APPEAL NO. 000940

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 March 21, 2000. The hearing officer determined that appellant (claimant) did not sustain a compensable injury on _____; that claimant did not have disability; that the respondent (carrier) did not waive the right to contest the compensability of the claimed injury by not disputing it within 60 days of being notified of the claimed injury; and that claimant is barred from pursuing workers' compensation benefits because of an election of remedies. The claimant appeals, arguing that these determinations are contrary to the evidence and that the hearing officer failed to properly apply the law in regard to carrier wavier and election of remedies. The carrier responds that the hearing officer's decision is sufficiently supported by the evidence and that he correctly applied the law.

DECISION

Affirmed in part; reversed and rendered in part.

The claimant testified that she was injured at work on _____. The claimant sought medical treatment and there is medical evidence in the record supporting her claim of injury. There was also evidence that the claimant paid for some of her medical treatment herself and filed some medical bills under her group health insurance. There was conflicting evidence concerning when the carrier began paying workers' compensation benefits.

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 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 medical evidence. 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.). 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.).

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 [Texas Workers' Compensation 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 claimant argues on appeal that the carrier was restricted to the reasons given in its initial denial of benefits because it did not begin benefits within seven days. We note that there was conflicting evidence in regard to when the carrier began benefits and under these circumstances we will defer to the hearing officer as the finder of fact.

The Appeals Panel in Texas Workers' Compensation Commission Appeal No. 92273, decided August 7, 1992, set forth the four-prong conjunctive test stated in Bocanegra v. Aetna Life Insurance Company, 605 S.W.2d 848 (Tex. 1980) (hereinafter Bocanegra) concerning election of remedies as follows:

> The election doctrine . . . may constitute a bar to relief when (1) one successfully exercises an informed choice (2) between two or more remedies, rights, or states or facts (3) which are so inconsistent as to (4) constitute manifest injustice.

The Appeals Panel has also noted that the election of remedies doctrine is not a favored one and that its scope should not be extended. Texas Workers' Compensation Commission Appeal No. 93155, decided April 14, 1993. In the present case, the hearing officer fails to make findings concerning all four prongs of the Bocanegra test. There is insufficient evidence in the record to support that all four of these prongs were met in the present case. We therefore reverse the decision of the hearing officer in regard to the election-of-remedies issue and render a new decision that the claimant was not barred from pursuing workers' compensation benefits because of an election of remedies.

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).

We affirm the decision of the hearing officer in regard to his resolution of the injury, carrier waiver, and disability issues. In regard to the election-of-remedies issue, we reverse and render a new decision that the claimant is not barred from pursuing workers' compensation benefits because of an election of remedies.

Gary L. Kilgore
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Robert W. Potts
Appeals Judge