APPEAL NO. 950238

This appeal is brought pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on January 19, 1995, in (city), Texas, with (hearing officer) presiding as hearing officer. The appellant (claimant herein) requests review of the following determinations of the hearing officer: that the claimant was not injured in the course and scope of her employment on (date of injury 1); that the claimant failed to timely notify the respondent (city) of her alleged injury; that the claimant does not have disability. The determination that the city timely disputed the compensability of this claim has not been appealed and has become final. Section 410.169. No response has been filed.

DECISION

We affirm.

The claimant worked for the city as a home care provider. Her work hours were Monday through Friday from 8:00 a.m. to noon and then from 6:00 p.m. until 10:00 p.m. Her duties included bathing, dressing, and house cleaning only for (Ms. C) who has cerebral palsy. The claimant testified that at approximately 11:45 a.m. on (date of injury 1), as she transferring Ms. C from a wheel chair onto a toilet chair, they both fell to the floor and through the wall. As a result of this fall, the claimant said she injured her head, neck, back and left arm and is suffering from memory loss. She said she was off work for about a week and that later her back hurt so badly that she called emergency medical personnel to take her to the hospital. She said that she then also reported her injury to her supervisor at the time, (Ms. H). She stated that she tried to keep working until (date of injury 2), when her back "went out" trying to pick up Ms. C. This injury of (date of injury 2) was not contested by the self-insured, and, according to the parties, benefits have been paid for this second injury.[1]

The claimant has not worked since (date of injury 2). She contended that as a result of her (date of injury 1), injury she is unable to do work. In closing argument, the ombudsman assisting the claimant stated that her position is that she requests benefits from February 21, 1994, the day benefits from the second injury were said to have stopped. The claimant's daughter also testified that the claimant can hardly do anything around the house because her back pain forces her to remain in bed most of the day. No medical records relating an inability to work to a (date of injury 1), injury were in evidence.

The self-insured does not dispute that the claimant fell on (date of injury 1), but asserts that the fall occurred between 12:30 and 1:00 p.m. which was after the claimant's work shift ended and for this reason was not in the course and scope of her employment.

[1]This injury of (date of injury 2), is the subject of Texas Workers' Compensation Commission Appeal No. 941477, decided December 14, 1994 (Unpublished). Apparently a typographical error, this decision refers to the date of injury as (date). The decision and order of the hearing officer which is reviewed in Appeal No. 941477 refers to an injury of (date of injury 2).

The claimant admitted that she had a separate agreement with Ms. C to occasionally stay past noon to assist with her feeding and to buy groceries. She was paid in cash for these additional services. The claimant was adamant that the fall occurred before her shift ended because she said the last thing she always did on her shift was to assist Ms. C to the toilet chair. In a transcription of a telephone conversation between an adjuster and the claimant on June 8, 1993, the claimant is recorded as saying she did not know what time the injury occurred.

On June 2, 1993, (Dr. A) in his initial medical report refers to the claimant's two injuries and states that the one on (date of injury 1), "was apparently not job-related as the patient seemed be [sic] on her own when a fall happened while [sic] she was trying to transfer a patient she took a fall against the wall of a bathroom and then down to the floor." The claimant testified that Dr. A "probably" obtained this information from her. She said that at a previous meeting between the claimant, Ms. H and another supervisor they all agreed to say the injury did not occur on city time so the city would not have to pay the landlord for the damage and this is why the claimant probably said the same thing to Dr. A.

Ms. H testified that she wrote a case entry for May 20, 1993, which was in evidence and which said the injury occurred between 12:30 and 1:00 p.m. According to Ms. H, the claimant called to tell her that both she and Ms. C were hurt at the time reported by Ms. H. Ms. H said she considered this to be a report on the patient, Ms. C, not on the claimant. She denied ever having a conversation with anyone about saying the injury did not occur on city time to keep the city from having to pay for the damaged wall.

