APPEAL NO. 001286

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 respondent (claimant herein) injured his left ankle, right elbow, upper back, and right shoulder, in addition to his left leg, on _____; and that the Texas Workers' Compensation Commission (Commission) did not abuse its discretion is approving Dr. O as an alternative treating doctor. The appellant (carrier herein) appeals, arguing that the hearing officer erred in both of these determinations. The appeal file does not contain a response from the claimant.

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.

It was undisputed that on _____, while in the course and scope of his employment, the claimant fell about 16 feet from a bridge into two feet of water. The claimant landed on his side on top of rocks and stones. The claimant was air-lifted by helicopter to (hospital) where he underwent left knee surgery the following day. Dr. C performed the left knee surgery. The claimant testified that he treated with Dr. C for two months. The claimant also testified that he told Dr. C that his injury affected other parts of his body other than his knee, but that Dr. C would tell him to contact the carrier. The claimant testified he tried to contact the carrier, but that his calls went unanswered. The claimant testified that he sought to change treating doctors so that he could receive treatment for all of the injury. The claimant contended that, in addition to an injury to his left knee, he had suffered an injury to his left ankle, right elbow, upper back, and right shoulder in his fall on _____. The Commission approved the claimant's change of treating doctor to Dr. O. Dr. O documented the claimant's complaints to the left ankle, right elbow, upper back, and right shoulder.

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. This is also true of the extent of an injury. Texas Workers' Compensation Commission Appeal No. 93613, decided August 24, 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 the injury included an injury to the claimant's left ankle, right elbow, upper back, and right shoulder and this is supported by the testimony of the claimant and medical evidence from Dr. O. The carrier argues that medical records from Dr. C do not mention complaints by the claimant concerning his left ankle, right elbow, upper back, and right shoulder. The claimant provides an explanation for this in his testimony and, in any case, it is up to the hearing officer to determine what weight to give this fact. We find that the hearing officer's finding concerning the extent of injury is sufficiently supported by the evidence.

The carrier contends that the hearing officer abused her discretion in finding no abuse of discretion in the approval of the claimant's change of treating doctor, which the carrier contends was done to obtain a medical report keeping the claimant off work. Section 408.022(b) provides, in part, that if an employee is dissatisfied with the initial choice of a doctor from the Commission's list, the employee may notify the Commission and request authority to select an alternate doctor. Section 408.022(c) provides that the Commission shall prescribe the criteria to be used in granting the employee authority to select an alternate doctor and that the criteria may include: (1) whether treatment by the current treating doctor is medically inappropriate; (2) the professional reputation of the doctor; (3) whether the employee is receiving appropriate medical care to reach maximum medical improvement; and (4) whether a conflict exists between the employee and the doctor to the extent that the doctor-patient relationship is jeopardized or impaired. A request for a change of doctor will not be approved if it is made to secure a new impairment rating or medical report. Section 408.022(d). Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 126.9(e) (Rule 126.9(e)) provides that reasons for approving a change in treating doctor include but are not limited to the reasons listed in Section 408.022. A reason to change treating doctors may also be that the selected doctor chooses not to be responsible for coordinating the injured employee's health care. Rule 126.9(e). The list of criteria in Section 408.022(c) regarding proper reasons to request a change of treating doctor is not exhaustive.

The Appeals Panel applies an abuse of discretion standard in reviewing cases regarding requests to change treating doctors. Texas Workers' Compensation Commission Appeal No. 951943, decided January 2, 1996. In determining whether the hearing officer has abused his or her discretion, the Appeals Panel looks to see whether the hearing officer acted without reference to any guiding rules or principles. Appeal No. 951943; Morrow v. H.E.B., Inc., 714 S.W.2d 297 (Tex. 1986). In reviewing the Commission's actions in approving a request to change treating doctors, the hearing officer also looks to see whether the Commission has abused its discretion. In light of the evidence in the record that the claimant changed doctors to receive treatment because he was not being taken care of and wanted his entire injury treated, we find no abuse of discretion on the part of the hearing officer.

The decision and order of the hearing officer are affirmed.

Gary L. Kilgore
Appeals Judge

CONCURRING OPINION

We write separately concerning the approval of the request to change treating doctors. The burden was on the carrier to prove that the Texas Workers' Compensation Commission (Commission) employee who approved the request to change treating doctors abused her discretion when she approved the requested change. The evidence related to that issue is limited. Different inferences may be drawn from it. It would have been better had the hearing officer made additional findings of fact concerning that disputed issue to indicate the basis for a conclusion of law that the Commission employee did not abuse her discretion in approving the requested change of treating doctors. We concur with the author judge that the hearing officer did not abuse her discretion in determining that the Commission employee did not abuse her discretion in approving the request to change treating doctors.

Kathleen C. Decker
Appeals Judge

Tommy W. Lueders
Appeals Judge