

APPEAL NO. 002314

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 commenced on July 18, 2000, with the record closing on September 15, 2000. The issues at the CCH were extent of injury and average weekly wage (AWW). The hearing officer concluded that the appellant's (claimant herein) injury did not extend or affect the claimant's cervical, thoracic, or lumbar spine and that the claimant's AWW was \$175.00. The claimant appeals arguing that she did suffer an injury to her cervical, thoracic, and lumbar spine and that her AWW was \$180.25. The claimant attributes the fact that the hearing officer erred to the passage of time between the CCH and the issuance of his decision. The respondent (carrier herein) replies that the evidence supported the decision of the hearing officer regarding extent of injury. The carrier also argues that the evidence established that the claimant's AWW was either \$158.31 or \$156.80.

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.

It was uncontested that the claimant was injured in a motor vehicle accident (MVA) on _____. The carrier acknowledged that as a result of the MVA the claimant sustained a compensable injury to her left knee and left hip and sustained a chest wall contusion. The claimant testified that she also suffered an injury to her cervical, thoracic, and lumbar spine in the MVA. The medical reports shortly after the MVA did not show any indication that the claimant had a problem with her spine. There were medical reports from Dr. L, D.C., stating that the claimant injured her neck, mid-back, and low back in the MVA. The hearing officer held the record open to obtain the results of an MRI performed by Dr. C, M.D. The primary finding of the MRI was a small disc protrusion at C7-T1. There was medical evidence that this same protrusion was shown on an MRI conducted in 1997, prior to the compensable injury.

In regard to AWW the evidence showed that at the time of her injury the claimant was working about 25 hours per week and was being paid \$7.00 per hour. It was undisputed that the claimant had not worked for the employer for the 13 weeks prior to her injury. The carrier presented a wage statement of a same or similar employee, who also did not work for the employer for 13 weeks prior to the claimant's 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).

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 to the claimant's cervical, thoracic or lumbar spine contrary to the testimony of the claimant and some of the medical evidence. The claimant had the burden to prove she was injured in the course and scope of her 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 in regard to an injury to her spine. 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 her asserted injury. It was undisputed that the claimant was paid at the rate of \$7.00 per hour. The claimant argued that her AWW should be based upon this hourly rate and a 25.75-hour work week. There was evidence that during the weeks prior to the alleged injury the claimant actually worked approximately 25 hours a week and the carrier argued that the claimant's AWW should be paid on the wages she was actually paid during the five weeks preceding the alleged injury during which she worked for the employer, or, in the alternative, on the wage statement of a same or similar employee which the carrier put into evidence. The hearing officer computed the AWW by using the 25 hours a week the claimant actually worked during the weeks prior to the injury multiplied by her \$7.00 an hour wage.

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 her

AWW should be computed under Section 408.041(c) which provides that if Section 408.041(a) or (b) cannot reasonably be applied then the employee's AWW be determined by "any method that 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 \$175.00. In regard to the carrier's contentions concerning AWW in its response to the claimant's request for review, we note that the carrier's response was not filed timely to act as a request for review so the carrier preserved no error in regard to the AWW issue. We also note that the wage statement of the same or similar employee presented by the carrier was not for an employee who worked for the employer during the 13 weeks prior to the claimant's injury so the wage statement of the similar employee did not meet the requirements of Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 128.3(e) (Rule 128.3(e)).

Further, we find no error in the passage of time between the CCH and the date the hearing officer issued his decision as the record was held open to allow the claimant to put into evidence the results of Dr. C's MRI which was scheduled to take place shortly after the CCH.

The decision and order of the hearing officer are affirmed.

Gary L. Kilgore
Appeals Judge

CONCUR:

Kenneth A. Huchton
Appeals Judge

Thomas A. Knapp
Appeals Judge