APPEAL NO. 950015
FILED FEBRUARY 16, 1995

This appeal is considered pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On November 29, 1994, a contested case hearing was. With respect to the issues before him, the hearing officer determined: (1) that appellant (claimant) did not sustain a compensable left shoulder/back injury on _____; (2) that claimant did not have disability within the meaning of the 1989 Act; (3) that claimant did not timely report his claimed injury to his employer and did not have good cause for his failure to do so; (4) that claimant's average weekly wage (AWW) was $120.00; (5) that additional issues cannot be added or raised at a subsequent benefit review conference (BRC) when disputed issues reported out of one BRC are already under the jurisdiction of a hearing officer; (6) that respondent (carrier) adequately raised a defense in the Notice of Refused/Disputed Claim (TWCC-21) form filed with the Texas Workers' Compensation Commission (Commission); (7) that the benefit review officer did not err in not accepting certain documents offered by the claimant at the BRC into the "record;" and (8) that carrier did not waive its right to contest compensability by filing its TWCC-21 with the Commission more than seven days after it had written notice of the alleged injury. Claimant's appeal essentially challenges the sufficiency of the evidence to support each of the hearing officer's determinations. Carrier's response urges affirmance on the basis of the sufficiency of the evidence in support of the hearing officer's decision and order. In the alternative, the carrier argues that the issues raised after the September 30, 1994, BRC were not properly before the hearing officer and should not have been decided. We note, however, that carrier's response was not timely filed as an appeal and as such, we are without jurisdiction to review that question.

DECISION

We affirm.

Claimant testified that on _____, he was employed by (employer) painting the interior of mobile homes, was lifting a piece of plywood, and felt pain in his left shoulder and upper back. Claimant stated that he was able to complete his shift on the day of the incident, but did not work on the following day. He also testified that on the Monday following the injury he went to work and reported his injury to his supervisor, (Mr. B). At a later point in his testimony, claimant stated that he did not go to work on Monday, but called in to report his injury to Mr. B. In a recorded statement claimant gave to carrier's adjuster on May 25, 1994, claimant stated that he had reported his injury on the Wednesday following the incident. At the hearing, claimant explained the difference in his statements as to when he reported his injury by stating that he had been heavily medicated when he had given his statement to the adjuster. Claimant continued to work for the employer after his injury until April 18, 1994, when his employment was terminated.

Claimant testified that he has a nervous disorder, for which he receives disability benefits from the federal government. On April 28, 1994, claimant checked himself into

(Hospital) primarily for that condition, however, he stated that he also was having difficulty with his left shoulder and his upper back from the lifting incident at work. On May 2, 1994, claimant sought treatment for his shoulder from (Healthcare Provider). Progress notes of that date indicate that claimant complained of left scapular pain of one month's duration. Those notes diagnose left scapular pain/muscle spasms and state that there is "no sign of trauma." Those notes do not include a history of claimant having been hurt on the job, despite claimant's insistence that he told the doctor of that injury. In treatment notes of May 31, 1994, claimant is diagnosed with "left rhomboid strain". Those notes also include a notation that "[claimant] states that he hurt himself when lifting material at work." In addition, physical therapy notes of June 9 and August 19, 1994, include a history of claimant having hurt his left shoulder lifting plywood at work.

With respect to disability, claimant stated that he was paid $6.00 per hour but that his hours varied from highs of 36 to 37 hours per week to lows of 15 hours per week. Claimant stated that since he was terminated from his employment on April 18, 1994, he has worked approximately four days performing odd jobs for a total of approximately $300.00.

Mr. B testified that he was the maintenance supervisor for employer and was claimant's supervisor. He specifically denied that claimant had ever reported a work-related injury to him. He testified that he first learned that claimant was alleging a workers' compensation injury several months after claimant stopped working for the employer and that he learned of the injury when he was contacted by carrier's adjuster. He also testified that it was very common that claimant would miss a few days of work in a row. He agreed that claimant was paid $6.00 per hour and stated that claimant worked an average of 18 to 20 hours per week. Mr. B further stated that on April 18, 1994, claimant became angry that the employer had hired someone else to complete the painting, which claimant apparently thought he should be permitted to do, and that claimant told Mr. B that the employer was not living up to the terms of his employment contract and that he would resolve this matter some other way. In his testimony, claimant confirmed that he had made the statement that he would settle this matter another way to Mr. B, after he was terminated by employer's owner.

It is well-settled that the claimant has the burden of proving that he sustained a compensable injury. Texas Workers' Compensation Commission Appeal No. 94248, decided April 12, 1994. A claimant's testimony is that of an interested party and only raises an issue of fact to be resolved by the hearing officer. Escamilla v. Liberty Mutual Insurance Co., 499 S.W.2d 758 (Tex. Civ. App.-Amarillo 1973, no writ). Under the 1989 Act, the hearing officer is the trier of fact and is the sole judge of the relevance and materiality of the evidence offered and of the weight and credibility to be given to the evidence. Section 410.165(a). When presented with conflicting testimony and evidence, the hearing officer may believe one witness and disbelieve others, and may resolve inconsistencies in the testimony of any witness. McGalliard v. Kuhlman, 722 S.W.2d 694 (Tex. 1986). As the fact finder, the hearing officer must resolve conflicts and inconsistencies in the evidence, weigh the credibility of the witnesses, and make findings

of fact. Texas Workers' Compensation Commission Appeal No. 92657, decided January 15, 1993. An appellate 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. National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied.) Where sufficient evidence supports the findings and they are not so against the great weight and preponderance of the evidence as to be clearly wrong and unjust, then the decision should not be disturbed. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

In this instance, the hearing officer determined that claimant had not carried his burden of proving a compensable injury. In so doing, the hearing officer apparently chose not to believe claimant's testimony relating to the alleged injury and resolved the inconsistencies in the other evidence against the claimant. The hearing officer was acting within his province as the fact finder in so finding. Our review of the record indicates that there is sufficient evidence to support the determination that claimant did not sustain a work-related injury. Therefore, there is no basis for disturbing that decision on appeal. Cain, *supra*. Because the hearing officer found that claimant did not sustain a compensable injury, he correctly determined that claimant did not suffer disability within the meaning of the 1989 Act, as the existence of a compensable injury is a prerequisite to a finding of disability. *See* Section 401.011(16).

