APPEAL NO. 990909

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case prehearing was held on February 10, 1999, and a contested case hearing (CCH) was held on March 31, 1999. The issues at the CCH were extent of injury, maximum medical improvement (MMI), impairment rating (IR) and whether the appellant (claimant herein) is entitled to supplemental income benefits (SIBS) for the first compensable quarter. The hearing officer determined that the claimant's injury did not include an injury to her neck or to her thoracic and lumbar spine. The hearing officer concluded that the claimant reached MMI on July 17, 1996, with an eight percent IR, based upon the initial certification of the designated doctor selected by the Texas Workers' Compensation Commission (Commission). The hearing officer also found that the claimant was not entitled to SIBS for the first compensable quarter because she did not meet the requirement of having an IR of 15% or greater. The claimant appeals, contending that a number of the factual findings and legal conclusions were supported by no evidence or were contrary to the great weight and preponderance of the evidence. The claimant also complains that the hearing officer denied her motion to add the issue of whether the respondent (carrier herein) waived the right to contest an injury to the claimant's neck. The claimant alleges bias on the part of the hearing officer in this ruling, as well as with many of her other decisions in this case. The claimant contends that the hearing officer's review of the Commission's file prior to the CCH, as well as her comments concerning the competency of the claimant's attorney, showed bias. The claimant complains that the hearing officer improperly decided the issue of whether the claimant's injury included an injury to her lumbar and thoracic spine when this issue was not before her. The claimant argues that the latest report of the designated doctor should have been afforded presumptive weight. Finally, the claimant contends that the issue of SIBS was not ripe for adjudication because of errors made by the hearing officer in resolving the IR issue. The claimant asks that we reverse the decision of the hearing officer and remand the case to another hearing officer. The carrier responds that the findings and decision of the hearing officer were supported by the evidence; that the hearing officer could decide the issues actually litigated before her and that she had to decide the issue of the extent of the claimant's injury to resolve the issue of IR; that the hearing officer did not err in adding the issue of waiver as the claimant's request to add the issue was untimely; that it was not error for the hearing officer to review information in the claimant's file, and, if error, it was harmless because this information was put into evidence; and that the hearing officer properly resolved the issues of MMI, IR, and SIBS entitlement. The carrier requests we affirm the decision 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.

This case is procedurally complex and the evidence is voluminous. We will briefly summarize the evidence and procedural history directly germane to the issues upon which

the appeal turns. First, it was undisputed that the claimant sustained a compensable injury on _____. The claimant described this injury as taking place while closing a gate at her place of employment and the gate fell on her. The claimant testified that as a result she felt pain in her head, hands, neck and wrist. There was conflicting medical evidence as to whether the claimant's injury was limited to her left thumb and wrist or whether it included an injury to her neck and her lumbar and thoracic spine. Dr. H, who was selected by the Commission to be the designated doctor, certified on a Report of Medical Evaluation (TWCC-69) dated August 9, 1996, that the claimant attained MMI on July 17, 1996, with an eight percent IR. The Commission sought clarification of Dr. H's opinion. Based upon medical evidence that the claimant's condition was improving with treatment, Dr. H issued a second TWCC-69 dated July 4, 1997, stating that the claimant was not at MMI. Dr. H reexamined the claimant and issued a third TWCC-69 dated February 2, 1998, certifying that the claimant attained MMI on October 11, 1997, with a 20% IR. This IR included the designated doctor's original eight percent rating but he added additional whole body impairment for lesions in the claimant's neck and low back based upon the treating doctor's correlation of these problems to the claimant's injury. The designated doctor issued a fourth TWCC-69 dated September 29, 1998, certifying MMI on October 15, 1997, with a 16% IR. The change in IR was due to the designated doctor correcting errors in the use of the combining tables of the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association (AMA Guides) made when on his third TWCC-69. Dr. A, the claimant's current treating doctor, certified on a TWCC-69 dated May 12, 1997, that the claimant attained MMI on May 12, 1997, with a 35% IR.

At the benefit review conference (BRC) on November 20, 1998, the benefit review officer certified that the disputed issues were whether the claimant's neck injury was a result of her compensable injury sustained on _____, MMI, IR and entitlement to SIBS for the first compensable quarter. At the BRC the claimant was assisted by an ombudsman. The claimant later retained counsel and counsel filed a motion on her behalf to add the issue of whether the carrier had waived the right to contest compensability of the claimant's cervical injury or, in the alternative, to remand the case to a BRC. The hearing officer held a contested case prehearing on February 10, 1999, to consider this. The hearing officer denied the motion.

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

FINDINGS OF FACT

2. On _____, the Claimant sustained a compensable injury to her left thumb and wrist while working for the Employer, and she has received benefits from the Carrier.

3. The medical records presented do not preponderate to show that the Claimant injured her neck, her thoracic spine, or her lumbar spine on _____.

