

APPEAL NO. 991881

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On August 5, 1999, a contested case hearing (CCH) was held. With regard to the issues before him, the hearing officer concluded that the appellant (claimant herein) did not sustain a compensable injury in the form of an occupational disease on _____, and the claimant did not have disability. The claimant appeals, argues that the hearing officer's findings and decision are contrary to the evidence, and raises questions about the effectiveness of her attorney's representation of her. The respondent (carrier herein) argues that the hearing officer's decision was supported by the evidence. The carrier also argues that we should not consider documents that the claimant attaches to her appeal which were not admitted into evidence at the CCH.

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.

At the outset, we note that the claimant attached to her request for review material that was not in evidence at the CCH, including medical articles and a medical report. We note that we will not generally consider evidence not submitted into the record and raised for the first time on appeal. Texas Workers' Compensation Commission Appeal No. 92255, decided July 27, 1992. To determine whether evidence offered for the first time on appeal requires that the case be remanded for further consideration, we consider whether it came to appellant's knowledge after the hearing, whether it is cumulative, whether it was through lack of diligence that it was not offered at the hearing, and whether it is so material that it would probably produce a different result. Texas Workers' Compensation Commission Appeal No. 93111, decided March 29, 1993; Black v. Wills, 758 S.W.2d 809 (Tex. App.-Dallas 1988, no writ). Applying this standard, we do not find a basis to remand the present case for consideration of the material attached to the claimant's appeal and we cannot consider this material in our review of this case.

As far as the claimant's contentions concerning her lack of adequate representation by her attorney, this is not a matter for our review. The claimant's attorney was retained counsel in a civil matter and we find no basis in such a circumstance under the 1989 Act for us to review the effectiveness of counsel.

The claimant testified that she had worked for (employer) since November 1997. She testified that she had initially worked as a keyboard operator and then later as a remittance clerk. The claimant testified that her job involved a lot of typing, keypunching, lifting books overhead, and filing as well as telephone work. The claimant testified that on _____, she experienced pain in her right shoulder and wrist. The claimant was initially diagnosed with possible carpal tunnel syndrome (CTS) but later testing was interpreted as being negative for CTS. An MRI of the claimant's right shoulder showed she has a right rotator cuff tear. Dr. E, an orthopedic surgeon, states as follows in a letter of July 30, 1999:

I have been treating and evaluating this patient. I believe the patient did sustain a compensable injury to her right arm, as a result of a repetitive use injury related to work.

The carrier put into evidence a videotape of the area in which claimant worked. The carrier also put into evidence various articles concerning repetitive trauma injuries and submitted a report by Dr. M, an orthopedic surgeon, who reviewed the claimant's records. Dr. M stated as follows in his report dated July 20, 1999:

In summary, I feel that the shoulder problem is more likely to be caused from every day stress and strain, and every day life activities than it is to be caused from injury due to a sedentary or light duty job. I would state that the shoulder problem is not likely due to an actual injury on the job.

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 opinion of Dr. E. Claimant had the burden to prove she was injured in the course and scope of her employment. Reed v. Aetna Casualty & Surety Co., 535 S.W.2d 377 (Tex. Civ. App.-

Beaumont 1976, writ ref'd n.r.e.). There was conflicting medical evidence. 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.).

In her appeal, the claimant questions why the carrier initially paid income and medical benefits if her claim was not compensable. We note that the 1989 Act encourages the prompt payment of benefits even while the investigation and consideration of a claim continues. To further the prompt payment of benefits, a carrier is not precluded from disputing compensability merely by beginning to pay benefits. See Section 409.021.

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:

Stark O. Sanders, Jr.
Chief Appeals Judge

Philip F. O'Neill
Appeals Judge