APPEAL NO. 950409

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 (CCH) was held on January 27, 1995, in (city), Texas, with (hearing officer) presiding as hearing officer. The issues at the CCH were injury, date of injury, timely reporting of injury or good cause for not doing so, extent of injury and disability. The hearing officer determined that the appellant (claimant herein) did not suffer a compensable injury, that she claimed her injury took place on (date of injury), that she failed to timely report her alleged injury without good cause for not doing so, that the alleged injury did not cause depression, and that the alleged injury did not result in disability. The claimant appeals the determinations of the hearing officer. The respondent (carrier herein) replies that the claimant's appeal is inadequate and that the evidence supports the determinations of the hearing officer.

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 she injured her back while lifting a container of soup from a steamer to a cart while working as a dietary clerk at a hospital on (date of injury). The claimant testified that she reported her injury to (Ms. Mc), her supervisor, on April 5, 1993. Ms. Mc stated in signed statements that the claimant did not report an on-the-job injury to her but did complain about back pain attributable to her pregnancy (the claimant was six months pregnant at the time of her alleged injury). (Ms. B), the employer's health services coordinator, testified that neither Ms. B nor any other supervisor was aware that the claimant was alleging a job-related injury until February 7, 1994.

The claimant testified that after the injury she continued to work with back pain until she requested a leave of absence for maternity leave. The claimant testified that (Dr. H), the doctor treating her pregnancy, told her that he believed her back pain was caused by her sciatic nerve and he could do nothing for it until after her delivery. The claimant's baby was born in early July and in September Dr. H released her, telling her to consult her family doctor concerning her back. The claimant's family doctor referred her to (Dr. S), a neurosurgeon. Dr. S ordered a CT scan which showed a herniated disc. Dr. S performed a lumbar hemilaminectomy L5-S1 on the claimant on November 23, 1993. There were complications due to infection of the surgical incision and the claimant continued to complain of back pain after her surgery. Dr. S referred claimant to (Dr. M), a psychiatrist.

Records from Dr. M and (Dr. B), a physical medicine and rehabilitation specialist, indicate that the claimant's depression and anxiety are attributable to a number of factors, including her daughter's health and financial problems. Neither specifically traces these problems back to any work-related injury.

The carrier contends that the claimant's request for review is inadequate to appeal the decision of the hearing officer because it fails to meet the requirements of Section 410.202(c) to clearly and concisely rebut the decision of the hearing officer on each issue on which review is sought. We stated as follows in Texas Workers' Compensation Commission Appeal No. 94951, decided August 23, 1994:

> In considering challenges to the adequacy of a purported request for appeal, we have been mindful of the general rule that where pleadings are required in administrative proceedings, their validity should not be tested by the technical niceties of pleading and practice required in court trials. Texas Workers' Compensation Commission Appeal No. 91131, decided February 12, 1992. And we have looked to the documents as a whole to determine whether it is so deficient as to render it inadequate for the purpose of perfecting an appeal to the Appeals Panel. Appeal No. 91131, *supra*. For example, where we can surmise that the main thrust of a document filed with the Appeals Panel complains of the sufficiency of the evidence to support the hearing officer's determination, we have found that it meets minimum requirements for an appeal. Texas Workers' Compensation Commission Appeal No. 92081, decided April 14, 1992.

Applying this standard we have found adequate requests for review far more cryptic than the one in the present case. *See* Texas Workers' Compensation Commission Appeal No. 94455, decided May 19, 1994; Texas Workers' Compensation Commission Appeal No. 94598, decided July 6, 1994. Thus the request for review in the present case raises the issue of whether the evidence was sufficient to support the decision of the hearing officer.

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 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 Co. of Newark, New Jersey, 508 S.W.2d 701 (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 (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 (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 she was injured in the course and scope of her 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 Insurance 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 notice. 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 her shoulder condition was work related until February 1992. This was supported by the statements of Ms. Mc and the testimony of Ms. B. Although the claimant testified that she reported earlier, it was the province of the hearing officer to resolve this conflict in the evidence.

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 worker's 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 early as October 1993 the claimant knew she had a herniated disc and she had surgery in November of 1993.

Another way to analyze this is to look at the burden of proof. It is also the claimant's burden to prove the existence of good cause for failing to give the employer notice. Aetna Casualty & Surety Company v. Brown, 463 S.W.2d 473 (Tex. Civ. App.-Fort Worth 1971, writ ref'd n.r.e.). Good cause must be shown to exist up to the time the claimant gives notice of the claim. Lee v. Houston Fire & Casualty Insurance Company, 530 S.W.2d 294, 296 (Tex. 1975); Farmland Mutual Insurance Co. v. Alvarez, 803 S.W.2d 841, 843 (Tex. App.-Corpus Christi 1991, no writ). Here, the claimant's evidence fell short of proving continuous good cause until his report of injury in February 1994.

We have held that the question of the extent of injury is a question of fact for the hearing officer. Texas Workers' Compensation Commission Appeal No. 93613, decided August 24, 1993. Under the facts of this case we cannot overturn the finding of the hearing officer that the claimant's alleged injury did not include her depression. There is no medical evidence connecting claimant's depression to any accident at work and in fact Dr. M and Dr. B list a number of other difficulties as causes of the claimant's depression.

The decision and order of the hearing officer are affirmed.

Gary L. Kilgore
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Alan C. Ernst
Appeals Judge