APPEAL NO. 990207

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 January 7, 1999. The issues at the CCH were injury, timely report of injury, election of remedies and disability. The hearing officer concluded that the appellant/cross-respondent (claimant herein) did suffer a compensable injury on _____; that he did timely report this injury to his employer, and that the claimant did not establish "entitlement to disability." The claimant appeals, arguing that the evidence established that the claimant suffered a period of disability. The respondent/cross-appellant (carrier herein) replies that the hearing officer's finding of no "entitlement to disability" was supported by the evidence. The carrier files a request for review challenging the hearing officer's findings as to injury, timely report of injury and election of remedies. The claimant responds that these findings were sufficiently supported by the evidence.

DECISION

We reform the hearing officer's Conclusion of Law No. 7 to read "entitlement to temporary income benefits" (TIBS) wherever the phrase "entitlement to disability" appears. 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 as reformed.

The hearing officer discusses the evidence in some detail in her decision and we will not repeat that discussion here, but will adopt her rendition of the evidence. We will very briefly summarize the evidence most germane to this appeal. This includes testimony by the claimant that while he was working carrying a piece of plywood on _____, his hand slipped and he felt a burning sensation in his left index finger. The claimant testified that he reported this injury within 20 minutes to his immediate supervisor. The claimant sought medical treatment and was referred to Dr. S, a plastic surgeon, who performed surgery on the claimant's left index finger on October 22, 1997. The claimant did testify that 47 years before the date of injury he had been shot with a BB pellet in left index finger, but that he had not had problems with the finger since that time. Medical records show that the claimant underwent additional surgeries on his left index finger on February 13, 1998, and on July 30, 1998. Dr. S related the claimant's left index finger problems to a work-related injury. The claimant testified that he missed three days from work at the time of the October 22, 1997, surgery and one day from work as a result of the February 13, 1998, surgery. The claimant was laid off work due to a reduction of force on July 9, 1998. The claimant testified that prior to being laid off he performed his regular duties.

The carrier challenges the hearing officer's finding that the claimant suffered a compensable injury on _____. The carrier argues that the claimant merely suffered an increase in pain from his preexisting injury of 47 years prior. 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 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).

Generally, corroboration of an injury is not required and may be found based upon a claimant's testimony alone. Gee v. Liberty Mutual Fire Insurance Co., 765 S.W.2d 394 (Tex. 1989). Here, the fact the claimant suffered an injury is supported not only by his testimony but by medical reports from Dr. S. We also note that it is well-established that to defeat a claim of injury due to a prior injury the burden is on the carrier to establish that the prior injury is the sole cause of the claimant's condition. Texas Employers Insurance Association v. Page, 553 S.W.2d 98 (Tex. 1977). We find no error in the hearing officer's finding of a compensable injury.

The 1989 Act generally requires that an injured employee or person acting on the employee's behalf notify the employer of the injury not later than 30 days after the injury occurred. Section 409.001. The burden is on the claimant to prove the existence of notice of injury. Travelers Insurance Company v. Miller, 390 S.W.2d 284 (Tex. Civ. App.-El Paso 1965, no writ). Here, the claimant testified that he gave notice of injury on the date of the injury and the hearing officer found that this was the case based on that testimony. The carrier gives no reason why we should overturn as a matter of law this factual determination of the hearing officer, and we decline to do so.

As far as election of remedies is concerned we have held previously recognized that to prove establish an election of remedies all four prongs of the disjunctive test set out by the Texas Supreme Court in Bocanegra v. Aetna Life Insurance Company, 605 S.W.2d 848 (Tex. 1980) must be met. *See* Texas Workers' Compensation Commission Appeal No. 980898, decided June 17, 1998. In the present case the hearing officer found that there was no knowing election because the claimant did not know the difference between group

health and workers' compensation insurance. This factual finding was supported by the testimony of the claimant. *See also* Texas Workers' Compensation Commission Appeal No. 990022, decided February 19, 1999.

The claimant appeals the hearing officer's Conclusion of Law No. 7, in which she stated as follows:

> Claimant did not establish entitlement to disability as a result of the _____ compensable injury.

This conclusion of law was apparently predicated on Finding of Fact No. 15, in which the hearing officer found as follows:

> Claimant failed to establish seven days of lost time due to his _____ compensable injury.

The problem with Conclusion of Law No. 7 and Finding of Fact No. 15 is that they confuse the issue of disability with entitlement to TIBS. Disability is defined in Section 401.011(16) as "the inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage." Clearly the hearing officer recognizes that the claimant met this definition when he was off work due to the first two surgeries. The claimant is not entitled to TIBS (or any other income benefits) pursuant to Section 408.082 unless the injury results in disability for at least one week. The hearing officer clearly believes that the claimant did not meet this requirement and was therefore not entitled to TIBS. The claimant does argue on appeal that he missed more than seven days from work due to the injury, but, as there was conflicting evidence regarding this issue, and we do not find the overwhelming evidence to be to the contrary, we do not find the hearing officer erred as a matter of law in finding the claimant was not entitled to TIBS. We do find that she did confuse the issue by making her determinations in terms of "entitlement to disability" rather than "entitlement to TIBS." We therefore reform the decision of the hearing officer to read "entitlement to temporary income benefits" whenever the phrase "entitlement to disability" appears. We understand this creates a less than perfect congruence between the issues and the determinations of this case. We do not believe that it is necessary under the facts of this case to remand this case to obtain a finding on disability as such because it is clear that the hearing officer believes that the claimant had a period of disability and she states in her decision what she believes this period to be.

As reformed the decision and order of the hearing officer are affirmed.

_____
Gary L. Kilgore
Appeals Judge

CONCUR:

_____
Susan M. Kelley
Appeals Judge

_____
Judy L. Stephens
Appeals Judge