

APPEAL NO. 991086

This appeal is considered in accordance with the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On April 28, 1999, a contested case hearing (CCH) was held. At issue was whether the respondent (claimant), TM, sustained an injury in the course and scope of employment on _____, and whether he had the inability to obtain and retain employment equivalent to his preinjury wage as a result of such injury (disability). Also at issue were the scope of the claimant's foot injury and whether the appellant (carrier) waived the right to contest compensability because it did not dispute that injury on or before the 60th day after the injury.

The hearing officer determined that the claimant was injured on _____, specifically his back and his right foot, and that the carrier failed to dispute either injury within 60 days after receiving written notice of injury. The hearing officer found that the claimant had disability from his injury beginning August 22, 1998, and continuing through the date of the CCH.

The carrier has appealed for various reasons. First and foremost, the carrier appeals the determination that the claimant sustained an injury in the course and scope of employment. It argues that the claimant suffers from an ordinary disease of life (degenerative disc disease), and that no injury occurred on the date in question. Second, the carrier argues that, where there is no injury, there can be no disability. It argues as part of its disability argument that the hearing officer erred by not waiting until an unavailable witness, whom the carrier attempted to call by telephone, was available. Finally, the carrier argues that the hearing officer failed to develop a full record as to the waiver issue, in that an undisputed Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) in the record was found by the hearing officer not to be timely filed. The carrier attached a copy of a date-stamped copy of the TWCC-21 in evidence which shows that it was timely filed with the Texas Workers' Compensation Commission (Commission). The claimant responds that the decision of the hearing officer is supported. The claimant contends that a carrier must prove, by a file-stamped TWCC-21, that it timely disputed an injury and that this was not done. As to the omitted witness of the carrier, the claimant points out that any error is not reversible because the written statement and report of that witness was in evidence.

DECISION

Affirmed as reformed.

The claimant had been employed for a number of years by (employer) as a truck driver. He said that his job did not require him to load and unload freight, but only to drive. He was part of a "team" of drivers on a route from (City 1) to (City 2), (State 1). When he was not driving, he slept in a berth behind the driver and passenger seats, which, while it had a security belt to prevent him from being thrown into those seats in the event of a sudden stop, did not otherwise belt him into position.

The claimant was sleeping, he testified, on _____, when his partner turned into one of the scheduled truck stops. The claimant said he was told, and a statement from the partner also says, that this driver hit a deep pothole while leaving the pavement to turn into the truck stop. The cab, which was turned to the left, bumped and jostled. The claimant said that he woke up and was jammed down against the right side of the sleeping berth. He speculated that the jolting was the trigger in being awakened, knocking him against the right side of the berth.

The claimant continued to drive his part of the shift, in spite of considerable pain in his foot. He said that he was able to do this because of cruise control on the truck. When he came back to City 1 on August 21st, he reported his injury and was sent to the company doctor. The doctors he saw were Dr. S and Dr. E. The claimant said he was taken off work at first, and then released to light duty but that light-duty work did not really happen. The Initial Medical Report (TWCC-61) completed by Dr. S on August 21, 1998, plainly identified back strain and contusion of the lower leg as the injuries in question. Dr. S observed moderate edema in the right foot. Specific and Subsequent Medical Reports (TWCC-64) were filed by Dr. E on August 25th and 26th to the same effect. Dr. Z examined the claimant on August 31, 1998, and found that he had radiating back pain. His x-ray was noted to be consistent with degenerative process of facet joints. A statement from Dr. Z's clinic shows that the claimant was kept off work until his next visit. The claimant had an MRI of his right foot and ankle on November 8, 1998, showing a partial tear of a ligament and recommended further testing to explore for fracture. An MRI of the lumbar spine that same day was reported as showing disc protrusions at L3-4 and L4-5, with the latter producing some sac effacement. The claimant produced a picture of his foot showing that it was bruised and swollen around the heel and ankle area. The claimant said that he presently had low back pain and an inability to sit without considerable pain in his tailbone. The claimant began treatment by Dr. B in early October 1998. There is much more medical evidence, not summarized here, involving treatment for injury to the claimant's foot and low back.

Notwithstanding Dr. E's TWCC-64s, he wrote on December 9, 1998, that the claimant reported no symptoms of foot pain. However, in that same letter, he noted that the claimant reported to the clinic on August 21, 1998, with complaints of back and right leg and ankle pain, and an antalgic gait secondary to both problems. Dr. ST examined the claimant for the carrier on February 24, 1999, and recorded his impression that the claimant had nonwork-related degenerative disease in his back, and an arthritic condition in his foot, with tarsal tunnel syndrome secondary to both. He advised that the claimant could operate a commercial truck although he should avoid repetitive loading and unloading. He assessed a six percent impairment rating for the claimant's lumbar spine.

