APPEAL NO. 93813

This appeal is brought 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 August 19, 1993, with (hearing officer) presiding as hearing officer. The sole issue at the CCH was the identity of the employer of the respondent (claimant herein) for the purpose of eligibility for benefits under the 1989 Act. The hearing officer found that the claimant's employer at the time of his injury was (PI), the insured of the appellant (carrier herein). The carrier appeals attacking a number of the rulings of the hearing officer as being against the great weight and preponderance of the evidence and requesting that we reverse and render a decision that (GG) was the claimant's employer at the time of claimant's injury. In the alternative the carrier requests that we remand to the hearing officer to conduct a new hearing so that a recording of the hearing may be made.

DECISION

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

The claimant testified that in (month year) a movie company came to (city), Texas, to make a motion picture. The claimant testified that he went to the PI office in (city) everyday to seek employment on the motion picture and after a week was hired. The claimant stated that PI assigned him to different locations and crews to variously work construction, painting and landscaping. The claimant said that he went to PI's offices everyday to get his daily work assignment and every Friday he picked up his check there. The carrier put into evidence a copy of one of the claimant's checks with its stub and another stub without the check. Both stubs indicate that PI was the payor and the claimant was the payee. Each stub has a notation at the bottom referring to GG without explanation.

The claimant testified that on (date), one of the trucks at the location he was working became stuck in the mud. The claimant said he was told to put plywood under the truck, however he did not want to because he did not believe that it would be effective in freeing the truck. The claimant testified that his supervisor told him that she was his boss, she worked for PI, and PI was paying him, so he would have to do as he was told. The claimant testified that he placed the plywood under the truck, but that the spinning of the truck caused the whole sheet of plywood to come up from under the truck, striking him and knocking him to the ground. The claimant testified that the supervisor who had ordered him to place the plywood under the truck asked him if he wanted to go to the hospital, but that he replied he did not. The claimant testified that when he was later unable to work because of pain, this same supervisor terminated his employment.

On November 29, 1992, the claimant sought treatment at the (hospital) where records show that his chief complaint was right leg pain. The claimant testified that the hospital referred him to (Dr. T), M.D., who diagnosed internal derangement of the knee and ordered an MRI. Dr. T stated that the claimant was "nonemployable" and set him up for an

arthroscopy. The claimant testified that while the carrier paid his medical bills and temporary income benefits (TIBS) for a period of time, eventually it suspended all benefits.

On December 19, 1992, the carrier filed a Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) which reflected that the carrier had received first notice of injury on December 11, 1992, listed PI as the employer, and stated:

> Claim is being investigated. First notice of injury is from attorney. Carrier has no medical information to show disability. Carrier has been unable to locate employer to investigate liability. Carrier has agreed in good faith for claimant to be examined by an orthopedic physician. Investigation continues.

On March 13, 1993, the carrier filed another TWCC-21 which listed PI as the employer, but which stated:

> Carrier has recently learned that [claimant] was an employee of [GG] Partners Producers. [PI] is a payroll service company for the film industry. They do not employ [claimant], nor did they direct his activities on the job. This information was not previously available.

The carrier also placed into evidence a transcript of a recorded telephone statement taken by one of its representatives from (Mr. RG), the post production supervisor of GG. The purpose of taking this statement was apparently to clarify the relationship between PI and GG. The hearing officer, in his statement of the evidence, cites the following extracts from Mr. G's statement:

> Q.. . . what is the relationship between [GG] and [PI]?
>
> A.To the best of my knowledge, [PI] was engaged in handling the payroll.
>
> * * * * *
>
> Q.. . . as far as people that are employed, are they employed through [GG] or are they employed through [PI]?
>
> A.I believe that [PI] is the employee . . . employer of record.
>
> Q.Can you define that for me?
>
> A.No, I cannot . . . . In other words, well . . . this . . . well . . . let me go back . . . . you could say that as the employer of record, [PI] is obligated to carry the workers' comp policy, and that all of our workers or employees . . . are covered under [PI]'s workers (sic) compensation policy.
>
> * * * * *

Q.. . . O.K. And was [claimant] one of these employees that were hired through [PI] on behalf of [GG]?

