APPEAL NO. 002398

Following a contested case hearing (CCH) held on September 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 issues by determining that the appellant/cross-respondent (claimant herein) suffered a compensable injury on _____, and that the claimant had disability from August 1, 2000, to August 7, 2000. The respondent/cross-appellant (carrier herein) files a request for review arguing that the evidence did not support the hearing officer's finding of injury, and, absent an injury, the hearing officer erred in finding disability. The carrier further argues that the hearing officer erred in permitting Ms. C, to testify after both parties had closed. There is no response from the claimant to the carrier's request for review in the appeal file. The claimant files a request for review arguing that the hearing officer erred in only finding disability from August 1, 2000, through August 7, 2000. The claimant argues that the evidence established he had disability from July 12, 2000, continuing through the date of the CCH. The carrier responds that there was sufficient evidence for the hearing officer to limit his finding of disability from August 1, 2000, through August 7, 2000.

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 he injured his back on _____, while carrying two five-gallon water jugs which he was delivering as part of his job for his employer, a water company. The claimant testified that he completed his shift that day and at the end of the day that he reported his injury to Mr. L, the company's owner. Mr. L testified that the claimant did not report an injury to him. The claimant testified that he worked on July 11, 2000, wearing a back brace he had borrowed from a family member. Mr. L denies the claimant was wearing a back brace. At the end of the day on July 11, 2000, Mr. L terminated the claimant for stealing. On July 12, 2000, the claimant sought medical treatment from Dr. M. Ms. L, Mr. L's wife and the employer's bookkeeper, testified that the employer had no knowledge that the claimant was asserting a workers' compensation claim until she was contacted by Dr. M's office on July 12, 2000. Ms. L testified that she told Dr. M's office that she was unaware of the claimant's injury. There is a written statement in evidence from Ms. C, who works for Dr. M's office, that she contacted Ms. L and was told that the claimant had reported an injury.

At the CCH, the claimant initially announced that Ms. C would not be called to testify as she was unavailable. After both sides rested and the CCH was recessed to prepare for final arguments, the claimant called Ms. C and it turned out that she was available to testify. The hearing officer reopened the record to allow Ms. C to testify as a rebuttal witness. Ms. C testified live that Ms. L told her on July 12, 2000, that the claimant had reported a workers' compensation injury. Ms. C testified that without such a confirmation it was the policy of Dr. M's office not to render treatment.

Medical records indicate that Dr. M treated the claimant for a back injury. The only medical records in evidence concerning the claimant's work status show that Dr. M placed the claimant under work restrictions from August 1, 2000, through August 7, 2000. The claimant testified that he had not worked since July 11, 2000, due to his injury, although he had sought employment and had obtained unemployment benefits.

We first address the carrier's allegation of procedural error in the hearing officer's allowing Ms. C to testify. We do not find error. First, we note that Ms. C was allowed to testify after the parties had rested, not after they had closed. Second, we note that nothing precludes the hearing officer from reopening the record to allow the development of evidence. Third, if there were error, it would have been harmless error as Ms. C's testimony was merely cumulative of her written statement which was admitted into evidence without objection. *See* Hernandez v. Hernandez, 611 S.W.2d 732 (Tex. Civ. App.-San Antonio 1981, no writ).

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 29, 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 great weight and preponderance 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 we find sufficient evidence to support the hearing officer's finding of injury. Generally, corroboration of an injury is not required and may be found based upon a claimant's testimony alone. Houston Independent School District v. Harrison, 744 S.W.2d 298, 299 (Tex. App.-Houston [1st Dist.] 1987, no writ). We have such testimony in the present case. While there is at least some circumstantial evidence supporting the carrier's contention that the claimant did not suffer an injury, it was up to the hearing officer to determine what weight to give the conflicting evidence.

Having affirmed the hearing officer's finding of injury, we reject the carrier's argument that the claimant did not have disability since it is predicated on the claimant not having an injury. As far as the claimant's appeal is concerned, the claimant argues that the finding of disability may be based upon the testimony of the claimant alone and need not be supported by medical evidence. This is true. *See* Texas Workers' Compensation Commission Appeal No. 92285, decided August 14, 1992; Texas Workers' Compensation Commission Appeal No. 92167, decided June 11, 1992. However, this does not mean that the hearing officer is required to be persuaded by the claimant's testimony concerning disability. Once again it is the province of the hearing officer to determine what weight to give the evidence. Applying our standard of review, we find no error in the hearing officer's resolution of the disability issue.

The decision and order of the hearing officer are affirmed.

Gary L. Kilgore
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Judy L. Stephens
Appeals Judge