APPEAL NO. 002138

Following a contested case hearing (CCH) held on August 18, 2000, pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act), the hearing officer resolved the disputed issue by determining that the appellant's (claimant) current cervical and thoracic condition is not a result of the compensable injury she sustained on _____, and that the claimant did not have disability resulting from the injury. The claimant appeals, contending that these determinations were contrary to the evidence and that the hearing officer erred in refusing to admit two exhibits offered by the claimant. The respondent (self-insured) replies that the hearing officer's determinations were supported by the evidence and that the hearing officer did not err in refusing to admit the exhibits because the exhibits had not been timely exchanged.

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 parties stipulated that the claimant sustained a compensable injury on _____. The claimant described this as an injury to her upper back and neck which took place in a "dentist chair" in her workplace. The claimant testified that she worked in spite of the injury until it worsened to the degree where her treating doctor took her off work on January 21, 2000. The self-insured contended that the claimant's present condition was due to the progression of degenerative disc disease rather than as a result of the progression of her injury. There was conflicting medical evidence as to whether the claimant's condition and disability were the result of her compensable injury or degenerative changes.

After the benefit review conference (BRC), the claimant's attorney sought clarification from two doctors as to their opinions. The claimant sought to admit the responses of these two doctors into evidence. The self-insured objected to the admission of these documents based upon untimely exchange. The claimant contended that these documents were exchanged once the claimant received them and could not have been exchanged earlier since they were not in existence. The self-insured responded that the claimant could have sought clarification from these doctors earlier.

We first address the claimant's evidentiary point. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 142.13(c) (Rule 142.13(c)) requires that parties exchange all documentary evidence within 15 days of the BRC unless the hearing officer determines there is good cause for a party failing to timely exchange documents. Here it was undisputed that the documents in question were not timely exchanged. The hearing officer found no good cause for the failure to timely exchange. We review such rulings by a hearing officer under an abuse of discretion standard. Texas Workers' Compensation Commission Appeal No. 961474, decided September 3, 1996. In determining whether there has been an abuse of discretion in these rulings, we look to see if the hearing officer

acted without reference to any guiding rules or principles. Morrow v. H.E.B., Inc, 714 S.W.2d 297 (Tex. 1986). We conclude that the hearing officer did not abuse his discretion, and, in any event, to obtain reversal of a judgment based upon the hearing officer's abuse of discretion in the admission or exclusion of evidence, an appellant must first show that the admission or exclusion was in fact an abuse of discretion, and also that the error was reasonably calculated to cause and probably did cause the rendition of an improper judgment. Texas Workers' Compensation Commission Appeal No. 92241, decided July 24, 1992; Hernandez v. Hernandez, 611 S.W.2d 732 (Tex. Civ. App.-San Antonio 1981, no writ). Here, the reports in question essentially only reiterated the opinions of the doctors that the claimant's condition and disability were related to the claimant's compensable injury. Consequently, even if there were error, we find it would be harmless error not requiring reversal.

The question of the extent of an injury is one of fact. 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, 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, there was conflicting evidence concerning the extent of the claimant's injury. The claimant had the burden of proof concerning the extent of her injury. We cannot say that the hearing officer was incorrect as a matter of law in finding that the claimant failed to meet this burden. This is so even though another fact finder might have drawn other inferences and reached other conclusions. Salazar v. Hill, 551 S.W.2d 518 (Tex. Civ. App.-Corpus Christi 1977, writ ref'd n.r.e.).

Disability is a question of fact to be determined by the hearing officer. Texas Workers' Compensation Commission Appeal No. 93560, decided August 19, 1993. The claimant had the burden of proof regarding disability. Applying our standard of review, we cannot say that the hearing officer's resolution of the disability issue was contrary to the overwhelming evidence.

The decision and order of the hearing officer are affirmed.

Gary L. Kilgore
Appeals Judge

CONCUR:

Robert E. Lang
Appeals Panel
Manager/Judge

CONCURRING OPINION:

I concur. Plainly, the self-insured has stipulated that there was a cervical and thoracic injury. Consequently, the decision of the hearing officer only makes sense if he believes that the effects of the injury that were stipulated to have occurred were of short duration. Recognizing that under the 1989 Act a party may always seek to have medical treatment of the "compensable injury," I nevertheless would concur that the hearing officer's inferences that there were limited effects from the stipulated injury are supported by the evidence.

Susan M. Kelley
Appeals Judge