APPEAL NO. 990821

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On March 24, 1999, a contested case hearing (CCH) was held. With respect to the issues before him the hearing officer determined that the respondent (carrier herein) is not relieved of liability under Section 406.071, that the appellant (claimant herein) elected to pursue a remedy and recover compensation under the workers' compensation laws of another jurisdiction, thereby barring recovery under the 1989 Act, and that the claimant did not file a claim within one year of the injury as required by Section 409.003. The claimant appeals the latter two determinations. The claimant argues that the ombudsman failed to obtain a copy of his claim from the files of the Texas Workers' Compensation Commission (Commission) and the claimant attaches a copy of a claim form to his appeal. The claimant argues that he did not knowingly elect to pursue a claim under the law of another jurisdiction but was told by the carrier and the employer that he had no choice but to pursue his claim in State 2. The carrier responds, arguing that the decision of the hearing officer should be affirmed. Neither party appeals the fact findings of the hearing officer that the claimant was recruited in Texas by the employer and that between July 29, 1996, and _____, the claimant worked in Texas ten or more days, or the hearing officer's conclusion of law that the carrier is not relieved of liability under Section 406.071. These findings and this conclusion have become final pursuant to Section 410.169.

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 sustained a work-related injury on _____. The claimant was a truck driver who was involved in a motor vehicle accident in the state of State 1. The claimant's employer was headquartered in the state of State 2. The claimant filed a claim for workers' compensation benefits in the state of State 2 and received workers' compensation benefits under State 2' workers' compensation law. The carrier and the ombudsman assisting the claimant entered into a stipulation that the claimant first filed his claim of injury with the Commission on February 4, 1999. The claimant attaches to his request for review a file-stamped Employee's Notice of Injury or Occupational Disease and Claim for Compensation (TWCC-41) date stamped as received by the Commission on May 13, 1998.

Section 406.075 provides as follows:

> (a) An injured employee who elects to pursue the employee's remedy under the workers' compensation laws of another jurisdiction and who recovers benefits under those laws may not recover under this subtitle.

(b) The amount of benefits accepted under the laws of the other jurisdiction without an election under Subsection (a) shall be credited against the benefits that the employee would have received had the claim been made under this subtitle.

The hearing officer specially made the following Finding of Fact No. 6:

Claimant knowingly filed for and received workers compensation benefits under the workers' compensation laws of State 2.

On appeal the claimant argues that he did not make a knowing election. The claimant certainly presented evidence in the form of his testimony that he did not make a knowing election. However, whether or not the claimant's election was knowing was essentially 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 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, we cannot say that the hearing officer erred in finding the claimant made a knowing election. The claimant attaches a copy of our decision in Texas Workers' Compensation Commission Appeal No. 951221, decided September 8, 1995. We note that case involved the affirming of a decision of a hearing officer that the claimant did not make a knowing election. Thus, we do not find that this decision would necessarily dictate that we reverse a hearing officer who has made a finding of no knowing election.

We find the late-filing-of-claim issue far more troubling. On appeal the claimant alleges that the ombudsman represented to him that she would locate a copy of his filed claim, but failed to do so or to tell him how he could obtain one. The ombudsman then stipulated that the claimant first filed a claim on February 4, 1999. The claimant now attaches to his appeal a copy of a TWCC-41 date-stamped May 13, 1998. The carrier argues the claimant cannot complain of ineffective assistance of an ombudsman who was only there to assist, not to represent, the claimant.

Section 409.003 requires that a claimant file a claim for compensation with the Commission for an injury not later than one year after the date on which the injury occurred. The hearing officer found that this was not done in this case. The hearing officer relies on the stipulation that no claim was filed until February 4, 1999. The claimant has attached a document to his request for review that belies the stipulation and thus throws into question the hearing officer's findings on this issue.

We note that we will not generally consider evidence not submitted into the record, but raised for the first time on appeal. Texas Workers' Compensation Commission Appeal No. 92255, decided July 27, 1992. We also note that the date the TWCC-41 was filed with the Commission is also more than one year after the claimant's injury. We do however observe that the carrier's position that the ombudsman owes the claimant no duty because the ombudsman is not the claimant's representative is less than consistent with its position that the ombudsman can enter into a binding stipulation on the claimant's behalf.

The decision of a hearing officer can be affirmed on any reasonable theory supported by the evidence. Daylin, Inc. v. Juarez, 766 S.W.2d 347, 352 (Tex. App.-El Paso 1989, writ denied). In the present case we find that the hearing officer's denial of benefits under the 1989 Act to be supported by his determination that the claimant is barred from benefits under Section 406.075.

The decision and order of the hearing officer are affirmed.

_____
Gary L. Kilgore
Appeals Judge

CONCUR:

_____
Joe Sebesta
Appeals Judge

_____
Robert W. Potts
Appeals Judge