APPEAL NO. 980792

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 et seq. (1989 Act). This case is back before us after our remand in Texas Workers' Compensation Commission Appeal No. 971967, decided November 10, 1997. We remanded the case for the hearing officer to determine whether the respondent (claimant herein) timely filed her claim for compensation considering the effects of tolling under Section 409.008. We also remanded for the hearing officer to frame a decision and order that was within his jurisdiction. A contested case hearing (CCH) on remand was held on December 17, 1997, with the record closing on March 24, 1998. On remand, the hearing officer found that the claimant timely filed her claim for compensation taking into account the effects of tolling under Section 409.008. The hearing officer ordered the appellant (self-insured herein) to pay income and medical benefits in accordance with the 1989 Act and the rules of the Texas Workers' Compensation Commission. The self-insured appeals arguing that the evidence is contrary to the finding of the hearing officer that the self-insured was aware of the claimant's injury. The self-insured argues that it was not aware of the injury and thus the requirement that it file an Employer's First Report of Injury or Illness (TWCC-1), and that tolling under Section 409.008 did not occur. The claimant responds that she agreed with the findings and the decision 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 facts of this case are summarized in our decision in Appeal No. 971967, supra. There was additional testimony taken at the hearing on remand and this is summarized in the hearing officer's decision and order. This primarily consisted of testimony by the claimant's supervisor that the claimant never complained of a work-related injury until June 21, 1996. The claimant had testified at the original CCH that she had reported her injury to her supervisor on _____. There is no appeal of the finding of the hearing officer that the claimant suffered a work-related injury to her back on _____, that the carrier filed its TWCC-1 on July 8, 1996, and that claimant filed her Employee's Notice of Injury or Occupational Disease and Claim for Compensation (TWCC-41) on April 11, 1997.

Section 409.003 provides as follows:

An employee or a person acting on the employee's behalf shall file with the commission a claim for compensation for an injury not later than one year after the date on which:

(1) the injury occurred; or

(2) if the injury is an occupational disease, the employee knew or should have known that the disease was related to the employee's employment.

Section 409.008 provides as follows:

If an employer or the employer's insurance carrier has been given notice or has knowledge of an injury to or the death of an employee and the employer or insurance carrier fails, neglects, or refuses to file the report under Section 409.005, the period for filing a claim for compensation under Sections 409.003 and 409.007 does not begin to run against the claim of an injured employee or a legal beneficiary until the day on which the report required under Section 409.005 has been furnished.

The key question in this case is when the self-insured had notice or knowledge of the claimant's injury. If the self-insured did not have actual and sufficient knowledge of an injury then 409.008 would not extend the claimant's time to file her claim. Texas Workers' Compensation Commission Appeal No. 950844, decided July 10, 1995. If the employer did have such notice or knowledge, then Section 409.008 would toll the time the claimant had to file her claim and make her filing on April 11, 1997, timely. The claimant testified that she gave notice of her injury to her supervisor on _____. The claimant's supervisor denied this under oath.

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).

It was the province of the hearing officer to sift through the conflicting evidence and we do not find that his factual findings were contrary to the overwhelming evidence. The decision and order of the hearing officer are affirmed.

Gary L. Kilgore
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Judy L. Stephens
Appeals Judge