

APPEAL NO. 030134
FILED MARCH 5, 2003

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 December 11, 2002. The hearing officer determined that the respondent (claimant herein) sustained a compensable injury; that the appellant (carrier herein) is not relieved of liability pursuant to Section 409.002; and that the claimant did not have disability. The carrier appeals, contending that the claimant's injury was not compensable pursuant to 406.032(1)(D) because it arose out of the claimant's voluntary participation in an off-duty recreational, social or athletic activity. The carrier also contends that the hearing officer erred in concluding that the carrier was not relieved of liability pursuant to Section 409.002. The claimant responds, arguing that the decision of the hearing officer should be affirmed.

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 carrier contends that the hearing officer did not make any findings concerning whether the claimant was engaged in a voluntary off-duty athletic activity at the time of his injury. The hearing officer found that the claimant's injury was compensable, implicitly rejecting the carrier's position that it was relieved of liability. More importantly, in his discussion the hearing officer makes absolutely clear that the "pivotal issue in this case" was whether or not the claimant's participation in the flag football practice in which he was injured was made mandatory by the employer or was voluntary. The hearing officer discusses the evidence in detail and explains why he believed that the evidence, while conflicting, convinced him that the claimant's participation in the flag football game in which he was injured was mandatory, not voluntary. In its appeal the carrier discusses the evidence supporting its position that the claimant's participation in the flag football game was voluntary. 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 error in the hearing officer's determining that the claimant's participation in the flag football game was mandatory and concluding that the claimant's injury was compensable.

Nor do we find merit in the carrier's argument that the hearing officer erred in not finding it was relieved of liability pursuant to Section 409.002. 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). 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 at the time of the claimant's injury, one of the claimant's managers was present, saw the circumstances surrounding the injury, and discussed with the claimant the claimant's intention to seek medical attention for the injury. This factual finding sufficiently supports the hearing officer's legal conclusion that the carrier was not relieved of liability pursuant to Section 409.002.

The decision and order of the hearing officer are affirmed.

The true corporate name of the insurance carrier is **AMERICAN HOME ASSURANCE COMPANY** and the name and address of its registered agent for service of process is

JIM MALLOY
8144 WALNUT HILL LANE, SUITE 1600
DALLAS, TEXAS 75231.

Gary L. Kilgore
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Terri Kay Oliver
Appeals Judge