APPEAL NO. 991733

This decision involves a request for reconsideration of Texas Workers' Compensation Commission Appeal No. 991110, decided July 6, 1999 (Unpublished), in which the Appeals Panel held that the request for review filed by the appellant (claimant) was not timely and that jurisdiction of the Appeals Panel had not been properly invoked. In his Motion for Reconsideration the claimant contends that his request for review was timely filed and attaches receipts from the U.S. Postal Service showing that the postage and certified mail fee were paid for the mailing of the claimant's request for review the day prior to the postmark on the envelope in which the request for review was transmitted. The claimant's attorney states in the Motion for Reconsideration that she personally delivered the claimant's request for review to the U.S. Postal Service on May 19, 1999. In Appeal No. 991110 we had found that the claimant's appeal was untimely because it was postmarked on May 20, 1999, when the claimant had only until May 19, 1999, to file his request for review. The claimant requests that we grant his request to reconsider and issue a new decision on the merits of the appeal.

The merits involve a challenge by the claimant of the hearing officer's determinations that the claimant did not sustain a compensable injury on _____, and did not have disability. The claimant contended in his request for review that these determinations were so contrary to the great weight and preponderance of the evidence as to be manifestly unjust. The respondent (carrier) replied that the findings and conclusions of the hearing officer were correct and should be affirmed.

DECISION

We grant the claimant's motion for reconsider and consider the merits of the appeal. 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.

First, we address the issue of reconsideration. Though somewhat factually distinct from the present case, we are guided by our decision in Texas Workers' Compensation Commission Appeal No. 982047, decided September 28, 1998, in resolving this issue. In Appeal No. 982047 we recognized that a request for review was timely filed if it was properly addressed and stamped and deposited in the mail on or before the last day on which it must be filed. We further stated in Appeal No. 982047 that while a legible postmark was prima facie evidence of the date of mailing the date of mailing could be established by other evidence. In Appeal No. 982047 we granted a motion to reconsider based upon evidence which we found sufficient to establish a date of mailing earlier than reflected by the postmark. We find in the present case that the evidence presented by the claimant is sufficient to establish that the claimant's request for review was mailed on May 19, 1999, making it timely. Thus we grant the Motion to Reconsider and will consider the merits of the claimant's appeal.

In his decision the hearing officer summarized the evidence taken at the contested case hearing (CCH) on April 7, 1999. The claimant testified that, on _____, while working as a truck driver delivering cars, his truck had transmission problems and he suffered an injury to his left shoulder, his neck and his low back while exiting the truck through a window. The claimant sought medical treatment on August 27, 1998. In September 1998 the claimant began treating with Dr. M, who treated the claimant conservatively and related the claimant's cervical, left shoulder and lumbar problems to a work injury on _____. There was evidence concerning a drug test that the claimant had taken on August 21, 1998. The carrier argued that the claimant only reported an injury after he knew he had tested positive on a drug test and sought to characterize the claimant's assertion of injury as a spite claim. The claimant argued that he was not aware of the results of the drug test until after he had reported his injury. On appeal the claimant argues that the hearing officer's decision is contrary to the unrefuted evidence of the claimant and Dr. M that the claimant suffered an injury and had disability.

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. 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 contrary to the testimony of the claimant and the reports of Dr. M. 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 erred 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.).

Finally, with no compensable injury found, there is no loss upon which to find disability. By definition disability depends upon a compensable injury. *See* Section 401.011 (16).

Gary L. Kilgore
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Judy L. Stephens
Appeals Judge