A.I would believe so.

Mr. G's statement also includes the following dialogue:

Q.O.K. You know, uh, when [PI] is involved in being the employer of record, uh .. is there a [PI] supervisor or something on . . . on site when the work is being done?

A.No.

Q.O.K. And does . . . is it normal for [PI] to have any role in . . . uh . . . instructing these employees on what to do or how to do it or anything like that?

A.No, I wouldn't think so.

The carrier in its request for review states that it received a copy of the tape recording of the CCH from the Texas Workers' Compensation Commission (Commission) which was totally blank. The carrier further states that after receiving the blank tape it called the Commission and asked if the original of the tape could be checked to see if it was blank. The carrier asserts it was told that there was no way to comply with its request, and even if there were, the Commission did not have time to do so. The carrier attaches a copy of the blank audiotape to its request for review and complains in its request for review that it is required to rely on its recollection of the testimony at the CCH, since it does not have a copy of the testimony from the hearing. The carrier requests that we remand this case to the hearing officer for a new hearing, so that the hearing can be recorded. Our review of the record shows that the original tape recording includes a complete record of the CCH.

Section 410.164(a) provides:

The proceedings of a contested case hearing shall be recorded electronically. A party may request a transcript of the proceeding and shall pay the reasonable cost of the transcription.

Tex. W.C. Comm'n 28 TEX. ADMIN. CODE § 142.17 (Rule 142.17) provides:

(a)A party or the employer may submit a request to the commission for a transcript of the hearing audiotape. The requester shall pay the cost of the transcript, as established by the commission.

(b)A party or the employer may submit a request to the commission for a duplicate of the hearing audiotape. The requester shall pay the cost of the

transcript, as established by the commission.

In a number of cases we have remanded because of the audiotape of the recording of the contested case hearing was defective preventing us from being able to fairly review the evidence. *See* Texas Workers' Compensation Commission Appeal No. 91017, decided September 25, 1991; Texas Workers' Compensation Commission Appeal No. 92700, decided February 4, 1993. In the present case, the record is complete and there is no need to remand the case to the hearing officer to record the evidence as requested by the carrier. Further, while we recognize that the parties have a right to obtain a copy of the audiotape under the statute and rule cited above and that not having a copy of the record certainly would hinder any party in prosecuting an appeal, we believe that the complaining party in this case has simply failed to exercise the due diligence that would require us to provide it with a remedy. Nor do we believe that the appropriate remedy, were the carrier to have shown the requisite due diligence, would be remand.

The making of one telephone call concerning the blank audiotape as alleged in the carrier's request for review and in that call merely requesting the Commission to check to see if the original audiotape was blank, in our view, simply is not sufficient to preserve an allegation of error. We believe direct complaint to the hearing officer or to this Panel by written motion requesting a copy of the audiotape, and if needed, additional time to prepare an appeal would certainly have gone much further in establishing due diligence than the actions of the carrier in the present case. This is not to say that there may not be other ways in which diligence may be established or error preserved. We find, however, that in the present case where a party alleges in its request for review that the audiotape it received from the Commission was defective, where the only action it alleges to have taken after receiving a blank audiotape was to call the Commission and request that the original audiotape be checked to see if it was also blank, and where the only remedy it requests is that we remand the case to the hearing officer to record a new hearing, neither due diligence has been shown nor error preserved.

As to the complaints of the carrier that the findings of the hearing officer are against the great weight and preponderance of the evidence, we must apply the proper standard of appellate review. 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).

Our examination of the record shows that those findings of the hearing officer which the carrier disputes are supported by evidence in the record. In particular there is considerable evidence that at the time of accident the claimant was employed by PI rather than GG. While there is certainly evidence in the record contrary to many of these same findings, we decline to substitute our judgment for that of the hearing officer. To do so would not only invade the province of the fact finder, but do violence to the appropriate standard of appellate review.

The decision of the hearing officer is affirmed.

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Gary L. Kilgore
Appeals Judge

CONCUR:

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Stark O. Sanders, Jr.
Chief Appeals Judge

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Robert W. Potts
Appeals Judge