APPEAL NO. 991455

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 June 17, 1999. The issues at the CCH were whether the compensable injury extended to include an injury to appellant's (claimant herein) back and whether the respondent (carrier herein) waived the right to contest the compensability of an injury to the claimant's back by not contesting compensability within 60 days of being notified of a back injury. The hearing officer concluded that the claimant's compensable injury did not extend to include an injury to the claimant's back and that the carrier did not waive the right to contest the compensability of a back injury. The claimant appeals challenging specific findings of the hearing officer and arguing that the evidence established both that the carrier waived its right to dispute an injury to the claimant's back and that the claimant's compensable injury included an injury to his back. The carrier responds that there is sufficient evidence to support the findings and 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.

The parties stipulated that the claimant sustained a compensable injury to his left knee on _____. The claimant testified that he was injured on the job while rolling a utility log into place with his feet. The claimant testified he suffered a twisting injury to his left knee and to his back. The claimant underwent three knee surgeries, the final one being a total knee replacement. The claimant testified that he told his employer and his doctors that he injured his back as well as his knee. However, there is no medical evidence mentioning the claimant's back problems until a September 30, 1998, report from Dr. G. Also in evidence is an Employee's Notice of Injury or Occupational Disease & Claim for Compensation (TWCC-41) in which the claimant lists the body parts affected by his injury as "[l]eft knee, foot and back." The TWCC-41 in evidence is date-stamped by the Texas Workers' Compensation Commission (Commission) as received on October 9, 1996.[1] Also in evidence is a Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) dated September 15, 1998, which states as follows:

> Carrier disputes treatment to the back. Compensable injury is right knee only.

The claimant challenges the following findings of fact and conclusions of law made by the hearing officer:

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[1]While the date-stamp is somewhat blurred it appears to be October 9, 1996, and the carrier concedes in its response that the date-stamp reads October 9, 1996.

## FINDINGS OF FACT

2. The Claimant did not injure his back in the compensable incident of _____.

3. There is insufficient evidence to establish the date on which Carrier was notified of the claimed back injury.

4. There is insufficient evidence to establish the date on which the Carrier filed its dispute of the back injury with the Commission.

5. There is insufficient evidence to establish that the Claimant has sustained an injury, as defined by the [1989] Act, to his back.

## CONCLUSIONS OF LAW

3. The compensable injury does not extend to include an injury to Claimant's back.

4. The Carrier did not waive the right to contest the compensability of the claimed injury by not contesting compensability within 60 days of being notified of the injury.

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 and the employee in writing of its refusal to pay and advise the employee of:

(A) the right to request a benefit review conference; 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 waiver issue in the present case revolved around when the carrier received notice that the claimant was alleging an injury to his back. The hearing officer in his "Statement of the Evidence and Discussion" states as follows:

> On the issue of Carrier's waiver of the back-injury claim, Claimant seeks to prove that Carrier was notified of a claimed back injury by means of a TWCC-41 purportedly filed in October 1996, which lists "back" among the body parts involved. The evidence on this point is confusing for various reasons: The TWCC-41 in evidence (Claimant's #11; Carrier's #H) bears an injury dated of "July 8, 1996" and describes an injury mechanism different from that described by the Claimant as being the source of the claimed injury here, which by the Claimant's testimony and the parties stipulation, occurred on _____. Further, the date stamp showing receipt by the Commission's Houston West office is partially illegible, the last digit being obscured. There is no direct evidence of receipt by the Carrier; to complicate matters further, the Benefit Review Conference report (HO-1) refers to a TWCC-41 bearing a notation of "body in general" as an injured body part, that purportedly notified the Carrier as of August 26, 1996. Overall, the state of the evidence is insufficient to prove the date on which the Carrier was notified of the claimed back injury.

Under the particular circumstances of this case, we can affirm the hearing officer's finding that there was insufficient evidence to establish when the carrier was notified of the claimant's back injury. However, we are somewhat troubled by some aspects of the hearing officer's analysis. For example, as pointed out earlier there is no real dispute between the parties as to the date stamped on the TWCC-41. However, taking as a whole the other considerations discussed by the hearing officer concerning the TWCC-41, we find the evidence supports the hearing officer's finding concerning notice to the carrier.

We are even more troubled by the hearing officer's finding that there was insufficient evidence to establish the date on which the carrier filed its dispute with the Commission. This would certainly seem to be a matter on which the hearing officer could easily develop the evidence by obtaining and admitting as a hearing officer exhibit matters in the Commission's own files. We note that the hearing officer has an old citation to develop the

record. Section 410.163(b). Were the case to turn on this finding, we would be constrained to remand to require the hearing officer to carry out his obligation to develop the record. However, in light of our decision not to remand on the issue of when the carrier received notice, we find any error in the hearing officer's failure to ascertain when the carrier filed its dispute with the Commission to be harmless.

The question of whether an injury occurred is one of fact. Texas Workers' Compensation Commission Appeal No. 93854, decided November 9, 1993; Texas Workers' Compensation Commission Appeal No. 93449, decided July 21, 1993. So is the question of the extent of an injury. Texas Workers' Compensation Commission Appeal No. 93613, decided August 24, 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).

A finding of injury may be based upon the testimony of the claimant alone. Houston Independent School District v. Harrison, 744 S.W.2d 298, 299 (Tex. App.-Houston [1st Dist.] 1987, no writ). However, as an interested party, the claimant's testimony only raises an issue of fact for the hearing officer to resolve. Escamilla v. Liberty Mutual Insurance Company, 499 S.W.2d 758 (Tex. Civ. App.-Amarillo 1973, no writ). In the present case, the hearing officer found no injury to the claimant's back contrary to the testimony of the claimant and medical evidence from Dr. G. Claimant had the burden to prove he was injured in the course and scope of his employment. Reed v. Aetna Casualty & Surety Co., 535 S.W.2d 377 (Tex. Civ. App.-Beaumont 1976, writ ref'd n.r.e.). We cannot say that the hearing officer was incorrect as a matter of law in finding that the claimant failed to meet this burden. This is so even though another fact finder might have drawn other inferences and reached other conclusions. Salazar v. Hill, 551 S.W.2d 518 (Tex. Civ. App.-Corpus Christi 1977, writ ref'd n.r.e.).

The decision and order of the hearing officer are affirmed.

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Gary L. Kilgore
Appeals Judge

CONCUR:

_____
Tommy W. Lueders
Appeals Judge

_____
Dorian E. Ramirez
Appeals Judge