

APPEAL NO. 001417

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 22, 2000. The hearing officer determined that the appellant's (claimant) compensable injury does not extend to reflex sympathetic dystrophy (RSD) in both arms and did not become compensable by operation of waiver. The claimant appeals, arguing that the hearing officer's decision that the claimant's compensable injury did not extend to RSD is contrary to the evidence and that the hearing officer erred as a matter of law in finding the respondent (carrier) did not waive the compensability of RSD. The carrier replies that there is sufficient evidence to support the hearing officer's determination that the claimant's injury does not extend to the RSD and that the hearing officer has properly applied Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 124.3 (Rule 124.3) in determining that the carrier did not waive the compensability of RSD.

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.

At the outset we note, as the carrier points out, that the claimant attaches to her request for review some documents that were not admitted into evidence at the CCH. The claimant, who is represented by an attorney on appeal, argues that because the claimant was not represented by counsel at the CCH, she was unaware of the significance of these documents. We note that we will not generally consider evidence not submitted into the record and raised for the first time on appeal. Texas Workers' Compensation Commission Appeal No. 92255, decided July 27, 1992. To determine whether evidence offered for the first time on appeal requires that that case be remanded for further consideration, we consider whether it was through lack of diligence that it was not offered at the hearing, and whether it is so material that it would probably produce a different result. Texas Workers' Compensation Commission Appeal No. 93111, decided March 29, 1993; Black v. Wills, 758 S.W.2d 809 (Tex. App.-Dallas 1988, no writ). We do not find that the documents attached to the claimant's appeal which were not admitted into evidence at the CCH meet this test. We will consider those attachments which were admitted into evidence and disregard those that were not.

The carrier argues that we should not consider the claimant's request for review at all because it was filed by an attorney without evidence that the attorney had properly notified the Texas Workers' Compensation Commission that she is representing the claimant in this matter. We find no reason to doubt the representation of counsel, implied by her filing a request for review, that she represents the claimant. Counsel includes her Texas State Bar number on the request for review and, as a member of the bar, is an officer of the court. As such, we accept her representation that she is counsel for the claimant in this matter and will consider the request for review.

It was undisputed that the claimant suffered an injury to her right hand on _____, while working as a waitress. The claimant was initially diagnosed with a contusion and later with RSD. There was conflicting medical evidence as to whether the claimant had RSD. Much of the evidence and most of the claimant's argument on appeal revolves around the issue of whether the carrier waived the right to contest the compensability of RSD.

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 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 (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 (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 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.); Aetna Insurance Company 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 Company, 715 S.W.2d 629, 635 (Tex. 1986).

The claimant had the burden to prove she was injured in the course and scope of her employment. Reed v. Aetna Casualty & Surety Company, 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 in regard to RSD. There was conflicting evidence as to whether the claimant's injury included or extended to RSD. It was the province of the hearing officer to resolve this conflict in the evidence. This is so even though another fact finder might have drawn other inferences and reached other conclusions. Salazar, et al. v. Hill, 551 S.W.2d 518 (Tex. Civ. App.-Corpus Christi 1977, writ ref'd n.r.e.).

As far as the carrier waiver issue is concerned, the resolution of this issue hinges upon Rule 124.3, which provides that carrier waiver does not apply to extent of injury. The claimant propounds many reasons why Rule 124.3 should not be applied in the present case, arguing that in the present case the carrier waived the compensability of RSD prior to the effective date of Rule 124.3. We have already addressed the issue of when Rule

124.3 applies and, under our prior decisions, it clearly would apply in the present case. See Texas Workers' Compensation Commission Appeal No. 001356, decided July 26, 2000.

The decision and order of the hearing officer are affirmed.

Gary L. Kilgore
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Susan M. Kelley
Appeals Judge