APPEAL NO. 950282

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On January 17, 1995, a contested case hearing (CCH) was held in (city), Texas, with (hearing officer) presiding as hearing officer. The issues were:

1.Whether Carrier [Self-insured] is relieved from liability under Texas Labor Code ANN. § 409.002 because of Claimant's failure to timely notify Employer;

2.Whether Claimant had disability resulting from the injury sustained on (date of injury), and, if so, for what periods; and

3.What is Claimant's average weekly wage (AWW)?

The issue involving the AWW was resolved in a stipulation that respondent's (claimant) AWW was $526.86.

The hearing officer determined, on the remaining issues that claimant had timely reported her injury to the employer and that claimant had disability from August 23, 1994, (all dates are 1994 unless otherwise noted) through the date of the CCH.

Appellant, self-insured, challenged the sufficiency of the evidence supporting the hearing officer's determinations regarding timely notice, and alleged that claimant either did not give notice, and/or the person receiving such notice was not a person "who holds a supervisory or management position" nor did that person have actual knowledge of the injury. Self-insured requests that we reverse the hearing officer's decision and render a decision in its favor. Claimant responds by repeating many of her arguments at the CCH and in essence requests that we affirm the decision.

DECISION

The decision and order of the hearing officer are affirmed.

Claimant testified that she was a Montessori school teacher for the, (self-insured). She testified that on (date of injury), while on a school field trip, she fell going up some concrete steps while taking a student to a snack area. Claimant said that she was following the student when she fell and twisted her back. Claimant said that she and the student then returned to the picnic area where two other teachers and the other students (estimated to be 50 or 60) were. Claimant testified that she told (Ms. J) the "team leader" and another teacher, (Ms. H) that she had fallen on the steps and hurt her back. Exactly what was said to whom is vague in that the testimony of both claimant and Ms. H was that another group of children had arrived and that claimant's group had to board the buses for return to the school. Claimant testified that she believed Ms. J, as the "team leader" or "lead teacher"

(the terms appear to be used interchangeably) was her supervisor as she had been her mentor and was "in charge" of the field trip. It is undisputed that claimant continued to work for the next two weeks until the end of the school year. Claimant stated that she first sought medical treatment from her primary care physician (Dr. J) on June 22nd, when she could no longer handle the pain. According to claimant, Dr. J referred her to a specialist, (Dr. G). As a result of diagnostic testing, Dr. G determined surgery was necessary and so informed claimant on August 5th. Claimant testified that when she was told surgery was required, she went to the self-insured's school and so informed the school secretary, (Ms. F) and the school principal, (Ms. W). Claimant subsequently took leave and completed the necessary paper work for her claim, and surgery was performed on or about August 22nd or 23rd. Claimant has not worked or been released to work since August 22nd.

Ms. H, one of the teachers on the (date of injury) field trip testified that claimant had gone with some students to the snack area and upon returning to the picnic area claimant told both Ms. H and Ms. J that she had fallen. What claimant may have said, at the time, about a back injury is somewhat vague and contradictory. Both parties contacted Ms. J, the "lead teacher" but neither party was able to obtain a statement or obtain her presence at the CCH. While both claimant and Ms. W, the principal, testified what Ms. J allegedly told them, it appears that either Ms. J (who is no longer employed by the self-insured) did not recall the incident or "did not want to get involved."

Self-insured's principal contention is that although Ms. J may have had a title of "lead teacher" or "team leader" she was not a person in a supervisory or management position, had not been hired, trained or paid as a supervisor, and that the team leader position was one to which a person is elected by one's peers. Ms. W testified the lead teacher served as a conduit or "liaison" between the teachers and the principal and disseminated information only on instructional matters. Ms. W testified that a lead teacher could not hire, fire or discipline other teachers. It was undisputed that if a teacher was unable to come to work that the principal (Ms. W) was to be notified in order that a replacement could be hired. Ms. W testified that injuries and accidents should be reported to the secretary (Ms. F) who was the "health ombudsman."

