APPEAL NO. 990775

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 March 16, 1999. The issues at the CCH were whether the respondent's (claimant herein) compensable injury of _____, extended to and included his current lumbar herniated discs, entitling him to reasonable and necessary medical treatment. The hearing officer found that the claimant's injury of _____, extends to and includes his current herniated lumbar discs. The appellant (carrier herein) files a request for review, arguing that this finding was in error because the claimant entered into a binding agreement with the carrier that he sustained a new injury on (subsequent date of injury), and because it was contrary to the great weight and preponderance of the evidence. There is no response from the claimant to the carrier's request for review in the appeal file.

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 consolidated hearings at issue in this case along with issues concerning the claimant's allegation of a new injury on (subsequent date of injury). While taking the evidence on both cases at the same time, the hearing officer issued separate decisions. Each case involved different employers and different carriers. In the present case the parties stipulated that the claimant suffered a compensable injury on _____. This was a back injury in which the claimant was shown by MRI to have a disc protrusion at L5-S1. The claimant returned to work with another employer on August 1, 1998. Until shortly before that time he was still having problems with his back and still undergoing medical treatment. The claimant alleged that he suffered a new injury to his back on (subsequent date of injury), while working. Dr. H, who treated the claimant for both his _____, compensable injury and his alleged injury of (subsequent date of injury), testified that the claimant suffered a new injury on (subsequent date of injury). Extensive medical records concerning the claimant's treatment since _____, were admitted into evidence.

The hearing officer's findings of fact and conclusions of law included the following:

FINDINGS OF FACT

2. The Claimant's current lumbar herniated discs are a continuation of the (incorrect date of injury), compensable injury and are not a result of an alleged new injury sustained on _____.

CONCLUSIONS OF LAW

3. The compensable injury of (incorrect date of injury) extends to and includes the Claimant's current lumbar herniated discs and thus entitles him to reasonable and necessary medical treatment.

The carrier first contends that the hearing officer erred in making the above determinations because the claimant entered into an agreement with the carrier that he sustained a new injury on (subsequent date of injury). The carrier cites to Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 147.4(c) (Rule 147.4(c)) in support of this proposition. Rule 147.4(c) provides as follows:

> An oral agreement reached during a benefit contested case hearing and preserved in the record is effective and binding on the date made.

The carrier apparently believes that the claimant's testimony at the CCH elicited by its attorney on cross-examination that he suffered a new injury on (subsequent date of injury), constituted this "agreement." This argument, while certainly novel, is without merit. First, it is axiomatic that any agreement, to be binding, requires consideration. There was no consideration here. Secondly, Rule 147.9 provides as follows in relevant part:

> (a) An agreement or settlement may not:
>
> (1) limit or terminate the employee's right to medical benefits; . . . .

Thus, even if there were consideration, an agreement to limit or terminate the claimant's medical benefits would have been void *ab initio.*

We have held that the issue of the extent of injury is a question of fact for the hearing officer. Texas Workers' Compensation Commission Appeal No. 93613, decided August 24, 1993. We have also held that the question of whether the claimant suffered a continuation of an injury or a new injury is a question of fact. Texas Workers' Compensation Commission Appeal No. 93515, decided July 26, 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).

In the present case, there was conflicting evidence on the issue of whether the claimant's _____, injury extended to and included his current herniated discs. The hearing officer resolved that conflict and we do not find the overwhelming evidence contrary to that resolution.

The decision and order of the hearing officer are affirmed.

Gary L. Kilgore
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Philip F. O'Neill
Appeals Judge