APPEAL NO. 950380

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 25, 1995, in (city), Texas, with (hearing officer) presiding as hearing officer. The issues at the CCH were injury, timely report of injury by the appellant (claimant herein), adequate dispute of injury by the respondent (carrier herein), disability and election of remedies. The hearing officer ruled that the carrier's dispute of disability was adequate when read as a whole, that the claimant failed to prove injury, that the claimant failed to timely report his alleged injury without good cause, that the claimant did not have disability and that the claimant had not made an election of remedies by seeking treatment through his group medical insurance. The claimant files a request for review asking that we review the decision and order of the hearing officer and specifically arguing that the hearing officer's findings as to the adequacy of the carrier's dispute of injury, injury and the claimant's timely report of injury and good cause for not doing so were not supported by sufficient evidence. The carrier does not appeal the hearing officer's decision as to election of remedies and does not file a response to the claimant's request for review.

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 testified that he believed his work had caused his left shoulder problems although he was not sure how or when he had hurt his left shoulder. Claimant was taken off work due to his left shoulder problems as of (date of injury), and, in February 1994, had surgery on his left shoulder. The claimant testified that he had received medical insurance benefits and short-term disability payments through the employers' group insurance program and continued to receive these benefits at the time of the CCH, even though his employment had been terminated.

The claimant testified that in (month year) he told (Mr. H), his supervisor, that he hurt his glands (throat) by inhaling Murphy's Oil due to a spill of that product on the job and that his shoulder hurt. Mr. H testified that he immediately reported the inhalation injury as a workers' compensation injury, but did not report the shoulder injury as such because when he questioned the claimant as to whether his shoulder problems were work related, the claimant stated that he did not know how he hurt his shoulder. Mr. H testified that he therefore filed the shoulder under the employers's group health and disability coverage. The claimant testified that he originally understood that Mr. H was going to file the shoulder under workers' compensation, although the claimant was confused as to any difference between group and workers' compensation insurance coverages.

The claimant testified that he did not report his shoulder injury as work related until June 1993. The carrier filed a Notice of Refused/Disputed Claim (TWCC-21) dated June 29, 1994, which stated that the reason the carrier was denying the claim was as follows:

WE ARE DENYING THE CLAIM FOR THE FOLLOWING REASONS: 1- THE INJURY DID NOT ARISE OUT OF AOE/COE. 2- WE HAVE NOT MEDICAL TO SUPPORT A WC INJURY. 3-THE CLMT HAS ELECTED TO FILE WITH HIS GROUP HEALTH AND DISABILITY INSURAN 4-WE HAVE A STATEMENT FROM THE INSD STATING THE CLMT TOLD HIM HE DID NOT KNOW HOW HE INJURED HIS SHOULDER. HE THOUGHT HE INJURED IT AT HOME OVER THE HOLIDAYS. 5--THIS WAS NOT REPORTED TO THE INSD AS WC WITHIN 30 DAYS.

The question of whether an injury occurred is one 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 contested case 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. 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 a 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.). 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 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 no 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 his shoulder condition was work related until June 1993. This finding is supported by the testimony of the claimant himself. 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. In the present case, the record supports a finding that the claimant had a "serious" injury, not a "trivial" injury. As the hearing officer pointed out in his discussion, the claimant's shoulder required surgery in February of 1994.

Even though the hearing officer's decision as to injury, disability and notice of injury is supported by sufficient evidence, this case could still turn on the issue of whether the carrier properly disputed compensability. This is because under Section 409.021 a carrier which fails to contest the compensability of an injury on or before the 60th day after the date on which the carrier is notified of the injury waives its right to contest compensability. Further, Section 409.022 requires that a carrier specify its reason for disputing compensability. We have held in a number cases that the failure to sufficiently specify grounds to contest compensability made the alleged injury compensable as a matter of law. *See* Texas Workers' Compensation Commission Appeal No. 92468, decided October 9, 1992; Texas Workers' Compensation Commission Appeal No. 93202, decided April 28, 1993; Texas Workers' Compensation Commission Appeal No. 93241, decided May 11,

1993; Texas Workers' Compensation Commission Appeal No. 931131, decided January 26, 1994; and Texas Workers' Compensation Commission Appeal No. 94477, decided May 27, 1994. In other cases we have found the carrier's contest of compensability sufficiently specific. *See* Texas Workers' Compensation Commission Appeal No. 92145, decided May 27, 1992; Texas Workers' Compensation Commission Appeal No. 93326, decided June 10, 1993; Texas Workers' Compensation Commission Appeal No. 93533, decided August 6, 1993; and Texas Workers' Compensation Commission Appeal No. 931148, decided February 1, 1994. One doctrine we have applied in making the determination as to whether the carrier's dispute is sufficiently specific is whether, read as a whole, any of the reasons listed by the carrier would be a defense to compensability that could prevail in a later proceeding. Texas Workers' Compensation Commission Appeal No. 93533, decided August 9, 1993.

This is the standard the hearing officer applied in determining that the carrier's TWCC-21 in the present case was specific enough to contest compensability. We appreciate the argument of the claimant that the first reason given by the carrier--"[t]he injury did not arise out of AOE/COE"--is vague due to the unusual abbreviations. The carrier argued at the hearing that "AOE" is an abbreviation for "accident of employee" and "COE" for "course of employment." The carrier also contended that a great deal of abbreviation was needed to fit the carrier's dispute onto the proper blank of the TWCC-21 form. While we have held that "magic words" are not necessary in stating a dispute, we think it preferable to use English words, rather than acronyms. Were this the only portion of the TWCC-21 that dealt with compensability we do not see how it could be found to suffice as notice of a dispute of compensability. However, when read in conjunction with other reasons for denial, particularly the first portion of the fourth reason given--"we have a statement from the insd stating the clmt told him he did not know how he injured his shoulder"--we cannot say that the hearing officer erred as matter of law in finding that read as a whole the carrier's TWCC-21 contests compensability. We would, however, encourage any carrier filing a TWCC-21 not to limit itself to the space provided on the form, and if needed, to attach an addendum outlining all of its reason for dispute to avoid unnecessary use of abbreviation.

The decision and order of the hearing officer are affirmed.

Gary L. Kilgore
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Philip F. O'Neill
Appeals Judge