

APPEAL NO. 001272

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 May 9, 2000. The hearing officer determined that the appellant (claimant herein) did not sustain an injury in the course and scope of her employment on _____, and did not have disability; and that the respondent (carrier herein) disputed the claimed injury in a timely manner and did not waive the right to contest compensability. The parties stipulated that the claimant's average weekly wage was \$253.57. The claimant appeals, contending that the hearing officer erred in his determinations concerning injury, disability, and carrier waiver. The carrier responds that the challenged findings were sufficiently supported by the evidence.

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 claimant testified that she worked for a newspaper and that part of her duties were to hang dummy pages on a board above a table where the pages were built before being photographed for the press. The claimant testified that on _____, she reached up with her right hand to press the binder clip in order to insert the dummy into the clip and felt a pop in her right shoulder blade. The claimant testified that the next morning she felt pain and numbness in her arm and made an appointment to see a doctor. The claimant sought medical treatment and was eventually diagnosed with a herniated cervical disc. The claimant's treating doctors relate the claimant's condition to an injury at work on the basis of the claimant's not having symptoms prior to the incident of _____.

There was conflicting evidence concerning the timing of the carrier's dispute of compensability. It was undisputed that the carrier first received notice of injury on _____. The carrier presented evidence from Mr. T¹, an adjuster, stating that the carrier electronically transmitted its dispute to the Texas Workers' Compensation Commission (Commission) on March 3, 2000. The claimant argues that the dispute was not received by the Commission until March 7, 2000, as is noted in a Commission computer record. The carrier put into evidence a copy of a Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) bearing a Commission date stamp of March 3, 2000.

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

¹We note that in the court reporter's transcript, Mr. T is referred to as "J___ T_____" although the carrier refers to him on the record as "J___ T_____."

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. The hearing officer apparently did not find the medical evidence persuasive because he did not believe it sufficiently explained how the claimant's mechanism of injury caused her physical harm or damage. The 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.). We have also on numerous occasions held that the Appeals Panel should not set aside the decision of a hearing officer because the hearing officer may have drawn inferences and conclusions different than those the Appeals Panel deems most reasonable, even though the record contains evidence of inconsistent inferences. Garza, supra; Texas Workers' Compensation Commission Appeal No. 93334, decided June 14, 1993; Texas Workers' Compensation Commission Appeal No. 93053, decided March 1, 1993; Texas Workers' Compensation Commission Appeal No. 92539, decided November 25, 1992.

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.

In the present case the issue of carrier waiver turns on when the carrier filed its TWCC-21. While there was conflicting evidence, it was up to the hearing officer to resolve this conflict, and, applying the standard of review set out above, there is clearly sufficient evidence to support his factual findings concerning the Commission's receipt of the TWCC-21.

The decision and order of the hearing officer are affirmed.

Gary L. Kilgore
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Robert W. Potts
Appeals Judge