APPEAL NO. 002183

Following a contested case hearing (CCH) held on August 3, 2000, pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act), the hearing officer, resolved the disputed issues by determining that he had jurisdiction to determine the extent of the appellant's (claimant herein) injury, that the respondent (carrier herein) had not waived the right to contest the compensability of the claimant's alleged reflex sympathetic dystrophy (RSD) of the bilateral upper extremities and that the claimant's compensable injury did not extend to RSD of the bilateral upper extremities. The claimant appeals, arguing that the carrier did waive its right to contest the compensability of RSD and that the evidence established that the claimant's injury extended to RSD of the bilateral upper extremities. The carrier responds that there was sufficient evidence to support the hearing officer's resolution of the extent-of-injury issue and that pursuant to Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 124.3 (Rule 124.3) the right to dispute extent of injury cannot be waived.

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 note that no party appealed the jurisdictional issue. However, we are constrained to address the issue as jurisdiction may not be created by waiver. The hearing officer based his resolution of this issue on the fact that while there had been a prior CCH regarding the extent of the claimant's injury, whether or not the claimant's injury extended to RSD was not in issue at the prior CCH. We find no error in the hearing officer's determination that he had jurisdiction over the question of whether the claimant's injury extended to RSD of the bilateral upper extremities.

As far as the carrier waiver issue is concerned, Rule 124.3 provides that the carrier waiver provisions of Section 409.021 do not apply to disputes of the extent of an injury. In light of this, we find no error in the hearing officer's determination that the carrier did not waive its right to contest the compensability of whether the claimant's injury extended to RSD of the bilateral upper extremities. *See* Texas Workers' Compensation Commission Appeal No. 000713, decided May 17, 2000.

Thus, the only issue before us on appeal is whether or not the hearing officer erred in finding that the claimant's injury did not extend to RSD of her bilateral upper extremities. The claimant contends that this finding was contrary to the evidence. While there is a great deal of evidence supporting the claimant's contention that her injury did extend to RSD of her bilateral upper extremities, including live testimony at the CCH to that effect from Dr. C, there was conflicting medical evidence. Dr. S testified at the CCH and stated that in his opinion the claimant was not suffering from RSD. The claimant argues that Dr. S's opinion was not objective and that the medical evidence that the claimant suffered RSD was overwhelming.

We have held that the question of the extent of an injury is a question of fact for the hearing officer. 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 of review, we do not find that the overwhelming evidence was contrary to the finding of the hearing officer that the claimant's injury did not extend to bilateral RSD of the upper extremities. There was conflicting medical evidence concerning this matter and it was the province of the hearing officer to resolve this conflicting evidence.

The decision and order of the hearing officer are affirmed.

Gary L. Kilgore
Appeals Judge

CONCUR:

Kenneth A. Huchton
Appeals Judge

Robert W. Potts
Appeals Judge