

APPEAL NO. 041327
FILED JULY 23, 2004

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 May 11, 2004. The hearing officer decided that the appellant (claimant herein) did not sustain a compensable injury either on (alleged date of injury) or _____; that the date of the claimed injury was (alleged date of injury); that the respondent (carrier herein) is relieved of liability because the claimant failed to timely notify his employer of the claimed injury without good cause; and that the claimant has not had disability. The claimant appeals, arguing that these determinations are contrary to the evidence. The carrier responds that the hearing officer did not commit error and that her 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 an injury when he fell at work on _____. There was evidence that the claimant had previously stated his injury took place on other dates. The hearing officer determined that the date of the alleged injury was (alleged date of injury). There was evidence that the claimant first reported an injury to his employer on June 2, 2003. The hearing officer states that she did not find the claimant's testimony persuasive because he had made contradictory statements and he had problems recalling and relating information.

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 injury.

DATE OF INJURY

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 his date of injury was _____. However, the hearing officer found that the date of the alleged injury was (alleged date of injury), a date more than 30 days prior to the date the claimant 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 because he initially believed he was suffering from a kidney infection. We do not find that the hearing officer abused her discretion by finding the claimant did not have good cause for failing to timely report his injury. Thus, we affirm the hearing officer's determination that the carrier is relieved of liability due to the claimant's failure 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 **AMERICAN HOME ASSURANCE COMPANY** and the name and address of its registered agent for service of process is

**CORPORATION SERVICE COMPANY
800 BRAZOS, SUITE 750, COMMODORE 1
AUSTIN, TEXAS 78701.**

Gary L. Kilgore
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Edward Vilano
Appeals Judge