APPEAL NO. 001356

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 May 4, 2000. The hearing officer determined that the respondent's (claimant herein) compensable injury extends to and includes the claimant's cervical spine; that the appellant (carrier herein) waived its right to dispute the compensability of the claimant's cervical spine injury by failing to timely dispute the compensability of such injury; that the claimant's compensable injury has resulted in disability since October 24, 1999; and that it will be necessary for the claimant to be reexamined by the designated doctor as the issue of maximum medical improvement (MMI) needs to be revisited in light of the decision on the extent of the injury and that the issue of impairment rating (IR) is not ripe until MMI has been determined. The carrier appeals, arguing that all of these determinations are incorrect and should be reversed. The claimant responds that the hearing officer's decision should be affirmed.

DECISION

Affirmed in part; reversed and rendered in part.

The hearing officer summarizes the evidence in some detail in her decision and we adopt her rendition of the evidence. We will only briefly touch on the evidence most germane to the appeal. It was undisputed that the claimant suffered a compensable injury on _____. The claimant testified that on this date he sustained an injury when he lifted a box of computer paper and felt a pop in his lower thoracic spine. The claimant also testified that he felt immediate pain radiating down to his pelvis and upward into his neck and shoulders. The claimant was examined by Dr. K, a designated doctor selected by the Texas Workers' Compensation Commission (Commission), who certified on a Report of Medical Evaluation (TWCC-69) dated December 23, 1998, that the claimant attained MMI on September 2, 1998, with a four percent IR. This IR was entirely based on loss of lumbar range of motion (ROM) and the designated doctor stated he did not test the thoracic spine for ROM. It is clear that the designated doctor did not rate the cervical spine.

In regard to the extent of the injury, it was undisputed that the claimant's injury included an injury to his lumbar spine. The carrier stated at the CCH that it was not disputing an injury to the thoracic spine. There was conflicting evidence concerning whether the claimant's injury included an injury to his cervical spine. The hearing officer, in her decision, points to the opinions of Dr. S and Sh relating the claimant's cervical spine problems to his compensable injury. The hearing officer relies on an August 17, 1999, report from Dr. Sh as constituting notice to the carrier that the claimant's injury extended to his cervical spine. The carrier's failure to dispute a cervical spine injury within 60 days of its receipt of this report is the basis for the hearing officer's finding the carrier waived its right to dispute that the claimant's injury extended to the cervical spine.

Although we conclude that the hearing officer's decision on the waiver issue is supported by sufficient evidence and that it is not contrary to the overwhelming weight of the evidence, in Texas Workers' Compensation Commission Appeal No. 000713, decided May 17, 2000, the Appeals Panel held that "the new Rule 124.3 [Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 124.3 (Rule 124.3)] is applicable in those cases in which a CCH is convened on or after March 13, 2000, to address a disputed issue of carrier waiver in the context of an extent of injury question, because it precludes the Commission from imposing a waiver after that date." The hearing officer did not have the benefit of this case when issuing her decision. The hearing officer articulated a very reasoned argument on why new Rule 124.3 should not be applied when the waiver took place prior to March 13, 2000, even when the CCH takes place afterwards. However, based on Appeals Panel precedent we must reverse the decision of the hearing officer in regard to carrier waiver and render a decision that the carrier did not waive its right to contest the compensability of a cervical injury.

However, we find no error in the hearing officer's determination that the claimant's compensable injury extended to his cervical spine. 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 regarding 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 sufficient evidence to support the hearing officer's finding that the claimant's injury of _____, extends to and includes an injury to his cervical spine.

Affirming the hearing officer's finding as to extent of injury leads us to affirm her decision as to disability, MMI and IR, which are based upon her resolution of the extent-of-

injury question. The hearing officer finds that the claimant has not been determined to be at MMI and that an IR is not ripe because his entire injury was not considered by the designated doctor in certifying MMI and assessing IR. The carrier's appeal of the hearing officer's resolution of the MMI and IR issues, as well as the disability issue, is based upon its argument that she erred in determining the claimant's compensable injury extended to and included an injury to his cervical spine. Having affirmed the hearing officer's decision in regard to the extent of injury, we affirm her resolution of the MMI, IR and disability issues.

We reverse and render a decision that the carrier did not waive its right to dispute the compensability of the claimant's cervical spine. We affirm the decision and order of the hearing officer in all other respects.

Gary L. Kilgore
Appeals Judge

CONCUR:

Kathleen C. Decker
Appeals Judge

CONCUR IN THE RESULT:

I concur in the result. Regarding carrier waiver concerning extent of injury, this issue is essentially moot because the hearing officer determined that the cervical injury is compensable. Additionally, I would note that there is the issue regarding whether the Texas Workers' Compensation Commission has given some indication in the preamble to Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 124.3 (Rule 124.3) that that rule applies to cases even if the hearing was convened before March 13, 2000. Apparently, Rule 124.3 is considered to be an indication that Section 409.021 does not and has not ever provided for waiver of extent of injury. The preamble states, in part, that "Texas Labor Code, Section 409.021 is intended to apply to the compensability of the injury itself or the carrier liability for the claim as a whole, not individual aspects of the claim." *See, generally*, Texas Workers' Compensation Commission Appeal No. 000784, decided May 30, 2000.

Judy L. Stephens
Appeals Judge