APPEAL NO. 931178

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act) (formerly V.A.C.S., Article 8308-1.01 *et seq.*). A contested case hearing (CCH) was held on November 2, 1993, in (city), Texas, with (hearing officer) presiding as hearing officer. The issues at the CCH were: 1. whether the appellant (claimant herein) suffered post-traumatic stress as a result of a chemical exposure on (date of injury); 2. whether the claimant's post-traumatic stress syndrome caused him after March 19, 1993, to be unable to obtain and retain employment at wages he earned prior to (date of injury); 3. whether the claimant had a zero percent impairment rating on March 22, 1993, from a (date of injury), chemical exposure in accordance with a report of (Dr. R), a designated doctor selected by the Texas Workers' Compensation (Commission); and 4. whether the claimant reached maximum medical improvement (MMI) on March 22, 1993, from a (date of injury), chemical exposure in accordance with a report from Dr. R. The hearing officer found that the claimant did not suffer post-traumatic stress syndrome as result of his (date of injury), chemical exposure, that the claimant's inability to obtain and retain employment after March 19, 1993, at wages he earned prior to (date of injury), was not caused by his (date of injury), injury, that the claimant reached MMI from his (date of injury), injury on March 22, 1993, with a zero percent impairment rating. The claimant appeals the decision of the hearing officer complaining of a number of the hearing officer's Findings of Fact and Conclusions of Law, but primarily contesting the decision of the hearing officer that the claimant's psychological symptoms diagnosed as post-traumatic stress syndrome were not a result of the (date of injury), chemical exposure and respiratory injury. The claimant also states that hearing officer failed to properly handle the carrier's failure to answer interrogatories which he states placed him at a great disadvantage in the preparation of his case. The carrier files no response.

DECISION

Finding sufficient evidence to support the decision of the hearing officer and no reversible error in the record, we affirm.

The claimant worked for the employer in 1990 and 1991 as a safety manager cleaning up chemical spills. In November and December 1990 he was exposed to chemicals and as a result filed a workers' compensation claim in which he was claiming post-traumatic stress syndrome as well as other injuries. According to the testimony of the claimant this claim had been settled prior to the CCH in the present case. The present case is based upon a chemical exposure that the claimant alleged took place on (date of injury), in which he and co-workers were repairing a tank when chemicals leaked out. The claimant testifed that as a result of this leak two co-workers went to the hospital and he suffered skin burns and respiratory problems.

The claimant testified that he was originally treated by (Dr. B) for respiratory problems and missed two weeks of work in April of 1991. The claimant testified that he later changed treatment to (Dr. J) who later referred him to (Dr. P) for psychological treatment. The claimant was examined by (Dr. R) who was a designated doctor selected by the Commission. Dr. R's narrative report reflects that he examined the claimant on March 22,

1993. Dr. R stated in his report that a CAT scan of the claimant's chest showed no bronchial irritability, that the claimant had reached MMI and that he found no physiological impairment. Dr. R certified on a Report of Medical Evaluation (TWCC-69) that the claimant had zero percent whole body impairment.

The claimant testified that his employer terminated his employment on March 19, 1993. The claimant testified he was sent to (Dr. C) to determine whether he had post-traumatic stress syndrome. In her report of report of June 3, 1993, Dr. C stated that the in her opinion the claimant met all the criteria for a diagnosis of post-traumatic stress syndrome, that he had not yet reached MMI and that she assessed him to be "75% to 80%" disabled. Dr. J stated in a letter dated July 7, 1993, that the claimant suffered from post-traumatic stress syndrome and estimated that the claimant had 80% impairment.

The claimant at the carrier's request was examined by (Dr. V) on July 20, 1993. Dr. V testified at the CCH that he did not believe that the claimant had post-traumatic stress syndrome, but more likely suffered from depression. Dr. V testified that the claimant's psychological problems were not due to the (month year) chemical exposure, but more likely resulted from his loss of his job and resulting loss of status and financial problems.

