APPEAL NO. 010049

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 held on November 30, 2000. The issues at the CCH were whether the respondent/cross-appellant's (claimant) compensable injury extended to her cervical spine, and whether the appellant/cross-respondent (carrier) had waived the right to dispute this extent of injury.

The hearing officer found that there was no waiver, because a dispute over extent of injury cannot be waived under Section 409.021, and further found that the claimant's cervical injury was part of the original compensable back injury.

Both parties have appealed. The carrier argues that the hearing officer erred by finding that the cervical injury was part of the original _____, back injury. The claimant argues that it was error to retroactively apply Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 124.3(c) (Rule 124.3(c)) and find that the carrier had not waived a dispute to the neck injury.

DECISION

We affirm the hearing officer's decision on all points appealed.

The claimant was injured when a filing cabinet that was destabilized fell forward and hit her along her left side, including the side of her head, as she twisted to avoid being hit more directly. The claimant had a congenital condition, cerebral palsy, for which she was in a wheelchair. She was initially treated for a lumbar injury and it was agreed that cervical pain did not manifest until some months later. The claimant had herniated cervical discs. She said that she had no problems with her neck prior to the accident. Conflicting medical evidence on causation was presented, with the designated doctor opining that spasms due to cerebral palsy could have resulted in herniation.

The hearing officer did not err, although different inferences could be drawn, in finding that the claimant's cervical spine was injured in the accident. The hearing officer is the sole judge of the relevance, materiality, weight, and credibility of the evidence presented at the hearing. Section 410.165(a). 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 of medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286, 290 (Tex. App.-Houston [14th Dist.] 1984, 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); American Motorists Insurance Co. v. Volentine, 867 S.W.2d 170 (Tex. App.-Beaumont 1993, no writ).

The issue of carrier waiver is mooted by the fact that the hearing officer found favorably for the claimant on the substantive issue of compensability. However, we note that because Rule 124.3(c) states that Section 409.021 does not apply to extent of injury, and there was no earlier rule applying the 60-day dispute provisions to extent where compensability of the injury was already accepted, we cannot agree that application of Rule 124.3(c) to disputes adjudicated after the rule's effective date constitutes a prohibited retroactive application.

The decision of the hearing officer will be set aside only if the evidence supporting the hearing officer's determination is so weak or against the overwhelming weight of the evidence as to be clearly wrong or manifestly unjust. Atlantic Mutual Insurance Company v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.). We affirm the decision and order.

Susan M. Kelley
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Judy L. S. Barnes
Appeals Judge