APPEAL NO. 002229

Following a contested case hearing held on September 1, 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, based upon newly discovered evidence, the respondent (carrier herein) was entitled to reopen the issue of compensability; that the appellant (claimant herein) did not sustain a compensable injury on _____; that the claimant did not sustain disability; and that the claimant's average weekly wage (AWW) was $326.83. The claimant appeals, essentially arguing that these determinations were contrary to the evidence. The carrier responds that the decision of the hearing officer was sufficiently supported by the evidence.

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 claimant testified that while working as a fence installer he was stepping over pipe and trenches and felt pain in his back. The carrier initially accepted the claimant's injury but when it discovered that the claimant's recorded statement concerning his prior injury and claim history was inaccurate, it disputed the compensability of the claimant's injury.

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:
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> (1) begin the payment of benefits as required by this subtitle; or
>
> (2) notify the commission [Texas Workers' Compensation 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.
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> (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.

In the present case, the carrier sought to reopen the issue of compensability. It argued that it could not have reasonably discovered earlier that the claimant's back problems did not result from his compensable injury because it was misinformed by the claimant concerning his prior history of injuries and claims. The hearing officer specifically found that this was the case, and we do not find that he erred as a matter of law in doing so.

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. 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).

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, the hearing officer found no injury contrary to the testimony of the claimant and some of the medical evidence. The claimant had the burden to prove he was injured in the course and scope of his employment. Reed v. Aetna Casualty & Surety Co., 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. 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.).

Nor do we find error in the hearing officer's resolution of the AWW issue. The claimant had not worked for the employer for 13 weeks at the time of his asserted injury. It was undisputed that the claimant was paid at the rate of $11.50 per hour. The claimant argued that his AWW should be based upon this hourly rate and a 40-hour work week. There was evidence that during the weeks prior to the alleged injury the claimant actually worked less than 40 hours a week and the carrier argued that the claimant's AWW should be paid on the wages he was actually paid during the nine weeks preceding the alleged injury during which he worked for the employer.

Section 408.041 deals with the calculation of AWW. Under Section 408.041(a) if an employee worked for the employer for 13 weeks prior to the injury, the AWW is computed by dividing the amount actually earned by 13. The claimant argued that his AWW should be computed under Section 408.041(c) which provides that if Section 408.041(a) or (b) cannot reasonably be applied that the employee's AWW be determined by "any method the commission considers fair, just, and reasonable to all parties and consistent with the methods established under this section." As we have previously noted, when the hearing officer determines that the usual AWW calculation method cannot be applied in a given case the hearing officer has discretion to apply any fair, just and reasonable method in arriving at AWW and we review the method used under an abuse of discretion standard. *See* Texas Workers' Compensation Commission Appeal No. 941292, decided November 9, 1994, and cases cited therein. Our review indicates that the hearing officer's method of calculating AWW was fair, just and reasonable and was consistent with the methods established in Section 408.041 to calculate AWW, although it was not the only method that could have been used in this case. Therefore, he did not abuse his discretion in so calculating AWW and we affirm the determination that the claimant's AWW is $326.83.

Finally, with no compensable injury found, there is no loss upon which to find disability. By definition, disability depends upon a compensable injury. *See* Section 401.011(16).

The decision and order of the hearing officer are affirmed.

Gary L. Kilgore
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Kenneth A. Huchton
Appeals Judge