4. The cause of any difficulties that the Claimant has experienced with her neck, thoracic spine, and lumbar spine cannot be determined from the evidence presented.

5. (Dr. H), D.C. and Commission designated doctor initially certified that the Claimant attained [MMI] on July 17, 1996, with an eight percent (8%) [IR].

6. Because the Claimant did not injure her neck, thoracic spine, or her lumbar spine on _____, the Commission did not need to seek clarification from Mr. H., although the Commission sent letters requesting clarification on November 25, 1996, and January 9, 1997.

7. Because the Claimant did not injure her neck, thoracic spine, or her lumbar spine on _____, Mr. H.,

   a. did not need to re-examine the Claimant on February 28, 1997, (when he determined that she had not attained [MMI]);

   b. did not need to re-examine the Claimant on November 25, 1997, (when he determined that she had attained [MMI] by operation of law with a twenty percent (20%) [IR]); and,

   c. was not required to recalculate the [IR] he assessed on November 25, 1997, which lowered the [IR] to sixteen percent (16%).

10. The Claimant attained [MMI] by operation of law on October 11, 1997.

11. Because the Claimant's [IR] is not fifteen percent (15%) or greater, the Claimant is not eligible to apply for [SIBS]; the Commission's determination that she was entitled to [SIBS] for the first compensable quarter was in error.

CONCLUSIONS OF LAW

3. The Claimant's neck injury is not a result of the compensable injury sustained on _____.

4. The [IR] is eight percent eight percent (8%).

5. The Claimant reached [MMI] on July 17, 1996.

6. The Claimant is not entitled to [SIBS] as she is not eligible to apply for [SIBS].

7. The Claimant did not sustain an injury to her thoracic spine and her lumbar spine on _____.

This case really turns on whether the hearing officer should have added the issue of carrier waiver. A carrier is required to respond within 60 days of receiving written notice of compensability to dispute an injury. Section 409.021(c). It has been held that a claimant may waive this issue by not raising it at a BRC. Texas Workers' Compensation Commission Appeal No. 91016, decided September 6, 1991. The claimant argues that she did raise the issue at the BRC, but our review of the BRC report does not indicate this. After a BRC, an issue may be only added for good cause or with the consent of the parties. Section 410.151(b). The carrier did not consent and the hearing officer did not find good cause. We do not find error as a matter of law in the hearing officer's refusal to add the issue of carrier waiver.

We are more troubled by the hearing officer's deciding the issue of whether the claimant's injury included injury to her lumbar and thoracic spine. We recognize that a hearing officer may decide an issue actually litigated at the CCH, even if it is not among the issues in dispute. Texas Workers' Compensation Commission Appeal No. 962596, decided March 27, 1997. This seems somewhat incongruous in that the claimant was not allowed to add the issue of waiver in regard to the neck and arguably had no notice that she even needed to add the issue of carrier waiver in regard to the compensability of the lumbar and thoracic spine. However, it would have been impossible, in the present case, for the hearing officer to resolve the issues of MMI and IR without resolving the issue of extent of injury. Under these circumstances, we do not find error in the hearing officer's deciding the issue of whether the claimant's injury included an injury to her lumbar and thoracic spine.

As far as the merits of the extent-of-injury issue are concerned, the extent of an injury is clearly 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).

It was the province of the hearing officer to resolve the conflicting evidence, including the conflicting medical evidence, concerning the extent-of-injury issue. We do not find that the overwhelming evidence was contrary to her resolution of this issue. This is so even though another fact finder might draw other inferences and reach other conclusions. Salazar v. Hill, 551 S.W.2d 518 (Tex. Civ. App.-Corpus Christi 1977, writ ref'd n.r.e.).

The hearing officer bases her reliance on Dr. H's first certification of MMI and IR on the fact that this is the only one of Dr. H's certifications that rate what the hearing officer has found to be the compensable injury. We do not find this to constitute error. The hearing officer bases her resolution of the SIBS issue on her resolution of the IR issue. Clearly, Section 408.142(a) provides that a 15% or greater IR is a requirement for SIBS eligibility.

The claimant contends that the hearing officer exhibited bias in a number of respects. We do not take such allegations lightly. However, our giving any credence whatsoever to these allegations would require proof, and we find none in the record. We do not think that the hearing officer's review of Commission records in and of itself establishes bias, especially in light of the fact that these records were later admitted into evidence. We do think that the hearing officer's suggestion that the claimant's counsel might need to return to law school was ill-considered and inappropriate. The hearing officer may have been somewhat frustrated at counsel's refusal to stipulate that venue was proper in the (City) field office. It was the attorney's view that the hearing officer did not have jurisdiction and that a stipulation as to venue could constitute some sort of waiver of jurisdiction. A more appropriate method of resolving this matter would have been to have requested a stipulation to the facts underlying venue--*i.e.*, that the claimant lived within 75 miles of the (City) field office at the time of her injury. However, we decline to infer bias based upon the hearing officer's remark.

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