

APPEAL NO. 032567
FILED NOVEMBER 19, 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 August 27, 2003. The hearing officer decided that the appellant (claimant herein) did not sustain a repetitive trauma injury; that the date of the claimed injury was _____, the date the claimant knew or should have known that the claimed injury was related to her employment; and that the respondent (carrier herein) is relieved of liability because the claimant failed to timely notify her employer of the claimed injury. 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); and erred in not finding that the claimant timely notified her employer of her injury. 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 she sustained a repetitive trauma injury on (alleged date of injury), from repetitively bending over hampers to move mail into tubs, lifting the tubs of mail to a conveyor belt, and pushing tubs along the conveyor belt. The claimant testified that she reported this injury on (alleged date of injury), to her supervisor. The carrier argues that the claimant was not injured on the job. The carrier admits the claimant reported an injury on (alleged date of injury), but argues that the claimant had back pain more than 30 days prior to the date so that if she did have an injury, she did not timely report such an injury.

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 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 to 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 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).

In the present case, the issue of timely notice really turns on the issue of the date of the injury. The claimant contends that her date of injury was the date she reported an injury to her 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 she 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 her injury. Thus, we affirm the

hearing officer's determination that the carrier is relieved of liability because the claimant failed to timely report her injury.

We affirm the decision and order of the hearing officer.

The true corporate name of the insurance carrier is **SECURITY INSURANCE COMPANY OF HARTFORD** and the name and address of its registered agent for service of process is

**CORPORATION SERVICES COMPANY
800 BRAZOS
AUSTIN, TEXAS 78701.**

Gary L. Kilgore
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Margaret L. Turner
Appeals Judge