

APPEAL NO. 010642

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on February 27, 2001. With respect to the single issue before her, the hearing officer determined that the respondent's (claimant) compensable injury, extends to and includes the low back. In its appeal, the appellant (carrier) contends that the hearing officer's extent-of-injury determination is against the great weight of the evidence. The carrier also asserts that the hearing officer erred in considering two of the claimant's exhibits, to which she sustained the carrier's objection for failure to timely exchange, in making her decision. The appeal file does not contain a response to the carrier's appeal from the claimant.

DECISION

Affirmed, as modified.

Conflicting evidence was presented at the hearing regarding the extent of the injury sustained by the claimant on the date of injury. Extent of injury is a question of fact. 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 and to decide what facts the evidence has established. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701, 702 (Tex. Civ. App.-Amarillo 1974, no writ). 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 manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986). In this instance, there is sufficient evidence in the record to support the hearing officer's determination that the compensable injury sustained by the claimant extends to and includes his low back. The hearing officer's extent-of-injury determination is not so against the great weight of the evidence as to compel its reversal on appeal.

As the carrier noted, the hearing officer improperly noted in her decision that Claimant's Exhibits 6 and 7 were admitted in evidence, when, in fact, she sustained the carrier's objection to those exhibits for failure to timely exchange. We find no merit in the contention that the hearing officer improperly considered the excluded documents in making her decision or in the assertion that "[i]f the Hearing Officer had not relied on Claimant's Exhibits 6 and 7, she would have rendered a different decision." After reviewing the record, we are satisfied that sufficient evidence supports the hearing officer's decision, apart from the excluded exhibits. Thus, we perceive no error. However, the hearing officer's decision will be modified to reflect that the hearing officer sustained the objection to those exhibits and that they were not admitted in evidence at the hearing.

As modified, the hearing officer's decision and order are affirmed.

Elaine M. Chaney
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Philip F. O'Neill
Appeals Judge