

APPEAL NO. 001331

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on April 26, 2000. The issues at the CCH were injury, extent of injury and whether the respondent (carrier herein) waived its right to contest compensability. The hearing officer concluded that the appellant (claimant herein) did not sustain an injury in the course and scope of her employment; that there was no compensable injury to the cervical spine; and that the carrier did not waive the right to contest compensability. The claimant appeals, arguing that she did suffer an injury to her cervical spine and that the carrier had waived its right to contest compensability. The carrier responds that the evidence supported the decision of the hearing officer.

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 has been employed as a technical support engineer for 17 years; that her work requires her to continuously use her hands; and that she developed pain at the base of her neck and left shoulder which radiated down to her left hand and fingers. On June 19, 1999, the claimant saw Dr. S, who diagnosed left carpal tunnel syndrome (CTS). The claimant reported this injury to her employer and this injury was initially accepted by the carrier. Further testing was negative for CTS, but an MRI on July 2, 1999, showed the claimant had a herniated cervical disc. The carrier received notice of this on July 19, 1999, and on August 16, 1999, filed a Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) disputing the claimant's injury.

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).

Applying this standard, we find no error in the hearing officer not finding an injury. There was conflicting evidence as to whether the claimant had an injury related to work and the claimant bore the burden of proof on this issue. It was the province of the hearing officer to resolve these conflicts in the evidence.

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.

On appeal the claimant argues that the carrier did not contest within 60 days of receiving notice that the claimant was asserting an injury. The carrier argues that it timely disputed the cervical injury and it had grounds to reopen the issue of compensability of CTS once testing showed the claimant did not have CTS. Under the highly unusual facts of the present case, we find no error in the hearing officer finding no carrier waiver.

The decision and order of the hearing officer are affirmed.

Gary L. Kilgore
Appeals Judge

CONCUR:

Alan C. Ernst
Appeals Judge

Philip F. O'Neill
Appeals Judge