(Ms. HW), the case worker for Ms. C and a supervisor, confirmed that she wrote a case entry for May 24, 1993, in which she states that the claimant telephoned to say she and Ms. C were going to call emergency services to go to a doctor. Ms. H wrote "[a]t the time of the call caseworker [Ms. HW] was not aware that the injury did not occur on City time." Ms. HW also wrote a case entry for June 1, 1993, which said, in part, that the claimant requested to see the City doctor "since the recurrence happened on City time." She testified that the word "recurrence" must have been suggested by the claimant. She said the (date of injury 2), injury was never disputed and that a report of injury would have been completed if she believed the claimant was also claiming a (date of injury 1), injury. She said she completed a "Payment of Compensation or Notice or Refused/Disputed Claim" (TWCC-21) on February 2, 1994, for a (date of injury 1), injury which she said the claimant told her about for the first time at a benefit review conference (BRC) conducted on January 19, 1994, in connection with the claimed (date of injury 2), injury. The grounds for disputing the claim were that the injury was not in the course and scope of employment and was not timely reported. An "Employer's First Report of Injury or Illness" (TWCC 1) for the (date of injury 1), injury was completed on January 21, 1994.

The claimant in a worker's compensation case has the burden to prove by a preponderance of the evidence that she sustained a compensable injury in the course and scope of her employment. Johnson v. Employers Reinsurance Corporation, 351 S.W.2d

936 (Tex. Civ. App.-Texarkana 1961, no writ). Whether an injury occurred as claimed is a question of fact for the hearing officer to decided and, in this case, could have been established by the testimony of the claimant alone, if found credible. Texas Workers' Compensation Commission Appeal No. 93560, decided August 19, 1993. In dispute in this case was not whether the claimant fell on (date of injury 1), but when she fell. The evidence was in stark contrast. The claimant insisted she fell during her normal work hours. Other evidence suggested that she did not. The credibility of the witnesses, including the claimant, was solely for the hearing officer to decide. Section 410.165(a). The failure of the claimant to recall when the accident occurred in her statement to the adjuster contrasted with her clear recollection at the hearing. Her explanation of why she may have told Dr. A that the accident occurred after her normal work hours may have seemed implausible to the hearing officer and could have cast doubt on her credibility. The hearing officer as fact finder resolves conflicts and inconsistencies in the evidence. Burelsmith v. Liberty Mutual Insurance Company, 568 S.W.2d 695 (Tex. Civ. App.-Amarillo 1978, 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 we will 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 Company, 715 S.W.2d 629 (Tex. 1986). Having reviewed the record in this case, we conclude that the decision of the hearing officer that the claimant did not suffer an injury in the course and scope of her employment on (date of injury 1), is supported by sufficient evidence. For this reason, we will not substitute our judgement for that of the hearing officer.

The hearing officer also determined that the claimant did not report her (date of injury 1), injury to the city until the BRC on January 19, 1994, held in connection with the separate (date of injury 2), injury, and had no explanation why she waited these eight months to notify her employer. The claimant asserted, both at the hearing and on appeal, that she did timely notify the city on (date of injury 1). Section 409.001 provides than an employee shall notify the employer of an injury not later than the 30th day after the date on which the injury occurs. Failure to do so relieves the employer and carrier (in this case the employer is self-insured) of liability in the absence of actual knowledge of the injury by the employer or upon a finding by the Texas Workers' Compensation Commission (Commission) of good cause for failure to give such notice. Whether the notice is timely given is a question of fact for the hearing officer to decide and notice is sufficient if it reasonably apprises the employer of the general nature of the injury and that it was work related. DeAnda v. Home Insurance Co., 618 S.W.2d 529 (Tex. 1980). Ms. H testified that the claimant told her she was not hurt while on city time. Ms. HW testified that if she had been informed of an on the job-the-job injury she would have reported it as required. The claimant testified to the contrary, that she did report she was injured on (date of injury 1), while working for the city. The hearing officer resolved this credibility issue against the claimant. Given our standard of review, we will not overturn this decision on appeal.

We also find no error in the hearing officer's determination that the claimant did not have disability, as the 1989 Act requires a finding of the existence of a compensable injury as a prerequisite to a finding of disability. Section 401.011(16).

The decision and order of the hearing officer are affirmed.

Alan C. Ernst
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Susan M. Kelley
Appeals Judge