Next, we turn to the issue of whether claimant timely notified his employer of his injury. The hearing officer found that claimant did not report his injury to his employer within 30 days and did not have good cause for his failure to do so. Thus, the hearing officer accepted the testimony of Mr. B that claimant never told him of a work-related injury over that of the claimant that he told Mr. B about his injury on the Monday following his injury. The hearing officer, as the sole judge of the evidence, was permitted to so resolve the inconsistencies in the testimony and evidence to determine that the claimant did not notify his employer of the alleged injury within the required 30-day period. That determination is supported by sufficient evidence and there is no sound basis for disturbing it on appeal. Our review of the record indicates, that as the hearing officer found, the claimant did not establish good cause for his failure to give timely notice, in that the claimant made no good cause argument, instead insisted that he timely reported his injury.

With respect to the issue of claimant's AWW, we note that we have previously stated that:

> the hearing officer has the discretion to apply any fair, just and reasonable method to calculate AWW where the wage rate was not determinable through the use of actual wages or the wages of another employee in the same or similar employment. [Citation omitted.] Courts have held that a "just, and fair" wage is "not a matter of mathematical calculation," but must be established by the fact finder on due consideration of all the facts and circumstances present in

the case. Barrientos v. Texas Employers' Insurance Association, 507 S.W.2d 900 (Tex. Civ. App.-Amarillo 1974, writ ref'd n.r.e.).

Texas Workers' Compensation Commission Appeal No. 93386, decided July 2, 1993. After reviewing the hearing officer's calculation of AWW in this instance, we cannot conclude that the hearing officer abused his discretion in calculating claimant's AWW and that determination will not be reversed on appeal. Appeal No. 93386, *supra*.

On the question of adding issues, the hearing officer determined that issues could not be added by requesting a BRC after a hearing had been set and that the parties were limited to the procedures established in Section 410.151 and Tex. W. C. Comm'n, 28 TEX. ADMIN. CODE § 142.7 (Rule 142.7) for adding issues following the issuance of the BRC report. We agree with the hearing officer's conclusion that parties are limited to the procedures in the 1989 Act and the Commission's rules for adding issues after a BRC and the procedure used in this case of continuing the hearing and setting another BRC was improper under the reasoning of Texas Workers' Compensation Commission Appeal No. 94109, decided March 8, 1994. In light of the hearing officer's determination of this issue, we are not sure why he decided to add those issues anyway, to receive evidence on them, and to decide them. Nonetheless, we are without jurisdiction to review his decision to decide the added issues in that claimant did not challenge it and carrier's response, which questioned the propriety of reaching the issues, was not timely filed to serve as an appeal. Accordingly, we will briefly address the merits of those issues added after the September 30th BRC, which were actually litigated and decided, and to which the claimant filed a timely request for review.

Two of those issues concern the question of whether carrier has waived its right to contest compensability. Specifically, claimant argues that the statement in carrier's TWCC-21 that "Carrier disputes injury in the course and scope of duty" was insufficiently specific to satisfy the requirements of Section 409.022 and Rule 124.6(a)(9). We have previously noted that in reviewing the adequacy of a carrier's controversion we look to see if "[a] fair reading of the grounds listed, when considered together, encompass a controversion or dispute on the basic issue that an injury was not suffered within the course and scope of employment." Texas Workers' Compensation Commission Appeal No. 92145, decided May 27, 1992. *See also* Texas Workers' Compensation Commission Appeal No. 931148, decided February 1, 1994, and the cases cited in that decision. Accordingly, we find no merit in the assertion that the phrase "disputes injury in course and scope of duty," which uses some statutory words of a defense was somehow insufficient to raise that defense. Similarly, we reject the argument that carrier waived its right to contest compensability in this case by failing to file its TWCC-21 within seven days of the date it received written notice of the alleged injury. We considered and rejected that argument in Texas Workers' Compensation Commission Appeal No. 92122, decided May 4, 1992, noting that "Class B administrative penalties, not waiver [of its right to contest compensability], are provided for by the statute should a carrier fail to either initiate payment or provide notice of refusal to pay not later than seven day after receiving written notice of injury."

Finally, we turn to claimant's apparent assertion of error that the benefit review officer did not accept some documents into the "record" at the BRC. This allegation is apparently premised upon a misunderstanding of the purpose of a BRC in the dispute resolution process. A BRC is a nonadversarial, informal dispute resolution proceeding designed to mediate and resolve disputed issues by mutual agreement. Section 410.021. Where, as here, that process does not result in a resolution of all disputed issues, the benefit review officer (BRO) files a report and the unresolved issues go to a hearing. Section 410.031. The BRO does not receive testimony and does not make a record. Section 410.026. The BRO has no authority to take evidence at the BRC; therefore, he acted properly in not accepting evidence at the BRC and instead explaining in his report that the claimant was to submit his evidence at the hearing.

For the foregoing reasons, the Decision and Order of the hearing officer is affirmed.

Tommy W. Lueders
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Thomas A. Knapp
Appeals Judge