APPEAL NO. 021501
FILED JULY 25, 2002

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing was held on May 13, 2002. The hearing officer resolved the disputed issues by deciding that the respondent (claimant) sustained a compensable cervical and thoracic spine injury; that the claimant's injury extends to include a fracture at level T1 of his spine and herniations at levels C5-6, C6-7, and T8-9 of his spine; that the claimant had disability from June 12 to June 18, 1997, from June 20 to August 15, 1997, and from September 16, 1997, to January 7, 1998; that his average weekly wage (AWW) is $380.00; and that the appellant (carrier) waived the right to contest the compensability of the claimant's injury. The carrier appeals the determinations on evidentiary sufficiency grounds. The appeal file does not contain a response from the claimant.

DECISION

Affirmed.

WAIVER AND NEWLY DISCOVERED EVIDENCE

It is undisputed that the carrier initially accepted this claim when it received notice on June 16, 1997. However, the carrier argues on appeal that when it learned of the claimant's arrest and criminal history, it filed a Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) on January 20, 1998, based on evidence that could not have reasonably been discovered earlier.

Under the provisions of Section 409.021(d), an insurance carrier may reopen the issue of the compensability of an injury if there is a finding of evidence that could not reasonably have been discovered earlier. Whether due diligence is shown in contesting compensability upon the discovery of new evidence or whether the evidence could have reasonably been discovered earlier are questions of fact for the hearing officer to determine. *See* Texas Workers' Compensation Commission Appeal No. 92218, decided July 15, 1992.

There are two components to being allowed to reopen compensability or present additional grounds: the information must not only be "newly discovered," but, further, prove to have been unavailable or inaccessible through the carrier's reasonable exercise of its duty to investigate the claim (in other words, not discoverable at an earlier time). *See* Texas Workers' Compensation Commission Appeal No. 992828, decided February 2, 2000. The hearing officer determined that the carrier failed to prove that its contest filed on January 20, 1998, was based on newly discovered evidence that could not have reasonably been discovered at an earlier date. The hearing officer did not err in deciding that the carrier waived the right to contest the compensability of the claimant's injury.

AVERAGE WEEKLY WAGE

The carrier argues on appeal that "the most equitable determination of the claimant's temporary income benefits, if any, should be based on the claimant's actual earnings." The carrier argues that the "actual earnings" should be measured by what the claimant earned while working through a temporary placement agency rather than the salary he earned from the employer during the two days prior to his injury. The claimant's salary while an employee for the employer was undisputed. Section 408.041(b) and Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 128.3(e) (Rule 128.3(e)) provide, in pertinent part, that the AWW of an employee who has worked for the employer less than 13 consecutive weeks immediately preceding the injury equals the usual wage that the employer pays a similar employee for similar services, or, if a similar employee does not exist, the usual wage paid in that vicinity for the same or similar services provided for remuneration. When Section 408.041(a) or (b) cannot reasonably be applied, the hearing officer may determine the employee's AWW by any method considered fair, just, and reasonable to all parties by the Texas Workers' Compensation Commission. Section 408.041(c). The hearing officer determined that the claimant's AWW was $380.00 based on a fair and just calculation using his wages while working for employer. Upon review of the record, we cannot conclude that the hearing officer's AWW determination is 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, 176 (Tex. 1986).

DISABILITY AND EXTENT OF INJURY

There was conflicting evidence presented on the factual questions of extent of injury, and whether there was disability. 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 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 (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 (Tex. App.-Houston [14th Dist.] 1984, no writ). The trier of fact may believe all, part, or none of the testimony of any witness. Aetna Insurance Company 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 it does not normally pass upon the credibility of witnesses or substitute its 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, *supra*; Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986). Applying this standard, we find no grounds to reverse the factual findings of the hearing officer.

We affirm the decision and order of the hearing officer.

The true corporate name of the insurance carrier is **GREAT AMERICAN ALLIANCE INSURANCE COMPANY** and the name and address of its registered agent for service of process is

C T CORPORATION SYSTEM
350 NORTH ST. PAUL STREET
DALLAS, TEXAS 75201.

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Michael B. McShane
Appeals Judge

CONCUR:

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Thomas A. Knapp
Appeals Judge

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Robert W. Potts
Appeals Judge