Self-insured on cross-examination elicited testimony that claimant had also fallen at work on some unspecified day in April and had seen a doctor for that injury on two occasions. Claimant was vague about the circumstances and testified that any injuries from that fall were "minor."

The medical evidence includes a progress note dated June 22nd in Dr. J's records which notes complaints of back and leg pain "6 wk ago." The note goes on to state: "Pain has worsened and extended up into low back area. Was put on Ibuprofen 800, told to do mild exercises. Had fallen at work (tripped) but hadn't really hit the floor [with] anything - caught herself with her hands." An MRI of the lumbar spine on July 1st, showed a "mild to moderate far left lateral herniation of the L3-4 disc. . . ." A report dated August 5th from Dr. G stated:

The patient is a 36 year old Montessori school teacher who began having back pain in April of insidious onset. She fell while on a school field trip in May and exacerbated her problem. She began having fairly intractable left leg pain which is her presenting pain complaint. The patient complains of chronic pain and numbness in her left leg.

* * * * *

I think the patient has a far lateral herniated disk at L3-4. She seems to be miserable with her pain. I think she is a candidate for surgery. The nature of micro lumbar diskectomy was discussed with her including surgical risks.

Claimant apparently had spinal surgery in latter August. There is some indication that further surgery may be contemplated.

The challenged determinations are:

FINDINGS OF FACT

4.On (date of injury), Claimant notified [Ms. J] that she claimed an injury to her back.

5.[Ms. J] is a person in supervisory position with the [Self-insured] and she had actual knowledge of the injury claimed on (date of injury).

CONCLUSION OF LAW

2.The Claimant reported her injury to [Self-insured] in a timely manner.

Self-insured contends that notice to the employer is the "crux of this case," and has not appealed the hearing officer's determinations on disability and consequently that issue will not be discussed further.

Section 409.001(b) of the 1989 Act provides that notice of an injury may be given to:

(1)the employer; or

(2)an employee of the employer who holds a supervisory or management position.

Self-insured takes the position that either no report of the injury was made to Ms. J or the report that was made was not to someone in a supervisory or management position. Self-insured attacks both the credibility of claimant (characterizing her testimony as "vacillating, contradictory, unresponsive and evasive") while at the time stating that self-insured "understands that the Hearing Officer has the sole authority to judge the weight and credibility to be given to evidence . . . [and] a Hearing Officer has the discretion to believe all, part, or none of a witness' testimony." Having stated those legal principals, self-insured asks us to determine whether claimant's testimony "was sufficient credible" to support the

hearing officer's decision. Not only do we subscribe to the proposition that the hearing officer is the sole judge of the weight and credibility of the evidence (Section 410.165(a)), but also that while the claimant's testimony, being that of an interested witness, only raises issues of fact, the hearing officer was nonetheless free to believe the claimant's testimony or not. Burelsmith v. Liberty Mutual Insurance Co., 568 S.W.2d 695 (Tex. Civ. App.-Amarillo 1978, no writ). In this case claimant testified that she told Mr. J that she had fallen and injured her back and that testimony is supported, at least in part, by the testimony and statement of Ms. H, who was also present. Although Ms. J declined to give a statement or testify, Ms. H testified that the three teachers were all sitting at the same picnic table and Ms. J must have heard claimant's statement regarding her fall. It was up to the hearing officer to resolve the inconsistencies and conflicts in the evidence. Garza v. Commercial Insurance Co. of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). As self-insured notes 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). Consequently, we find sufficient evidence that claimant reported to Ms. J that she had fallen and that she had injured her back in that fall, based on claimant's and Ms. H's testimony.

