carrier responds that the decision of the hearing officer was sufficiently 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.

The hearing officer summarizes the evidence in her decision and we adopt her summary of the evidence. We will only briefly touch on the evidence germane to the appeal. This is primarily the evidence concerning the date of the claimant's injury as the issues of timely notice and timely filing of claim turn on the issue of the date of injury. The claimant testified that she initially felt pain in her lower back on _____, when she was moving some tables and receiving merchandise at work. The claimant sought medical treatment in November 1998 and again in March of 1999. The claimant was diagnosed with a herniated disc at L5-S1. The claimant was off work from March 31, 1999, through May 3, 1999. The claimant returned to work on Mary 3, 1999, and continued working through October 8, 1999. The claimant testified that she reinjured herself and sustained a new aggravated injury at work on _____, and again sought medical attention. An MRI showed the claimant had a herniated disc at L5-S1. The employer contended that the claimant did not report an injury on the job until after the _____, incident. The claimant contended she reported it within 30 days of _____. The claimant first filed an Employee's Notice of Injury or Occupational Disease & Claim for Compensation (TWCC-41) with the Commission on November 8, 1999.

The date of injury is generally a question of fact for the hearing officer to decide. Texas Workers' Compensation Commission Appeal No. 94534, decided June 13, 1994. 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).

The hearing officer found that the date of the claimant's injury was _____. Applying the standard of review set out above, we do not find this to be contrary to the overwhelming evidence. 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.).

Given our affirmance of the hearing officer's date of injury determination, we find no error in her relieving the carrier of liability for not timely reporting her injury to her employer and for not timely filing a claim with the Commission. 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 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 claimant had argued at the CCH that the employer had received actual notice of an injury in October 1998 from receiving medical records. The hearing officer points out that the medical records on which the claimant relies did not indicate that the claimant's back problems were work-related and there was no showing

that a medical report that did relate the claimant's back problems to work was actually received by the employer.

Section 409.003 provides that a claimant must file a claimant with Commission within one year of an injury and Section 409.004 provides that, if a claimant fails to do so without good cause, the carrier is relieved of liability. With a date of injury of _____, evidence that the claimant did not file a TWCC-41 with Commission until November 8, 1999, and no evidence of good cause, we find no error in the hearing officer's relieving the carrier of liability due the claimant's failure to timely file a claim.

Finally, in light of the fact the carrier is relieved of liability, we find no error in the hearing officer's not finding disability as disability must be based upon a compensable injury.

The decision and order of the hearing officer are affirmed.

Gary L. Kilgore
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Judy L. Stephens
Appeals Judge