APPEAL NO. 001486
FILED AUGUST 14, 2000

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 June 6, 2000, in _____, Texas, with _____ presiding as hearing officer. The issues at the CCH were stated as follows:

1. Is the low back part of the compensable injury of _____?

2. What is the period of disability?

3. Did the Carrier waive the right to contest compensability by failing to timely dispute the low back on or before the 60th day of the injury?

The hearing officer concluded that the respondent's (claimant herein) low back is part of the compensable injury of _____; that the claimant had disability beginning on _____ and continuing through the date of the CCH; and that the appellant (carrier herein) waived the right to contest compensability by failing to timely dispute the low back. The carrier appeals contending that the hearing officer erred in his statement of the issue and that the issue should have been stated in terms of whether the claimant's injury extended to an injury including the bilateral par interartiuclaris fractures at L5. The carrier argues that the hearing officer erred in finding waiver as the actual issue was extent of injury rather than injury. Finally carrier argues that the hearing officer erred in finding that the claimant suffered an injury which included bilateral pars interarticularis fractures at L5 and that the claimant had more than eight weeks of disability. The claimant responds that the decision of the hearing officer is supported by the evidence and should be affirmed.

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.

We will first deal with determining what are the issues in this case so as to clarify the scope of what is before us on appeal. First, we note that in spite of representations by the carrier on appeal that the carrier objected to the issues at the CCH, our review of the record uncovers no such objection. In fact when the hearing officer stated that the issues quoted above were the issues at the CCH, the carrier representative agreed that these were the issues. However, it is clear that both parties presented evidence and argument as to whether the claimant's low back injury included the bilateral interarticularis fractures at L5.

The hearing officer summarized the evidence in his decision. We adopt his rendition of the evidence and will only briefly touch on the evidence germane to the appeal. This includes testimony by the claimant that he was injured on _____, when he was walking across a board that had been laid across a hole, the board slipped and the claimant fell into the hole, landing on his back with board striking him across the face. There was no dispute concerning the claimant's facial injuries and the carrier argued at the CCH and on appeal that it has no dispute that the claimant suffered a low back injury.

The claimant was initially diagnosed by the company doctor with low back pain/strain. The claimant testified that when his condition did not improve he sought other treatment. Claimant was later diagnosed with bilateral pars interarticularis fractures at L5. The claimant testified that he had been unable to work since his injury due to the effects of his injury. The claimant introduced medical evidence supporting his claim of disability. The carrier placed into evidence records of medical service providers who opined that the claimant's bilateral pars interarticularis fracture was not due to his _____, injury.

The hearing officer's decision includes the following findings of fact and conclusions of law:

FINDINGS OF FACT

4. On _____, when Claimant fell into a hole, as he was performing his job duties for Employer, Claimant sustained a back injury including bilateral pars interarticularis fractures at L5, as evidenced by the following facts:

   A. On _____, Claimant fell about eight feet and landed on his back;

   B. On _____, Claimant was diagnosed with a back pain;

   C. An MRI test performed on Claimant on January 13, 2000 has been read as revealing pars interarticularis fractures at L5;

   D. Claimant has not had previous injury to his lower back.

5. Due to his _____ injury, Claimant has been unable to obtain and retain employment at his preinjury wage beginning on _____ and continuing through the date of the [CCH].

6. Carrier did not contest or dispute compensability of an injury or compensability of a low back injury on or before the 60th day after Claimant's _____ injury.

CONCLUSIONS OF LAW

3. Claimant's low back is part of the compensable injury of _____.

4. Due to his _____ injury Claimant has had disability beginning on _____ and continuing through the date of the [CCH].

5. Carrier waived the right to contest compensability by failing to timely dispute the low back on or before the 60th day of the 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). Based upon this standard, particularly in light of the carrier's repeated representations that it is not disputing that the claimant suffered a low back injury, we find no error in the hearing officer's finding a low back injury and in light of the conflicting evidence on the matter, we find no error in the hearing officer's finding that this low back injury included the pars interarticularis fractures at L5.

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.

The thrust of the carrier's argument is that pursuant to Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 124.3(c) this provision does not apply to disputes concerning extent of injury. If a carrier is allowed to parse injuries into individual diagnoses, which evolve over time, rather than simply into affected body parts, one could argue that Section 409.021 is virtually meaningless. However, in the present case we need not reach this problem as the hearing officer's decision as written finds waiver as to a low back injury and the issue is not stated in terms of a diagnosis. Thus we find no error in the hearing officer's determination that the carrier waived the compensability of a low back injury.

Disability is a question of fact to be determined by the hearing officer and may be based on the testimony of the claimant alone. Here, the claimant's testimony supports the hearing officer's finding of disability.

The decision and order of the hearing officer are affirmed.

Gary L. Kilgore
Appeals Judge

CONCUR:

Alan C. Ernst
Appeals Judge

Tommy W. Lueders
Appeals Judge