APPEAL NO. 990689

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 commenced on February 2, 1999, with the record closing on February 12, 1999. The issues at the CCH were whether the appellant (claimant) sustained a compensable injury and whether the respondent's (carrier) 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. The hearing officer determined that the carrier's contest of compensability was based upon newly discovered evidence that could have not been discovered earlier and that the carrier disputed the compensability of the claim within a reasonable time of receiving such evidence. The hearing officer also found that the claimant did not sustain a back injury in the course and scope of his employment on _____. The claimant appeals, arguing that certain findings of the hearing officer were contrary to the evidence, that the hearing officer erred by not considering the claimant's final argument, and that the hearing officer erroneously put the burden of proof on the claimant. The carrier responds that the claimant's final argument was late and was not evidence, that the hearing officer correctly placed the burden of proof and that there was sufficient evidence to support the findings of the hearing officer.

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.

The hearing officer summarizes the evidence in her decision and we adopt her rendition of the evidence. We will briefly summarize the evidence germane to the appeal. This includes testimony from the claimant that he sustained a low back injury at work on _____. This claim was initially accepted by the carrier and benefits were paid. However, on August 11, 1998, the claimant's ex-wife wrote a letter to the carrier stating that the claimant had told her that he was actually injured in a bar fight rather than at work. A great deal of the testimony concerns the relationship between the claimant and his ex-wife.

At the conclusion of the evidence the parties agreed to submit final arguments in writing by 5:00 p.m. on February 12, 1999. The hearing officer states in her decision that the claimant's argument was received by facsimile transmission on February 12, 1999, at 5:11 p.m. and was not considered because it was late.

The claimant argues in its brief that his attorney tried repeatedly to transmit the final argument between 4:00 and 5:00 p. m. on February 12, 1999, but was unable to get through on the field office's facsimile transmission line. The claimant argues that it was unjust for the hearing officer not to consider his final argument. The carrier responds that the parties agreed to submit final argument by the deadline and that the claimant failed to bring any telephone or transmission problems to the attention of the hearing officer, only raising this issue on appeal. Finally, the carrier argues that argument is not evidence.

We do not perceive any great harm that would have resulted from the hearing officer's considering the claimant's argument. However, we also do not think that the claimant has demonstrated any harm from her failing to do so. We find any error in the hearing officer's failure to consider the claimant's final argument was harmless error. *See* Hernandez v. Hernandez, 611 S.W.2d 732 (Tex. Civ. App.-San Antonio 1981, no writ).

As far as the burden of proof is concerned, the claimant argues that the hearing officer erred in putting the burden of proof on him to establish injury when the carrier failed to timely dispute his injury. The carrier contends that because the hearing officer correctly found that it could reopen the issue of compensability based upon newly discovered evidence, the burden of establishing an injury remained on the claimant. The hearing officer's determination that the carrier was entitled to reopen the issue of compensability is clearly the key to the resolution of whether the claimant had the burden of proof to prove an injury.

Section 409.021 provides as follows, in relevant part:

> (a) An insurance carrier shall initiate compensation under this subtitle promptly. Not later than the seventh day after the date on which an insurance carrier receives written notice of an injury, the insurance carrier shall:
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> (1) begin the payment of benefits as required by this subtitle; or
>
> (2) notify the commission [Texas Workers' Compensation Commission] and the employee in writing of its refusal to pay and advise the employee of;
>
> (A) the right to request a benefit review conference; and
>
> (B) the means to obtain additional information from the commission.
>
> (b) An insurance carrier shall notify the commission in writing of the initiation of income or death benefit payments in the manner prescribed by commission rules.
>
> (c) If an insurance carrier does not contest the compensability of an injury on or before the 60th day after the date on which the insurance carrier is notified of the injury, the insurance carrier waives its right to contest compensability. The initiation of payments by an insurance carrier does not affect the right of the insurance carrier to continue to investigate or deny the compensability of an injury during the 60-day period.

(d) An insurance carrier may reopen the issue of the compensability of an injury if there is a finding of evidence that could not reasonably have been discovered earlier.

In the present case, it was undisputed that the carrier did not dispute the compensability of the claimant's injury within 60 days, but instead initiated benefits. The carrier contends that it did not have a reason to dispute the claimant until the claimant's ex-wife sent a letter to the employer stating that the claimant had told her he was actually injured in a bar fight, and not at work. The claimant's ex-wife did not send this letter to the employer until August 11, 1998, and there was evidence that the carrier did not receive it until August 17, 1998. It is undisputed that the carrier filed a dispute of the claim based upon this evidence on August 20, 1998. The hearing officer reasons that the carrier could not have discovered the evidence until the ex-wife sent the letter and that it acted in a reasonable amount of time after receiving the letter. The claimant does not explain in its appeal how such findings were in error and, under the circumstances of this case, we find no error in them.

The claimant, in his appeal, does point to evidence from the claimant and medical evidence that supports his contention that he suffered a compensable injury. The carrier points to contrary evidence and characterizes this case as turning on a "swearing match" between the claimant and his ex-wife.

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 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).

A finding of injury may be based upon the testimony of the claimant alone. Houston Independent School District v. Harrison, 744 S.W.2d 298,299 (Tex. App.-Houston [1st Dist.] 1987, no writ). However, as an interested party, the claimant's testimony only raises an issue of fact for the hearing officer to resolve. Escamilla v. Liberty Mutual Insurance Company, 499 S.W.2d 758 (Tex. Civ. App.-Amarillo 1973, no writ). In the present case, the hearing officer found no injury contrary to the testimony of the claimant. Claimant had the burden to prove he was injured in the course and scope of his employment. Reed v. Aetna Casualty & Surety Co., 535 S.W.2d 377 (Tex. Civ. App.-Beaumont 1976, writ ref'd n.r.e.). We cannot say that the hearing officer was incorrect as a matter of law in finding that the claimant failed to meet this burden. Nor can we say that the hearing officer erred as matter of law in giving more weight to the testimony of the claimant's ex-wife than to the testimony of the claimant.

The decision and order of the hearing officer are affirmed.

_____
Gary L. Kilgore
Appeals Judge

CONCUR:

_____
Philip F. O'Neill
Appeals Judge

_____
Thomas A. Knapp
Appeals Judge