APPEAL NO. 950437

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 February 14, 1995, in (city), Texas, with (hearing officer) presiding as hearing officer. The issues at the CCH were injury, timely reporting of injury and disability. The hearing officer found that the appellant (claimant herein) was not injured in the course and scope of her employment, that the claimant failed to report her claimed injury to the respondent (self-insured herein) within 30 days without good cause for not doing so, and the claimant has not had disability. The claimant appeals these determinations by the hearing officer, arguing that they are contrary to the evidence. The claimant attaches documentary evidence to her appeal not admitted into evidence at the CCH. Self-insured replies that the findings of the hearing officer were supported by sufficient evidence and that the claimant should not be permitted to include documents in an appeal that were not permitted at the CCH.

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, a school custodian, testified that she was originally injured on (date of injury), when she fell at work. She testified that she was treated by (Dr. D) who certified on a Report of Medical Evaluation (TWCC-69) that she attained maximum medical improvement (MMI) on October 25, 1993, with a zero impairment rating (IR). Dr. D soon after issued an amended TWCC-69 changing the IR to one percent.

The claimant testified that she returned to work around October 25, 1993, although she continued to see Dr. D. The claimant testified that at some point Dr. D referred all of his patients to one of two doctors. The claimant testified that she was referred to (Dr. M). The medical records and bills in evidence indicate that Dr. M first saw the claimant in April 1994. The claimant testified that she suffered a reinjury on or about May 25, 1994, while lifting a table. She testified that she essentially injured the same parts of her body as in the (date of injury), fall.

The claimant contends that after the reinjury Dr. M took her off work and provided a note placing her on an off work status which she took to her employer. Time cards from the employer indicate that the employer showed she was out during this period for personal leave followed by vacation leave. The claimant testified that from May 25, 1994, through the date of the CCH she had been unable to return to work due to the May 25, 1994, injury. The self-insured contends that the claimant's problems are not a new injury but a continuation of her (date of injury), injury. Dr. M commingled the two injuries in his reports. He did state in a letter dated January 2, 1995, that her reinjury on May 25, 1994, was a new injury and not the same injury that she suffered in (month year). Attached to this letter is a

TWCC-69 stating that the claimant attained MMI on January 6, 1995, with a 29% IR. This TWCC-69, however, lists the date of injury as (date of injury).

The claimant attached three documents to her request for review--a letter she wrote to the adjuster after the CCH disagreeing with the position of the self-insured taken at the CCH, a copy of an off work slip from Dr. M placing her off work indefinitely commencing on May 23, 1994, and letter from the Texas Department of Insurance to the claimant. The claimant's attorney, who prepared the request for review, wrote a letter shortly after it was filed saying that the third document had no bearing on the present claim.

First, we note that we will not generally consider evidence not submitted into the record, and raised for the first time on appeal. Texas Workers' Compensation Commission Appeal No. 92255, decided July 27, 1992. To determine whether evidence offered for the first time on appeal requires that case be remanded for further consideration, we consider whether it came to appellant's knowledge after the hearing, whether it is cumulative, whether it was through lack of diligence that it was not offered at the hearing, and whether it is so material that it would probably produce a different result. Texas Workers' Compensation Commission Appeal No. 93111, decided March 29, 1993; Black v. Willis, 758 S.W.2d 809 (Tex. App.-Dallas 1988, no writ). In the present case the first document attached to the claimant's request for review merely restates the claimant's position at the CCH and is therefore cumulative. The second document should have been available at the first hearing (also it could hardly be argued that it would have changed the result in the case when it lists the date of injury for which Dr. M was placing the claimant off-duty as ("date of injury").

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 [CCH] 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 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.). Also, with no compensable injury found, there is no basis upon which to find disability. By definition disability depends upon a compensable injury. *See* Section 401.011(16).

The 1989 Act generally requires that an injured employee or person acting on the employee's behalf notify the employer of the injury not later than 30 days after the injury occurred. Section 409.001. The 1989 Act provides that a determination by the Texas Workers' Compensation Commission (Commission) that good cause exists for failure to provide notice of injury to an employer in a timely manner or actual knowledge of the injury by the employer can relieve the claimant of the requirement to report the injury. Section 409.002. 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 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 a work-related injury of May 25, 1993, to the self-insured with 30 days. He also found that the self-insured did not have actual knowledge of a work-related injury within 30 days of May 25, 1993. There is evidence to support both findings in that the claimant's evidence concerning reporting does not make clear whether she reported to the employer she was back off work due to the (date of injury), injury or actually reported a new injury. Merely reporting she was on an off work status was insufficient to notify the self-insured that

she had suffered an injury on the job. Nor was there evidence that the employer knew within 30 days from May 25, 1994, that the claimant was alleging a new injury as opposed to continuing effects of the (date of injury), injury.

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. 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 Ins. Co. V. Alvarez, 803 S.W.2d 841, 843 (Tex. App.-Corpus Christi 1991, no writ). Under the evidence in this case we cannot say that the hearing officer erred as matter of law by finding no good cause.

The decision and order of the hearing officer are affirmed.

Gary L. Kilgore
Appeals Judge

CONCUR:

Lynda H. Nesenholtz
Appeals Judge

Alan C. Ernst
Appeals Judge