APPEAL NO. 980023

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 8, 1997. The issues at the CCH were whether the appellant's (carrier herein) contest of compensability was based on newly discovered evidence that could not reasonably have been discovered at an earlier date allowing the carrier to reopen the issue of compensability, whether the compensable injury was a producing cause of the respondent's (claimant herein) left arm and left elbow condition, and whether the claimant had disability resulting from the injury sustained on _____. The hearing officer determined that the carrier's contest of compensability regarding an intervening injury was not based on newly discovered evidence that could not have been discovered earlier, that the claimant's compensable injury is a producing cause of the claimant's left arm and elbow condition and that the claimant had disability from June 6, 1997, and continuing through the date of the CCH due to his _____, injury. The carrier appeals these determinations arguing that it timely contested compensability upon receiving medical evidence of an intervening injury, that the evidence establishes that claimant's left arm and elbow condition is a result of the intervening injury and that there is no medical evidence that the claimant had disability after May 30, 1997. The claimant replies that the hearing officer's resolution of the issues is legally correct and supported by the evidence.

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.

It is undisputed that the claimant suffered an injury on _____, when he was breaking open a wooden crate with a pry bar and sledgehammer. The claimant was released to regular duty by (Dr. F), his treating doctor, on March 26, 1997. The claimant testified that in May 1997 he felt his arm pop while he and a coworker were lifting a turbomolecular pump. Dr. F opined that the claimant experienced a "flare in pain" and not a new injury while lifting the pump. The claimant testified that from June 6, 1997, continuing through the date of the CCH he was unable to obtain and retain employment at his preinjury wage due to his _____, injury. The carrier produced copies of medical records from Dr. F showing receipt on June 20, 1997, and June 30, 1997. On July 2, 1997, the carrier filed a Payment of Compensation or Notice of Refused or Disputed Claim (TWCC-21) contesting compensability because the claimant's problems arose from playing golf. In evidence was a TWCC-21 dated July 22, 1997, in which the carrier disputed compensability based on the claimant's problems resulting from playing golf as well as from lifting a heavy object at work. This second TWCC-21 did not show when it was received by the Texas Workers' Compensation Commission (Commission).

The carrier contends that the hearing officer improperly checked Commission records concerning the Commission's receipt of the second TWCC-21. In the hearing

officer's Finding of Fact No. 11 he states that the "Carrier has not produced a copy of the TWCC 21 form with a receipt stamp evidencing receipt by the [Commission]." It appears that the hearing officer's determination of this issue was not based upon his review of Commission records but on the carrier's failure to produce evidence of filing. As the claimant points out, the carrier was given ample opportunity to provide this evidence at the CCH. Further, the TWCC-21 dated July 22, 1997, appears to be an original rather than a copy. The hearing officer essentially does not find there was evidence supporting when, or if, this TWCC-21 was filed. The carrier had the burden to establish a filing of a contest of compensability as part of its burden to show that it based such contest on newly discovered evidence. Absent such evidence, we find no error in the hearing officer's resolution of this issue.

As to producing cause the carrier argues that the evidence establishes that the claimant's condition is due to an intervening injury lifting the pump. We first note that the carrier's argument on appeal is essentially a sole cause argument and there was not a sole cause issue before the hearing officer. In any case, the issue of producing cause is one 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. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986). This finding was supported by medical evidence from Dr. F. Applying this standard we find no error in the hearing officer's finding regarding producing cause.

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. The hearing officer's finding of disability is supported by the claimant's testimony.

The decision and order of the hearing officer are affirmed.

Gary L. Kilgore
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Philip F. O'Neill
Appeals Judge