APPEAL NO. 950154

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 January 5, 1995, in (city), Texas, with(hearing officer (hearing officer) presiding as hearing officer. The issues at the CCH were injury, timely reporting of the injury to the employer, and disability. The hearing officer found that the appellant (claimant herein) did not suffer a compensable injury, failed to report his alleged injury to his employer within 30 days without good cause for not doing so, and did not have any period of disability as a result of the alleged injury. The claimant appeals contending that he was injured, reported his injury to his supervisor and has disability. He argues that witness statements and a doctor's report supports his position. The respondent (carrier herein) files a response to the claimant's request for review, contending that the findings of the hearing officer were 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, who worked on a loading dock testified that he was injured carrying a heavy box on (date of injury). (Mr. J), a co-worker of the claimant, testified that he witnessed the injury as well as the claimant reporting the injury to their supervisor, (Mr. K). Two other co-workers signed sworn statements in which they stated they overheard the claimant report his injury to Mr. K on (date of injury). The claimant testified that the carrier delayed authorizing medical treatment and would authorize only one visit. The claimant testified that once the visit was authorized he went to (Dr. S), who diagnosed "cervical strain and lumbosacral strain" in his narrative report. The claimant testified that Dr. S told him not to do a lot of lifting, bending or stooping, although Dr. S's report itself does not mention any restrictions. The claimant testified that prior to seeing Dr. S he knew he was unable to work based on his experience from his previous back injury in 1992.

On cross-examination the claimant admitted that he applied for unemployment benefits, stating that he was discharged when he called in sick. The employer responded that the claimant was absent without notifying the employer or having an excuse. The claimant's application for unemployment benefits was denied. Mr. K testified that the claimant did not report an injury to him. The employer stated that it first received notice of the alleged injury on August 11, 1994.

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 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 and we cannot say that this was against the overwhelming weight of the evidence. The hearing officer specifically stated that she found the testimony of the claimant not credible because it was vague and internally inconsistent. 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 matter of law in finding that the claimant failed to meet this burden. This is so even though, were we fact finders, we 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.).

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). To be effective, notice of injury needs to inform the employer of the general nature of the injury and the fact it is job related (emphasis added). DeAnda v. Home Ins. Co., 618 S.W.2d 529, 533 (Tex. 1980). Thus where the employer knew of a physical problem but was not informed it was job related, there was not notice of injury. Texas Employers' Insurance Association v. Mathes, 771 S.W.2d 225 (Tex. App.-El Paso 1989, writ denied). 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 the claimant did not report to the employer that he had a work related injury on (date of injury), until August 11, 1994. There is evidence that the employer knew the claimant was alleging he was "sick" prior to August 11, 1994, but this was not sufficient to show that the employer had notice of injury.

The 1989 Act provides that the Texas Workers' Compensation Commission (Commission) may determine that good cause exists for failure to provide notice of injury to an employer in a timely manner. Section 409.002(2). We have held that good cause for failure to timely report an injury can be based upon the injured workers' not believing the injury is serious and his initial assessment of the injury as being "trivial," but this belief must be based upon a reasonable or ordinarily prudent person standard. Texas Workers' Compensation Commission Appeal No. 91030, decided October 30, 1991; Texas Workers' Compensation Commission Appeal No. 93184, decided April 29, 1993; Baker v. Westchester Fire Insurance Co., 385 S.W.2d 447 at 449 (Tex. Civ. App.-Houston 1964, writ ref'd n.r.e.). Good cause exists for not giving notice until the injured worker realizes the seriousness of his injury. Baker, 385 S.W. 2d at 449. Here there was no evidence that the claimant trivialized his injury or any other evidence of good cause.

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 decision and order of the hearing officer are affirmed.

Gary L. Kilgore
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Alan C. Ernst
Appeals Judge