APPEAL NO. 011264
FILED JULY 16, 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 commenced on April 19, 2001, and concluded on May 7, 2001. The issues before the hearing officer were:

1. Was the [appellant] Claimant injured in the course and scope of his employment when involved in a motor vehicle accident [MVA] on _____?
2. Does the Claimant have disability as a result of this compensable injury, and if so, for what period?
3. Has the [respondent] Carrier waived the right to dispute the compensable injury by not contesting the injury in accordance with the Texas Labor Code Ann. Section 409.021?

With regard to the issues, the hearing officer determined that the claimant sustained a forehead laceration in the course and scope of his employment on _____, but did not injure his back and neck; that the claimant has not suffered disability as the result of the compensable injury; and that the carrier has not waived the right to contest compensability of the claim pursuant to Section 409.021. The hearing officer's determination of an injury in the course and scope of employment has not been appealed and has become final. Section 410.169.

The claimant appealed, emphasizing not only the severity of the MVA but also that the claimant had been taken by ambulance to a hospital for a scalp laceration and "a closed head injury," and that the treating doctor has taken the claimant off work. The claimant also appealed the hearing officer's determination of the carrier's timely contest of compensability, citing Downs v. Continental Casualty Company, 32 S.W.3d 260 (Tex. App.-San Antonio, 2000, pet. pending). The carrier responds, urging affirmance.

DECISION

Affirmed, as reformed.

This case was tried in conjunction with the case involving a coworker, Mr. ER. The great majority of the case dealt with whether the claimant and Mr. ER were in the course and scope of their employment at the time of the MVA. The hearing officer's determination that the workers were in the course and scope of their employment has not been appealed and has become final. The claimant was a passenger in a vehicle driven by Mr. ER when the vehicle the claimant was riding in was struck by another vehicle and rolled over on _____. The police report indicates that the claimant was injured and was taken by ambulance to a hospital emergency room (ER). The ER record indicates that the claimant was complaining only about his lacerated forehead and denied any other pain or

complaints. The doctor's impression was "closed head injury, intermediate scalp laceration." The claimant's laceration was sutured and the claimant was released to return in seven days for suture removal.

The hearing officer found that the claimant "returned to work on Monday December 18, 2000." Although not specifically appealed, the claimant's testimony was that he called in and did not work on Monday, December 18, 2000; that he returned to work on Tuesday, December 19, 2000; and that he worked his regular duties until he saw Dr. H, a chiropractor.

When the claimant saw Dr. H on Wednesday, December 20, 2000, Dr. H took the claimant off work and diagnosed some 17 separate diagnostic code injuries, none of which dealt with the claimant's lacerated forehead. The claimant was treated with chiropractic adjustments. On January 4, 2001, the claimant was released back to work. The claimant testified that he returned to work but was unable to continue after about a week, and that Dr. H took the claimant off work again. The hearing officer obviously did not find Dr. H's reports persuasive, citing the fact that the claimant specifically had denied back and neck pain at the ER, "had full range of motion of the neck," and had worked his regular duties until he was taken off work by Dr. H. We reform the hearing officer's findings to the extent that the great weight and preponderance of the evidence is that the claimant did not work on Monday, December 18, 2000. We further note that an extent-of-injury issue was not before the hearing officer and we hold that the hearing officer's Conclusion of Law No. 4 that "Claimant did not injure his back and or neck in the accident" is surplusage and we disregard that determination.

Otherwise, the hearing officer weighed the credibility of the evidence and is the sole judge of the weight and credibility to give to the evidence, including medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). We hold that the hearing officer's decision is supported by the evidence and is not against the great weight and preponderance of the evidence.

The claimant, in his appeal, expresses puzzlement that the hearing officer did not discuss "the existence of an injury or disability. Instead, all of the discussion concerns whether Claimant was in the course and scope of his employment at the time of the collision." We note that the great majority of the relatively lengthy CCH dealt with the course and scope issue, and other than ask the claimant what parts of his body were injured and whether he could return to work, there was little focus on the injury and disability issues.

Regarding the timely contest of compensability issue, the Employer's First Report of Injury or Illness (TWCC-1) indicates that the date of the carrier's first written notice of injury was January 5, 2001; and in evidence is the carrier's Payment of Compensation or Notice of Refused or Disputed Claim Interim (TWCC-21) dated January 12, 2001, but apparently not filed with the Texas Workers' Compensation Commission (Commission) until January 22, 2001. The claimant contends that the carrier's contest of compensability,

pursuant to Downs, *supra*, was not timely. The Commission has declined to follow Downs until it becomes final upon the completion of the judicial process. TWCC Advisory No. 2000-07 issued August 28, 2000; Texas Workers' Compensation Commission Appeal No. 010003, decided February 12, 2001. Therefore, the hearing officer did not err in not following Downs in accordance with Commission policy.

The Appeals Panel will not disturb the challenged factual findings of a hearing officer unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust and we do not find them so in this case. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

The decision and order of the hearing officer are affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Gary L. Kilgore
Appeals Judge