APPEAL NO. 010819

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 February 1, 2001. The hearing officer determined issues of (1) compensability, (2) disability, and (3) the respondent's (self-insured) alleged waiver of its right to dispute compensability, adversely to the appellant (claimant). The claimant has appealed the adverse determinations and the self-insured has responded, urging that the hearing officer be affirmed.

DECISION

Affirmed.

We note first that the hearing officer erroneously stated that the benefit review conference was held on August 9, 2000; the correct date, as shown in Hearing Officer's Exhibit No. 1, is October 19, 2000. _____, was the date of the alleged injury. We next note that although the tape recording of the CCH has the hearing officer correctly stating that the parties stipulated that venue was proper in the (field office 1), the hearing officer's finding and conclusion relating to venue erroneously refer to venue as being proper in the (field office 2). The hearing officer does make a correct venue statement in her decision paragraph. Lastly, we note that Mr. B testified as a witness for the self-insured, but his name was omitted from the witness list. We perceive no prejudicial error from these obvious administrative errors.

The claimant was riding in a large school bus on the first day that teachers and aides were back for orientation at the beginning of the school year. The bus hit a bump, causing the claimant and others to bounce into the air and land back on the bus seats. The claimant went to the school nurse that same day and reported that her back hurt. No one else ever reported that they were injured due to the bumpy bus ride. The next morning the claimant called in to the school, reporting that her back hurt worse, and went to the emergency room. She saw a succession of four doctors who diagnosed a back strain based on her subjective complaints, the last doctor being the chiropractor to whom she was sent by her attorney. The last doctor took her off work from mid-August 2000 until he released her for light-duty work in January 2001. There was evidence presented that the claimant wrote to the employer stating her objections to what she perceived as a significant change in the duties she was to perform in August 2000, as compared to what she did the previous one and one-half years of employment.

The hearing officer is the trier of fact and is the sole judge of the relevance and materiality of the evidence and of the weight and credibility to be given to the evidence. Section 410.165(a). While a claimant's testimony alone may be sufficient to prove an injury, the testimony of a claimant is not conclusive but only raises a factual issue for the trier of fact. Texas Workers' Compensation Commission Appeal No. 91065, decided December 16, 1991. The trier of fact may believe all, part, or none of any witness's testimony. Taylor v. Lewis, 553 S.W.2d 153 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.); Texas Workers' Compensation Commission Appeal No. 93426, decided July 5, 1993. This

is equally true regarding medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). In a case such as the one before us where both parties presented evidence on the disputed issues, the hearing officer must look at all of the relevant evidence to make factual determinations and the Appeals Panel must consider all of the relevant evidence to determine whether the factual determinations of the hearing officer are so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. Texas Workers' Compensation Commission Appeal No. 941291, decided November 8, 1994. An appeals-level body is not a fact finder, and it 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 could 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). Only were we to conclude, which we do not in this case, that the hearing officer's determinations were so against the great weight and preponderance of the evidence as to be manifestly unjust would there be a sound basis to disturb those determinations. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951); Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986). Since we find the evidence sufficient to support the determinations of the hearing officer, we will not substitute our judgment for hers. Texas Workers' Compensation Commission Appeal No. 94044, decided February 17, 1994.

The claimant contends that Downs v. Continental Casualty Company, 32 S.W.3d 260 (Tex. App.-San Antonio 2000, pet. filed), which requires a carrier (in this case, the self-insured) to either pay benefits or give notice of its refusal to pay within seven days of the day it receives written notice of injury, is applicable. The self-insured received written notice of the alleged injury on August 14, 2000. On August 23, 2000, the self-insured initiated payment of temporary income benefits (TIBs) on a Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21), and on a separate TWCC-21 on the same date terminated payment of TIBs and disputed that there was any disability. On a third TWCC-21, dated August 28, 2000, the self-insured gave its reason for disputing the claim: "Our continued investigation reveals after speaking with witnesses that there was No Injury in the Course and Scope of employment." This language was used by the self-insured to place the issue of whether there was a compensable injury into dispute.

We have been asked to apply the Downs decision to similar factual situations, and have declined to do so. Our rationale for doing so is stated in Texas Workers' Compensation Commission Appeal No. 001927, decided September 25, 2000:

> However, on August 28, 2000, the [Texas Workers' Compensation] Commission issued Advisory 2000-07 which states, in part, as follows: "After consultation with the Office of the Attorney General and in light of §410.205(b) of the Texas Labor Code, the Commission understands that the August 16th decision in the *Downs* case should not be considered as precedent at least until it becomes final upon completion of the judicial process. In addition, the related Commission's rules, such as those found at [Tex. W.C. Comm'n,] 28 TEX. ADMIN. CODE §§124.2, 124.3, and

132.17, remain in effect." We decline to accept the claimant's challenge to apply the Downs case.

We continue to decline to follow Downs and we affirm the hearing officer's decision on this issue.

In her appeal, the claimant cites Section 409.022(b) as an additional basis for finding waiver arguing that the grounds for the refusal to pay benefits, which is specified in the notice of refusal to pay benefits, is the only basis for the self-insured's defense on the issue of compensability in a subsequent proceeding, unless the defense is based on newly discovered evidence that could not reasonably have been discovered at an earlier date. The claimant alleges that this provision comes into play because the self-insured started, then stopped, payment of TIBs on August 24, 2000, before it gave notice of the dispute as to compensability on August 28, 2000. The hearing officer made a factual determination that the controversions by the self-insured were within 60 days of the first written notice of the injury and that the requirements of Section 409.021 were met. The hearing officer's determination on the issue was not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986). In any event, these questions are mooted by our affirmance of the hearing officer's determination that there was no compensable injury. Where there is no injury to the claimant, a carrier does not waive the right to contest compensability of the claim for failing to contest compensability of the claim within 60 days of receiving written notice. Continental Casualty Company v. Williamson, 971 S.W.2d 108, 110 (Tex. App.-Tyler 1998, no writ.)

For the foregoing reasons, we affirm the decision and order of the hearing officer.

Michael B. McShane
Appeals Judge

CONCUR:

Judy L. S. Barnes
Appeals Judge

CONCUR IN THE RESULT:

Elaine M. Chaney
Appeals Judge