

APPEAL NO. 010726

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 March 15, 2001. The issues at the CCH were election of remedies, whether the respondent (self-insured herein) waived its right to contest compensability, extent of injury, and disability. The hearing officer concluded that the appellant (claimant herein) did not sustain an injury in the course and scope of his employment; that the claimant made an election of remedies to pursue alternate benefits to the exclusion of workers' compensation benefits; that the self-insured did waive the right to contest compensability as to election of remedies but did not waive the extent of the claimant's injury; that the claimant's injury did not extend to include a bulging disc at C5-C6 and spondylosis which resulted in a cervical fusion; and that the claimant did not sustain disability as a result of his compensable injury. The claimant appeals arguing that he did suffer an injury to his cervical spine and that the self-insured had waived its right to contest compensability. The claimant also argues that he did not make an election of remedies by seeking treatment using his group health insurance after the self-insured denied his claim and refused to pay for treatment. Finally, the claimant contends that his injury extended to his herniated cervical disc and that as a result of the injury he had disability. The self-insured responds that the evidence supported the decision of the hearing officer.

DECISION

Affirmed in part and reversed and rendered in part.

It was not disputed that the claimant suffered a compensable injury on _____. The claimant contends that he suffered an injury to his arm, shoulder, and neck while working a knife grinder for the self-insured. The claimant testified that he initially pursued a workers' compensation claim but when he was told that the self-insured would not accept the claim and he was unable to get an x-ray authorized, he filed for medical and disability benefits on his group health and disability policies. The self-insured argued that the claim was never denied. The claimant underwent cervical surgery in November 1999. There is conflicting evidence as to whether this surgery was due to the claimant's compensable injury or due to degenerative processes in the claimant's cervical spine. The claimant testified that he has been unable to work since November 1, 1999.

The hearing officer found an election of remedies in Finding of Fact No. 5, but that the self-insured had waived its right to deny compensability on this basis. The finding of waiver has not been appealed. However, the claimant has appealed contending he did not make an election of remedies. In Texas Workers' Compensation Commission Appeal No. 002763, decided January 11, 2000, we laid out in some detail what must be established to prove election of remedies under Bocanegra v. Aetna Life Insurance Company, 605 S.W.2d 848 (Tex. 1980). In the present case, the four elements of Bocanegra were not proven and we thus reverse the hearing officer's finding that the claimant made an election of remedies.

Pursuant to Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 124.3(c) waiver does not apply to extent of injury. Therefore, the hearing officer was correct in finding that the self-insured had not waived the right to dispute whether the claimant's injury extended to include a bulging disc at C5-C6 and spondylosis which resulted in a cervical fusion. The claimant argues that his injury did include these problems. However, the question of the extent of the claimant's injury was one of fact. Texas Workers' Compensation Commission Appeal No. 93613, decided August 24, 1993.

Section 410.165(a) provides that the 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). 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.). Applying this standard, and in light of the conflicting evidence on extent of injury, we find no sound basis upon which to reverse the hearing officer's extent-injury determinations.

Finally, disability is a question of fact to be determined by the hearing officer. Texas Workers' Compensation Commission Appeal No. 93560, decided August 19, 1993. Again, there was conflicting evidence and we find no basis for reversal of the hearing officer on this issue.

We reverse and render a decision that the claimant did not make an election of remedies. Otherwise, the decision of the hearing officer is affirmed.

Gary L. Kilgore
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Robert W. Potts
Appeals Judge