.APPEAL NO. 990812

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On March 18, 1999, a contested case hearing (CCH) was held. With respect to the issues before him, the hearing officer determined that the respondent's (claimant herein) compensable injury of _____, was a producing cause of his reflex sympathetic dystrophy (RSD), that the appellant (carrier herein) waived the right to contest the compensability of the RSD, and that the claimant sustained disability beginning on September 29, 1998, and continuing through the date of the CCH. The hearing officer also found that the claimant had good cause for not attending a CCH scheduled for February 1, 1999. The carrier appeals arguing that the hearing officer erred in admitting two documents that were not timely exchanged. The carrier also contends that there was no evidence, or insufficient evidence, to support the hearing officer's determination that the claimant's injury was a producing cause of his RSD. The carrier argues that it was under no obligation to dispute the RSD as it did not constitute an extension of the claimant's injury. The carrier also disputes the hearing officer's finding that the claimant had good cause for not attending the February 1, 1999, CCH. Finally, the carrier argues that the hearing officer erred in his disability finding. 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 procedural history of this case is somewhat unusual. There was a benefit review conference (BRC) held on November 18, 1998, on the issue of disability. As a result of this BRC a CCH was scheduled for January 6, 1999. This CCH was canceled due to the illness of the hearing officer and rescheduled for February 1, 1999. Meanwhile, a second BRC on the issues of extent of injury and carrier waiver was set for February 10, 1999. The claimant did not appear at the February 1, 1999, CCH. The hearing officer rescheduled this CCH along with the issues heard at the February 10, 1999, BRC for the CCH presently under review. At this CCH the hearing officer also considered whether the claimant had good cause for not appearing at the February 1, 1999, CCH.

The claimant testified that he did not appear at the February 1, 1999, CCH because he was confused over receiving notices for the different hearing dates. At the hearing the hearing officer admitted two exhibits proffered by the claimant over carrier's objection that neither of them were timely exchanged. The first of these exhibits was a medical report from (Dr. W), the claimant's treating doctor, in which Dr. W expressed the opinion that the claimant's RSD was directly related to the claimant's compensable injury. The second

exhibit was a pamphlet describing RSD. The hearing officer admitted both exhibits. In regard to the first, he found that it was timely exchanged.[1] The hearing officer also found that had the document not been timely exchanged there was good cause for it not being timely exchanged due to the confusion about the hearing dates. In regard to the second challenged exhibit, the hearing officer admitted it for the limited purpose of providing him background information on RSD and not as evidence on any issue in the case.

The hearing officer summarizes the evidence on the merits in his decision and we adopt his rendition of the evidence. We will only briefly touch on the evidence germane to the appeal. This includes the fact that it was undisputed that on March 16, 1998, the claimant suffered a crush injury to his right hand. The claimant testified that the injury took place when he was working on a drill press and a "chuck" fell from the press injuring his right hand.

The claimant testified that he was initially treated for this injury by the company doctor and later began treating with Dr. W. There was medical evidence from Dr. W as well as other doctors relating the claimant's RSD to his compensable injury. There is evidence in the record that the carrier preauthorized treatment for RSD on May 29, 1998. There was also evidence that the carrier first filed a Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) on December 29, 1998, disputing that the claimant's RSD was related to his compensable injury.

First, we consider the hearing officer's finding that the claimant had good cause for not being present at the CCH of February 1, 1999. We first note that the question of whether or not the reason the claimant was not present at the CCH was due to his confusion concerning the various notices is a question of 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

[1]There were representations by the claimant that he exchanged it once he received it and representations from the carrier that the carrier had not seen the document until the CCH.

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).

Applying this standard, there is sufficient evidence in the claimant's testimony to support the finding. We also hold that confusion over the date of the hearing due to receiving various hearing notices is an adequate reason to support a finding of good cause for failure to appear under the circumstances of this case.

We next consider the carrier's argument that the hearing officer erred in admitting the two challenged exhibits. We note in regard to the first challenged exhibit that there was conflicting evidence as to whether or not it was timely exchanged. Determining whether or not it was exchanged was a factual matter for the hearing officer, and applying the standard of review set out above, we find sufficient evidence to support the hearing officer's finding that it was. Also, we find no error in the hearing officer's finding good cause in the alternative.

As far as the second challenged exhibit is concerned, we note that the hearing officer admitted it only for a very limited purpose. The carrier has also failed to show that the admission of this exhibit was prejudicial to it. Error, if any, in its admission was harmless error. *See* Hernandez v. Hernandez, 611 S.W.2d 732 (Tex. Civ. App.-San Antonio 1981, no writ).

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:
>
> (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 [BRC]; 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.

The carrier clearly did not dispute the compensability of the claimant's RSD within 60 days of receiving notice that his injury included or extended to this condition. We find no error in the hearing officer's finding that the carrier waived its right to contest compensability of RSD.

The hearing officer also challenges the hearing officer's factual finding that the claimant's compensable injury was a producing cause of his RSD. This was a factual determination supported by medical evidence. We find sufficient evidence to support this finding under the standard of review discussed above. While the carrier apparently tries to draw some distinction between "objective medical evidence" and expert medical testimony, we do not find this distinction well-taken.

Finally, we consider the carrier's argument concerning disability. Disability is a question of fact to be determined by the hearing officer and may be based upon the testimony of the claimant alone. Texas Workers' Compensation Commission Appeal No. 93601, decided August 31, 1993. Here, the hearing officer's finding of disability was based upon both the testimony of the claimant and medical evidence. We do not find merit in the carrier's argument that the hearing officer exceeded his jurisdiction by finding that the claimant's disability continued through the date of the CCH and his order that the carrier pay temporary income benefits until the claimant attained maximum medical improvement or disability ends.

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