The claimant propounded interrogatories to (BUSINESS)[1] inquiring as to the details of the personal or business relationship between Dr. V and (BUSINESS) or individuals acting at the request of or on behalf of the carrier and asking the amount of compensation and number of referrals to Dr. V by any individual acting at the request of or on behalf of the carrier and (BUSINESS). A certified mail receipt indicated that (BUSINESS) received these interrogatories on September 23, 1991. On October 6, 1993, the claimant wrote the carrier's attorney (Mr. A) to inquire why his interrogatories had not been answered. Carrier's counsel stated in his reply letter dated October 14, 1993:

> Thank you for your letter of October 6, 1993. In that letter you indicate that you have served interrogatories upon my client, (business). I do not recall having ever been served with such interrogatories. Without having a copy of the interrogatory, I cannot assist in providing you any answers. Additionally, it is my understanding that the Administrative procedure (sic) in (sic) Texas Register Act requires interrogatories be served upon counsel for all parties who are represented by counsel.

On October 26, 1993, the ombudsman sent a request by facsimile transmission to the hearing officer as well as carrier's counsel requesting that the hearing officer order the carrier to answer the interrogatories. Carrier's counsel represented at the hearing that after receiving this request he contacted the ombudsman and advised the ombudsman as to what

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[1]Correspondence in the file between various doctors and (BUSINESS) indicated that (BUSINESS) appeared to be handling the claim, presumably as servicing adjuster, for the carrier. That (BUSINESS) was handling the claim for the carrier was conceded by the carrier's attorney at the CCH.

Dr. V's testimony at the hearing would be in regard to these matters. Under examination by carrier's counsel, Dr. V testified at the CCH that he met carrier's counsel when carrier's counsel was employed by the county attorney's office of (city) County and representing a hospital with which Dr. V was associated. Dr. V stated that since that time carrier's counsel had "twisted his arm" to look at some cases and he may have reviewed one or two such cases prior to agreeing to review the claimant's case.

The claimant's complaints concerning the hearing officer misspelling of the name of his first treating doctor[2] and misstating dates[3] are not controlling in this case. If the claimant were completely correct in these regards, which is not clear from the record, it would not affect the outcome of his case.

The crux of the claimant's appeal is that the hearing officer erred in finding that his injury of (date of injury), did not result in post-traumatic stress syndrome. This is a question of the extent of the claimant's injury. The claimant contends that his injury extended to his psychological problems and the carrier took the position that it did not. Both sides brought forth medical evidence in support of their positions. This presented the hearing officer with conflicting evidence concerning a question of fact.

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.

[2]We are unable to check the spelling against any medical records from this physician as none were admitted into evidence. The hearing officer spells the doctor's name as "(Bo)" in his decision. For purposes of our decision we have adopted the spelling urged by the claimant ("B").

[3]The claimant contends that he saw Dr. R, the designated doctor in 1992, not 1993, and that Dr. R certified MMI in 1992, not 1993. Dr. R's written records admitted into evidence state that the date of his examination and MMI date were 1993 as stated in the hearing officer's decision.

Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986).

In this case the hearing officer decided that the claimant's injury did not extend to his psychological problems and there was evidence to support his determination. Applying the appellate standard of review above we cannot say his decision was against the overwhelming weight of the evidence.

The issue of the carrier's failure to respond to discovery is more troubling. The allusion by the carrier's attorney to the Administrative Procedure and Texas Register Act (now the Administrative Procedures Act) indicates ignorance of the law. *See* Section 410.153; Tex. W. C. Comm'n, 28 TEX. ADMIN. CODE § 142.1 (Rule 142.1). While the carrier's response at the hearing to the claimant's complaint that the carrier failed to respond to his interrogatories was entirely unsatisfactory and bordering on the cavalier (suggesting the hearing officer apply the agency's discovery sanction rules "if it has rules that provide for that"), the claimant has never requested what remedy he seeks.

Certainly the failure of a party to respond to proper discovery requests may be the basis of a motion for continuance. In this case the claimant never requested a continuance. Further, if continuance would not have sufficed, and with a claimant seeking benefits denied by a carrier, delay may not always be an appropriate remedy, the claimant might have requested that the hearing officer exclude any evidence oral or written from Dr. V. In the present case the claimant has not requested an appropriate remedy, and we do not feel justified under the circumstances of this case to craft one. The claimant had an opportunity to obtain the information he sought from Dr. V during Dr. V's live testimony, and if the response proved a surprise he could have asked for a continuance at that point. Under the facts of this case, while we find the behavior of the carrier's attorney to reflect ignorance and short-sighted tactics, we do not find harmful error.

For the foregoing reasons, 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