APPEAL NO. 031613
FILED AUGUST 13, 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 (CCH) was held on May 20, 2003. The hearing officer decided that the appellant (claimant herein) did not sustain a compensable injury in the form of an occupational disease; that the date of the claimed injury was _____; that the respondent (carrier herein) is relieved of liability because the claimant failed to timely notify his employer of the claimed injury; that the carrier has not waived the right to dispute the compensability of the claimed injury; and that the claimant has not had disability. The claimant appeals, arguing that the hearing officer; erred in not finding a compensable injury; erred in not finding that the date of injury was (alleged date of injury); erred in not finding that either the claimant timely notified his employer of the injury or had good cause for not timely reporting his injury; erred in not finding that the claimant did not have disability; erred in not admitting all the claimant's exhibits; and erred in admitting the carrier's job analysis video. The carrier responds that the hearing officer did not commit error and that his decision 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 claimant contended that he sustained a repetitive trauma injury on (alleged date of injury), from repetitively pushing packages onto slides from a conveyor belt. The claimant testified that he reported this injury on (alleged date of injury), to his supervisor. The claimant alleges that as result of his injury he had disability beginning on (alleged date of injury), and continuing through the date of the CCH. The carrier argues that the claimant's job was not sufficiently repetitive to cause a repetitive trauma injury and that it was more likely that the claimant was injured participating in the martial arts. The carrier states that it first received written notice of injury on December 10, 2002, and there is evidence that the carrier filed a dispute of the claim with the Texas Workers' Compensation Commission (Commission) on December 13, 2002.

EVIDENTIARY RULINGS

The hearing officer admitted the carrier's job analysis video, which was not timely exchanged, finding good cause for the lack of timely exchange. The hearing officer also admitted some of claimant's exhibits, which were not exchanged, also finding good cause. However, regarding other of the claimant's exhibits, which were not exchanged, the hearing officer found no good cause for not timely exchanging them and excluded them from evidence. We have frequently held that to obtain reversal of a judgment based upon the hearing officer's abuse of discretion in the admission or exclusion of evidence, an appellant must first show that the admission or exclusion was in fact an

abuse of discretion, and also that the error was reasonably calculated to cause and probably did cause the rendition of an improper judgment. Texas Workers' Compensation Commission Appeal No. 92241, decided July 24, 1992; *see also* Hernandez v. Hernandez, 611 S.W.2d 732 (Tex. Civ. App.-San Antonio 1981, no writ). We find no abuse of discretion in the hearing officer's application of the exchange of evidence rules and perceive no reversible error in the evidentiary rulings in question.

CARRIER WAIVER

Section 409.021(a) requires that a carrier act to initiate benefits or to dispute compensability within seven days of first receiving written notice of an injury or waive its right to dispute compensability. *See* Continental Casualty Company v. Downs, 81 S.W.3d 803 (Tex. 2002); Texas Workers' Compensation Commission Appeal No. 030380-s, decided April 10, 2003. The hearing officer found no carrier waiver due to the fact that the carrier received written notice of injury on December 10, 2002, and disputed compensability on December 13, 2002.

INJURY

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). In light of the conflicting evidence concerning injury in the record, and applying this standard, we cannot say the hearing officer erred as a matter of law in finding no repetitive trauma injury.

DATE OF INJURY

Under Section 401.011(34), an occupational disease includes repetitive trauma injuries, which is what the claimant is alleging here. The date of an occupational disease is a question of fact. Texas Workers' Compensation Commission Appeal No. 94415, decided May 23, 1994. We stated in Texas Workers' Compensation Commission Appeal No. 992783, decided January 26, 2000, "[t]he date is somewhat of a 'moving target,' but need not be as early as the first symptoms nor as late as a definitive diagnosis." Applying our standard of review set out above, we find sufficient evidence to support the hearing officer's factual determination concerning the date of injury. 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.).

TIMELY REPORT 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 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).

In the present case, the issue of timely notice really turns on the issue of the date of the injury. The claimant contends that his date of injury was the date he reported an injury to his employer--(alleged date of injury). However, the hearing officer found that the date of the alleged injury was _____, a date more than 30 days prior to the date the claimant alleged he reported an injury. Having affirmed the hearing officer's date of injury determination, we likewise affirm the hearing officer's determination that the claimant failed to timely report his injury. While the claimant argues that even if he did not report his injury within 30 days that he had good cause not to do so, we do not find that the hearing officer abused his discretion by not finding the claimant had good cause for failing to timely report his injury. Thus, we affirm the hearing officer's determination that the carrier is relieved liability for failing to timely report his injury.

DISABILITY

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).

We affirm the decision and order of the hearing officer.

The true corporate name of the insurance carrier is **SENTRY INSURANCE A MUTUAL COMPANY** and the name and address of its registered agent for service of process is

TREVA DURHAM
1000 HERITAGE CENTER CIRCLE
ROUND ROCK, TEXAS 78664.

_____
Gary L. Kilgore
Appeals Judge

CONCUR:

_____
Judy L. S. Barnes
Appeals Judge

_____
Elaine M. Chaney
Appeals Judge