

## APPEAL NO. 000539

This appeal arises pursuant to the Texas Workers= Compensation Act, TEX. LAB. CODE ANN. ' 401.001 *et seq.* (1989 Act). A contested case hearing was held on February 16, 2000. The issues at the hearing were whether the appellant (claimant) sustained a compensable injury on \_\_\_\_\_, and whether the claimant had disability. The hearing officer determined that the claimant did not sustain a compensable injury and did not have disability. In his appeal, the claimant asserts that those determinations are against the great weight of the evidence. In its response, the respondent (carrier) urges affirmance.

### DECISION

Affirmed.

In its response, the carrier asserts that the claimant's appeal is untimely. We find no merit in that assertion. The hearing officer's decision was distributed to the parties on February 23, 2000. Pursuant to Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE ' 102.5, the claimant is deemed to have received the hearing officer's decision on February 28, 2000. For his appeal to be timely, it had to be mailed within 15 days, and received within 20 days, of February 28th. The 15th day after February 28th was Tuesday, March 14, 2000. The claimant's appeal is postmarked March 13, 2000, and was received by the Texas Workers' Compensation Commission on March 15, 2000. Thus, it was timely.

The hearing officer's decision contains a detailed factual summary, which will not be repeated here. The claimant testified that on \_\_\_\_\_, he was working as a plumber; that at the end of his shift he was dispatched to an after-hours call; that he had to climb up on the roof to clean a clogged line; and that when he was coming down the ladder after he completed the job, he lost his balance and fell approximately four feet to the ground, landing on his right hip and shoulder. The claimant stated that he injured his right hip, right shoulder, mid back and low back in the \_\_\_\_\_ fall. He testified that he was taken off work for one month for the \_\_\_\_\_, injury and that he thereafter returned to his regular duties as a plumber with the employer. The claimant acknowledged that he had sustained a prior workers' compensation injury when he was involved in a motor vehicle accident in \_\_\_\_\_. The claimant was off work for that injury from the date of injury until August 1999.

Dr. D was the claimant's treating doctor for both the \_\_\_\_\_ and \_\_\_\_\_ injuries. The medical records from the claimant's \_\_\_\_\_ injury reflect that he had cervical, thoracic, and lumbar injuries and a right shoulder injury. Dr. D's records after the \_\_\_\_\_ incident reflect complaints of right hip, right leg, mid back and low back pain. In a January 11, 2000, "To Whom it May Concern" letter, Dr. D stated that "[b]ased on this patient's history, examination and radiographic findings, it is my opinion that the second work related injury is not related to the first injury." Dr. D's records after \_\_\_\_\_, do not include a right hip or a right leg diagnosis.

The claimant has the burden to prove that he sustained a compensable injury. That question presented the hearing officer with a question of fact. The hearing officer is the sole judge of the relevance, materiality, weight, and credibility of the evidence before him. Section 410.165. The hearing officer resolves conflicts and inconsistencies in the evidence and determines what facts have been established. Texas Employers Ins. Ass'n v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). To that end, the hearing officer may believe all, part, or none of the testimony of any witness. Generally, questions of injury and disability can be established based on the claimant's testimony alone, if it is believed by the hearing officer. Gee v. Liberty Mutual Fire Ins. Co., 765 S.W.2d 394 (Tex. 1989). The hearing officer need not accept the testimony of the claimant at face value; rather, it only raises an issue of fact for the hearing officer to resolve. Campos, supra; Burelsmith v. Liberty Mut. Ins. Co., 568 S.W.2d 695 (Tex. Civ. App.-Amarillo 1978, no writ). An appeals level body is not a fact finder and it does not normally pass upon the credibility of the witnesses or substitute its judgment for that of the trier of fact, even if the evidence would support a different result. National Union Fire Ins. Co. v. Soto, 819 S.W.2d 619 (Tex. App.-El Paso 1991, writ denied).

In this instance, the hearing officer determined that the claimant was involved in an accident at a customer's house on \_\_\_\_\_. However, he further determined that the evidence did not establish "the existence of new and distinct damage or harm to the physical structure of the claimant's body as a result of the \_\_\_\_\_ episode." The hearing officer noted that the claimant's medical records after his \_\_\_\_\_ injury reflect complaints to primarily the same body parts that were alleged to have been injured in the \_\_\_\_\_, fall. In addition, the hearing officer stated that he was discounting Dr. D's opinion that the claimant sustained a new injury, noting that Dr. D's "sparse narratives within the record state the claimant was being treated for a 'spinal condition,' but do not specify what that condition is, or how it is [a] new and distinct injury from the claimant's previous spinal conditions." The hearing officer simply was not persuaded that the evidence demonstrated that the \_\_\_\_\_, fall at work caused new and distinct damage or harm to the physical structure of the claimant's body.

As the fact finder, the hearing officer was acting within his province in so finding and in deciding to reject Dr. D's opinion that the claimant had sustained a new injury. Our review of the record does not reveal that the hearing officer's determination in that regard is so against the great weight of the evidence as to be clearly wrong or manifestly unjust. Accordingly, no sound basis exists for us to reverse that determination on appeal. Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986); Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986). Given our affirmance of the determination that the claimant did not sustain a compensable injury, we likewise affirm the determination that the claimant did not have disability because the existence of a compensable injury is a prerequisite to a finding of disability. Section 401.011(16).

The hearing officer's decision and order are affirmed.

Elaine M. Chaney  
Appeals Judge

CONCUR:

Thomas A. Knapp  
Appeals Judge

Gary L. Kilgore  
Appeals Judge