

APPEAL NO. 950127

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 20, 1994, in _____, Texas, with _____ presiding as hearing officer. The issues at the CCH were: injury, date of injury, disability, average weekly wage (AWW) and whether the carrier waived its right to contest the compensability of the claim by not doing so in 60 days. The parties entered into stipulations concerning the date of the alleged injury and AWW. The hearing officer found that the claimant suffered an injury in the course and scope of his employment, that as result of compensable injury the claimant had disability from _____, continuing through the date of the CCH, that the carrier did not contest compensability within 60 days of being notified of the injury, and that the carrier's contest is based upon evidence that was reasonably available and discoverable by the carrier had it chosen to investigate the claim. The carrier appeals contending that the findings and conclusions of the hearing officer are not supported by the evidence. The claimant does not file a response.

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.

Claimant testified that on _____, a forklift he was operating tilted over causing part of the forklift to hit him in the left hip, for which he received medical attention on _____. The claimant testified that the employer sent him to Dr. H. The claimant testified that Dr. H gave him medication, told him he could return to work and told him his condition would improve. The claimant testified that he returned to work the next day, but continued to have pain and difficulty in lifting. The claimant testified that he tried to communicate these concerns to coworkers and that he tried to get medical attention, but was told by the employer's medical coordinator that he would have to pay a \$250.00 deductible for any medical treatment. The claimant testified that he did not have the \$250.00 deductible.

The claimant testified that on the night of _____, he was unable to sleep due to pain and therefore he overslept. The claimant testified he sought medical care that day at number of places, including the offices of Dr. B. The claimant stated that the office manager at Dr. B's office told him he would have to get authorization from the carrier to change treating doctors to Dr. B before Dr. B could see him. The claimant testified that on the following day, _____, he was informed that he was terminated from the employer's employment for absenteeism. The claimant testified that after pursuing his attempts to change treating doctors, on October 4, 1994, he was able to see Dr. B. The claimant testified that Dr. B placed him off work.

The claimant also stated that were he not terminated, he would have continued working for the employer, although his physical condition may have limited his ability to perform some of his duties. The claimant testified that since being terminated, he has not been able to return to work with the employer¹ and that under his doctor's restrictions, which limit his lifting and bending, he has been unable to obtain and retain employment since he was terminated on _____.

The carrier brought forth testimony from the claimant's supervisor and two coworkers to the effect that from the time of the injury until his discharge from employment the claimant did not complain of difficulty working and appeared to have no such difficulty. The carrier also brought testimony from KB (Ms. B), who said that the initial Employer's Report of Injury (TWCC-1) was of a "no lost time" injury thereby relieving carrier of the duty to investigate until any claim for benefits was made. The carrier took the position that this claim is essentially a spite claim filed by the claimant after he was discharged from employment in retaliation for his firing. The carrier also points to a number of inconsistent statements made by the claimant, contending that the claimant's credibility was questionable and his description of events incoherent.

We have held that 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 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

¹The claimant did state in his recorded statement that he was in the lawn care business "part-time," but denied working in his CCH testimony.

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).

The carrier argues that there is evidence that the claimant was not injured when the forklift fell, citing Dr. H's report and attacking the testimony of the claimant that he was injured by pointing to inconsistencies between his earlier recorded statement and testimony at the hearing and to inconsistencies in his testimony at the hearing. We point out that corroboration of an injury is not required and an injury may be found based upon a claimant's testimony alone. Gee v. Liberty Mutual Fire Insurance Co., 765 S.W.2d 394 (Tex. 1989). Also as stated above the hearing officer may believe all, some, or none of the testimony of a particular witness. Further, Dr. H does not state that the claimant had no injury but said "there is no evidence of an acute injury." With evidence in this posture we cannot say that the decision of the hearing officer that the claimant was injured in the course and scope is against the great weight and preponderance of the evidence.

As to the issue of disability the carrier again points to inconsistencies in the claimant's testimony as well to a statement in his interrogatories that disability began on October 4, 1994, (a date later than the _____, date found by the hearing officer). The carrier also relies on the testimony of the claimant's supervisor and coworkers that the claimant was able to perform his job duties after the accident. We have held that disability is a question of fact to be determined by the hearing officer and may be based on the testimony of the claimant alone. Texas Workers' Compensation Commission Appeal No. 93560, decided August 19, 1993. There is testimony from the claimant to support the hearing officer's finding of disability since _____. The claimant's response to interrogatories obviously dealt with the date Dr. B placed him under restrictions, not necessarily the date he was unable to "obtain and retain employment." Under the standard of appellate review discussed above we cannot say the hearing officer findings as to disability were against the great weight and preponderance of the evidence.

Much of the carrier's argument concerning whether the carrier timely controverted the claim revolves around whether or not the carrier knew at the time it was first notified of the claimant's accident that it was a time lost injury. We need not review this argument as we have previously held that the fact that an injury is a no lost time accident does not relieve the carrier of its obligation to investigate and timely dispute a claim. See Texas Workers' Compensation Commission Appeal No. 93967, decided December 9, 1993. In the present case, the carrier received an employer's report of injury on July 18, 1994. The carrier states that it had no duty to investigate since the TWCC-1 was marked "F.Y.I." (which it interprets as meaning "for your information"). We know of no authority supporting this position. As we stated in Appeal No. 93967:

It has been observed in another context that workers' compensation insurance carriers have a "duty" to investigate claimant. [Citations omitted.] We

believe that Section 401.021(c) provides motivation to a carrier not to simply serve as a passive repository of filed documents and provided information, but to investigate within 60 days in order to bring claims to prompt resolution.

Thus the carrier, which was admittedly aware of the accident on July 18, 1994, but did not dispute the claim until October 10, 1994, clearly failed to comply with the provisions of Section 409.021.

The decision and order of the hearing officer are affirmed.

Gary L. Kilgore
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Alan C. Ernst
Appeals Judge