APPEAL NO. 011221
FILED JULY 09, 2001

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 May 7, 2001. The hearing officer resolved the disputed issues by determining that neither the compensable injury sustained by the appellant (claimant) on _____, nor the injury sustained on _____, extend to and include fibromylagia and myofascial pain syndrome. On appeal, the claimant expresses disagreement with this decision and also urges that evidence, which the hearing officer excluded at the CCH, should have been considered. The respondent (self-insured) urges affirmance.

DECISION

Affirmed.

At issue in this case is whether the hearing officer erred in determining that neither the compensable injury sustained by the claimant in _____, nor the injury sustained in _____, extend to and include fibromylagia and myofascial pain syndrome. Conflicting evidence was presented at the hearing regarding the extent of injuries sustained by the claimant on the two injury dates. 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. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701, 702 (Tex. Civ. App.-Amarillo 1974, 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 overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986). In the present case, there is sufficient evidence in the record to support the hearing officer's determination that the compensable injuries sustained by the claimant do not extend to and include fibromylagia and myofascial pain syndrome. The hearing officer notes the absence of expert medical evidence on causation.

With regard to the evidence that was excluded by the hearing officer on the basis that it was not timely exchanged with the self-insured, it is well-settled that to obtain reversal of a decision based upon the hearing officer's abuse of discretion in the admission

or exclusion of evidence, an appellant must first show that the admission or exclusion was in fact an abuse of discretion, and then show that the error was reasonably calculated to cause and probably did cause the rendition of an improper judgment. Texas Workers' Compensation Commission Appeal No. 92241, decided July 24, 1992; *see also* Hernandez v. Hernandez, 611 S.W.2d 732 (Tex. Civ. App.-San Antonio 1981, no writ). We find no abuse of discretion in the hearing officer's application of the exchange of evidence rules.

Accordingly, we affirm the decision and the order of the hearing officer.

Philip F. O'Neill
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Susan M. Kelley
Appeals Judge