The claimant had previously injured his back 10 years before. He said that this affected the left side of his body. It was essentially healed, although he felt discomfort on occasion, and slept on his side to avoid it. However, the claimant had received a safety bonus in the form of shares of stock in the employer. Although the carrier brought out evidence that there were some injuries prior to that, one of which the claimant had not recalled, the claimant pointed out that the pain and inability to work that he encountered after April 22, 1998, resulted from the incident that occurred on the _____.

The claimant agreed he had diabetes, but he was not insulin dependent. He had not been treated for any diabetes-related problems in his extremities. The claimant testified that at the time of the incident, he weighed 252 pounds.

The transcribed statement of the claimant's co-driver, Ms. S, was given on August 27, 1998, and related the accident plus the fact that injury to the claimant's back and ankle resulted.

At the CCH, the carrier offered essentially no evidence concerning whether it timely filed a dispute to the compensability of the injury. The claimant submitted the "only" TWCC-21 that he said he could find, and pointed out that it was dated August 25, 1998, and did not dispute compensability of the foot injury. The claimant did not assert that this form did not timely dispute the compensability of the back injury. The TWCC-21 states that first written notice of injury was received on August 24, 1998. The basis for the dispute is that the claimant's alleged low back injury did not happen on the job, is an ordinary disease of life, and represents a preexisting injury that is the sole cause of his disability. No TWCC-21 was put into evidence that disputed the claimant's foot injury, and the carrier's contention at the hearing was that none was required and did not waive the foot injury as it was not compensable to begin with. We note that Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE §§133.101 and 133.102 (Rules 133.101 and 133.102) require the TWCC-61 and TWCC-64 to be mailed to the carrier and the claimant. There was no evidence that these rules were not complied with by the health care providers.

Finally, as part of its case in chief, the carrier announced at the beginning of its case that Dr. ST was on "standby" and prepared to give testimony by telephone. There was an objection for failure to exchange, and about a 10-minute discussion ensued in which objection was overruled. The carrier at no time indicated that it was urgent to contact Dr. ST at any particular time. Efforts were made to contact Dr. ST at a few numbers that the carrier had, or to which it was referred; ultimately, a woman answering one telephone number stated that Dr. ST would return in 15 minutes. At this point, the hearing officer stated that he could not defer the CCH for 15 minutes to wait for Dr. ST, and the record was closed. The carrier did not object, move for continuance, nor seek to hold the record open.

First, concerning the waiver issue, we agree that the hearing officer should not have found that the TWCC-21 in evidence had not been timely filed with the Commission. It was not the claimant's contention, as we understood it, that this form had not been actually filed with the Commission; had the matter come up, the carrier would have had the opportunity to request official notice of that form in the file of the Commission, as we indicated should be done where timely filing of essential forms like the claim form or the TWCC-21 is in issue. See Texas Workers' Compensation Commission Appeal No. 941522, decided December 21, 1994. The claimant's waiver argument went solely to the foot injury. We therefore reform and strike the hearing officer's finding that the carrier did not dispute the back injury within 60 days. We affirm, however, the finding of waiver as to the foot injury, as no dispute to this injury was ever proven to be filed even assuming the TWCC-61 and TWCC-64 forms were sent to the carrier.

Concerning the existence of the injuries themselves, separate and apart from the issues of waiver, we agree that there is sufficient evidence to support the hearing officer in his belief that the incident and injury occurred as alleged by the claimant and that disability resulted therefrom. 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.). 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); American Motorists Insurance Co. v. Volentine, 867 S.W.2d 170 (Tex. App.-Beaumont 1993, no writ).

We find no error in proceeding without Dr. ST's testimony, and note that Dr. ST's report was in the record for the hearing officer to consider as part of the evidence against the claimant's contention of injury and disability. Insofar as the carrier defended on the basis of a preexisting condition, we repeat that we have stated that the carrier bears the burden of proving that a preexisting condition was the "sole cause" of resulting disability. In considering all the evidence in the record, we cannot agree that the findings of the hearing officer on injury and disability are so against the great weight and preponderance of the evidence as to be manifestly wrong and unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

As explained above, we reform the determination that the back injury was not timely disputed by the carrier. We affirm the hearing officer's decision and order in every other respect.

Susan M. Kelley
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Judy L. Stephens
Appeals Judge