A potentially thornier problem is whether Ms. J was such an employee who had "a supervisory or management position." It is undisputed that Ms. J was a "team leader" or a "lead teacher." Claimant testified that she considered Ms. J her supervisor and went to her whenever she had a problem. By the same token claimant admits that if she were unable to go to work she would call the principal, Ms. W. Self-insured's witnesses testified that Ms. J was only an intermediary or "liaison" between the principal and other teachers without authority to hire, fire or discipline. (Although we note the lack of authority to hire, fire and discipline does not automatically preclude an individual from having a supervisory or management position. Texas Workers' Compensation Commission Appeal No. 94028, decided February 14, 1994 and Texas Workers' Compensation Commission Appeal No. 92694, decided February 8, 1993). Self-insured emphasizes that Ms. J was voted into the position of team leader or lead teacher by her peers, but we would note that too would not necessarily disqualify someone from holding a supervisory or management position. Self-insured emphasizes that as the lead teacher Ms. J was only authorized to act as a liaison between the teachers and the principal, relaying teacher concerns to the principal and communicating the principal's instructions to the teachers. Ms. W sought to qualify that her communications to teachers through the lead teacher related to only instructional matters. Finally, for the field trip in question, it appears relatively clear that Ms. J had arranged the trip and was "in charge." Ms. W sought to limit the "in charge" status only to the children's safety, but it is relatively undisputed that Ms. J had made arrangements for the trip and presumably had responsibility for meeting the time schedules and getting both the children and other teachers back to school.

In Appeal No. 94028, *supra*, cited by self-insured, the issue was whether an employee (called an "A" operator) held a supervisory or management position for purposes of receiving a notice of injury. In that case a written job description delineated that "A" operators directed and supervised B, C, and trainee operators and substituted for the foreman. Apparently there was no written job description for lead teachers or team leaders in this case. In Appeal No. 92694, *supra*, the question was whether a "lead frozen foods clerk" was a supervisor to whom the employee could report an injury. There also the employer testified that the lead frozen food clerk was "only a supervisor over himself and . . . was not a supervisor over claimant" emphasizing the lead clerk "was not authorized to hire, fire, terminate or discipline." The evidence in that case was conflicting and the Appeals Panel stated "it was unclear as to who held a `supervisory' position at any given time." In that case, as in the instant case, the individual in question held a title as "lead" clerk or, in this case teacher. The Appeals Panel, in Appeal No. 92694, affirmed the hearing officer in that case stating:

> . . . we cannot state that there was an insufficient basis or insufficient evidence to support the hearing officer's determination that at the time the claimant reported his injury, [the lead clerk] was the head of a department and was functioning in a supervisory capacity.
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> Here, it was appropriate, under the circumstances, for the hearing officer to give a less grudging reading and application of Article 8308.5.01(c) [since codified as Section 409.001(b)] to the facts.

Similarly, we decline to hold, as a matter of law, under the circumstances here presented, that at the time and date of the field trip on (date of injury), Ms. J was not a person in a supervisory position, as found by the hearing officer. As stated in Appeal No. 92694, we believe it appropriate in this case for the hearing officer to give a less grudging reading and application of Section 409.001(b) to the facts. (We note that self-insured has not contested that claimant sustained an accidental injury on (date of injury)).

We do, however, reform by deletion so much of the hearing officer's Finding of Fact No. 5 which purports to determine that Ms. J "had actual knowledge" of claimant's injury. Claimant has made no contention on that point and the undisputed evidence was that Ms. J and Ms. H remained at the picnic table in the picnic area while claimant went with one or more children to the snack area. There is no evidence that Ms. J could have even seen the fall. Rather the evidence is that claimant told Ms. J about the fall after returning from the snack area.

Upon review of the record submitted, we find no reversible error and we will not disturb the hearing officer's determinations unless they are so against the great weight and preponderance of the evidence as to be manifestly unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). We do not so find and consequently the decision and order

of the hearing officer are affirmed, as reformed by the deletion of the reference that Ms. J had actual knowledge of the claimed injury.

Thomas A. Knapp
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Philip F. O'Neill
Appeals Judge