APPEAL NO. 990255

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 December 29, 1998. The issues at the CCH were injury, timely report of injury, disability and average weekly wage (AWW). The hearing officer concluded that the respondent (claimant) was injured in the course and scope of her employment on _____; that the claimant timely reported the injury to her employer; that the claimant had disability from November 22 through December 1, 1997, and again from December 5, 1997, through the date of the CCH; and that the claimant's AWW was $599.55. The appellant (carrier) files a request for review, arguing that the hearing officer's resolution of the injury, timely report of injury, and disability issues are contrary to the evidence. The carrier also argued that the claimant did not have disability because she has been determined to be at maximum medical improvement (MMI). The claimant responds that there is sufficient evidence to support the determinations of the hearing officer and argues that the date of MMI is still in dispute. No party having appealed the hearing officer's findings regarding AWW, his decision on this issue has become final pursuant to Section 410.169.

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 hearing officer summarized the evidence in his decision and we adopt his rendition of the evidence. We will only briefly touch on the evidence most germane to the appeal. This includes the fact that the claimant testified she was injured at work on _____, while lifting a case of beer. The claimant testified that while picking up the case of beer for customers she felt pain in her neck and back. The claimant testified that she reported this injury to her supervisor Ms. P, the next day. The claimant testified that she did not seek medical treatment until November 13, 1997, because she thought she could shake off the problem. The claimant testified that she sought medical treatment because her pain persisted. The claimant was taken off work. The claimant testified that she was unable to work due to her injury from November 22, 1997, until December 1, 1997, and again from December 5, 1997, through the date of the CCH. There is medical evidence supporting this.

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 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. Houston Independent School District v. Harrison, 744 S.W.2d 298, 299 (Tex. App.-Houston [1st Dist.] 1987, no writ). 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 an injury and this was supported by the testimony of the claimant. The carrier argues that the hearing officer should not rely upon the claimant's testimony because it was contradictory and the claimant was not credible. We decline to reweigh the evidence or second guess the hearing officer's determination concerning credibility. We do not find that the overwhelming evidence was contrary to the hearing officer's finding of an injury.

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 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).

In the present case, the hearing officer found as a matter of fact that the claimant did report her injury to her employer on October 3, 1997. This finding is supported by the claimant's testimony. Once again, the carrier argues that the hearing officer erred in relying on the claimant's testimony because it was not credible. Once again, we defer to the hearing officer as the fact finder on the issue of credibility.

Disability is also a question of fact. Texas Workers' Compensation Commission Appeal No. 92147, decided May 29, 1992. Disability can be established by a claimant's testimony alone, even if contradictory of medical testimony. Texas Workers' Compensation

Commission Appeal No. 92285, decided August 14, 1992; Texas Workers' Compensation Commission Appeal No. 92167, decided June 11, 1992. Here, the hearing officer's finding of disability was supported by both the claimant's testimony and medical evidence.

The carrier argues that the claimant cannot have disability because she is already at MMI. While inartfully framed, we presume the carrier is actually arguing that the claimant is not entitled to temporary income benefits (TIBS) because she has been determined to be at MMI. The issue of MMI was not litigated at the CCH and the claimant contends it is still in dispute. Until the issue of MMI has been finally determined, we find no error in the hearing officer ordering payment of TIBS.

The decision and order of the hearing officer are affirmed.

_____
Gary L. Kilgore
Appeals Judge

CONCUR:

_____
Thomas A. Knapp
Appeals Judge

_____
Tommy W. Lueders
Appeals Judge