APPEAL NO. 011257
FILED JULY 17, 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 3, 2001. The hearing officer determined that the appellant (claimant) had not made an election of remedies when she used Medicaid coverage for medical treatment, but that she did not sustain a compensable injury on _____, or have disability as defined in the 1989 Act (which requires a compensable injury as a threshold finding.)

There is no appeal of the election-of-remedies finding. The claimant has appealed the determination that she did not suffer an injury or have disability. The claimant also complains of the denial by the hearing officer of her motion to add an issue regarding waiver by the respondent (carrier) of the right to dispute compensability. The carrier responds that the fact findings of the hearing officer are supported by sufficient evidence, and that the hearing officer did not abuse his discretion by refusing to add an issue that was first requested on the morning of the CCH.

DECISION

We affirm the hearing officer's decision.

We do not agree that the hearing officer abused his discretion by declining to add an issue of carrier waiver that was first requested on the morning of the CCH. An issue not taken up at a benefit review conference and that is not added by the agreement of the parties may be added as set out in Tex. W.C. Comm'n, 28 Texas. ADMIN. CODE § 142.7(e) (Rule 142.7(e)) upon a finding of good cause by the hearing officer. That rule sets out a procedure for seeking addition of the issue not later than 15 days prior to the CCH. That procedure was not followed in this case, nor was a reason argued for seeking to add that issue for the first time on the morning of the CCH. Consequently, the hearing officer found no good cause and declined to add the issue. We find no error.

The hearing officer also did not err in finding that the claimant was not injured as the result of any occurrence on _____, and that she did not have disability. As noted in the summary of facts in the decision, the claimant, who was an older teenager, contended that, while working her overnight shift, she slipped and fell on her overnight shift, yet there was a delay both in reporting the accident, and in seeking medical treatment; the latter did not occur until after her termination. It must be frankly stated that there were inconsistencies in portions of the claimant's testimony. The hearing officer may also have found it incredible that claimant had neither discussed nor been told by any of three doctors what they believed was wrong with her.

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.). 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). A trier of fact may evaluate the extent to which a doctor's opinion is based upon subjective, rather than objective, evidence. Although the claimant could not, due to pregnancy, avail herself of some objective testing, an x-ray of the lumbar spine taken November 26, 2000, before she realized she was pregnant, was normal, with no signs of subluxation or abnormal disc space. Although the claimant argues that the Required Medical Examination doctor was favorable to her claim of injury, that doctor also stated that she could not do a full physical examination because of claimant's pregnancy, and it was consequently "nearly impossible" to determine whether there was an actual physical injury to the claimant's body that resulted from her contended fall.

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 cannot agree that this was the case here, and affirm his decision and order.

Susan M. Kelley
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Robert Potts
Appeals Judge