

APPEAL NO. 010985  
FILED JUNE 13, 2001

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 April 9, 2001. With regard to the issues before her, the hearing officer concluded that the appellant (claimant herein) did not sustain a compensable injury on \_\_\_\_\_; that the claimant failed to timely report an injury to the employer without good cause for failing to do so; and that the claimant did not have disability. The claimant argues that these determinations were contrary to the evidence. The respondent (carrier herein) replies that the hearing officer's decision 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 claimant testified that he injured his right shoulder on \_\_\_\_\_, while working as a part-time assistant maintenance helper, when he was throwing heavy brown bags filled with copies of magazines. The claimant testified that he reported his injury to his supervisor on October 19, 2000. The claimant testified that he had disability from October 19, 2000, through the date of the CCH. The claimant presented medical reports into evidence which tended to support his claims of injury and disability. The claimant's supervisor, who was the brother of the claimant's ex-wife, testified that the claimant did not report an injury to him, but resigned from his employment on October 19, 2000. The supervisor testified that the employer did not receive notice of the injury until it received a letter from the claimant dated December 5, 2000, from the claimant was received by the employer.

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. Gee v. Liberty Mutual Fire Insurance Co., 765 S.W.2d 394 (Tex. 1989). 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. The claimant had the burden to prove he was injured in the course and scope of his 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. The hearing officer states that she found the claimant's testimony as to injury not credible in light of inconsistencies between the claimant's testimony and his prior recorded statements. On appeal, the claimant argues that his contention that he was injured while on the job is supported by medical evidence. However, the opinion of the doctors as to the cause of the injury was clearly based upon the history provided by the claimant. The history of an incident given by a patient to a doctor is not proof of the truth of the patient's statements to the doctor. Texas Employers' Insurance Association v. Butler, 483 S.W.2d 530, 534 (Tex. Civ. App.-Houston [14th Dist.] 1972, writ ref'd n.r.e.). It was the province of the hearing officer to determine what weight to give to the medical evidence as well as to the testimony of the claimant.

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 (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). 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 his shoulder condition was work related until December 5, 2000. This was not within 30 days of the injury. The claimant does not argue either good cause or actual notice. He does argue that he timely reported his injury. There is conflicting evidence from the supervisor as to whether the claimant timely reported the injury, and it was up to the hearing officer to resolve this conflict. Under the standard of

review discussed of above, we cannot say that the hearing officer's decision in this regard was incorrect as a matter of law.

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 hearing officer's decision and order are affirmed.

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Gary L. Kilgore  
Appeals Judge

CONCUR:

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Thomas A. Knapp  
Appeals Judge

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Robert W. Potts  
Appeals Judge