APPEAL NO. 022707
FILED DECEMBER 10, 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 (CCH) was held on September 24, 2002. With respect to the issues before her, the hearing officer determined that the respondent/cross-appellant (claimant) is not barred from pursuing workers' compensation benefits because he received benefits under a professional athlete's contract (PAC) and/or collective bargaining agreement (CBA) after the date of injury, _____. The hearing officer further held that the claimant had disability from March 7 through April 17, 2001, but not from April 18, 2001, through September 24, 2002. In addition, the hearing officer resolved that the appellant/cross-respondent (carrier) is not entitled to a credit of the claimant's income and medical benefits due to medical and income benefits received under the claimant's PAC. The carrier appealed, arguing that the claimant elected to receive his benefits under his PAC/CBA and thus was not entitled to workers' compensation benefits. The carrier also argued that it was entitled, because of fundamental fairness, to a credit or an offset of the claimant's income and medical benefits he received under the PAC/CBA. The carrier challenged the disability determination on a sufficiency of the evidence basis. The claimant appealed the disability determination, arguing that the evidence was sufficient to support a finding that the claimant had disability from March 7, 2001, through the date of the CCH, September 24, 2002. The claimant also responded to the carrier's appeal, requesting that the hearing officer be affirmed on the other issues.

DECISION

Affirmed.

The parties stipulated that the claimant sustained a compensable injury to his cervical spine during a (athletic) game on _____. The claimant had a cervical fusion at C3-4 on November 14, 2000, and did not play for the rest of the (athletic) season of 2000, per his orthopedic surgeon's [and that of the team's] advice. The claimant's PAC was terminated March 7, 2001. Under the terms of the PAC/CBA, the claimant received two payments after March 7, 2001: a payment of $225,000.00 as an injury protection benefit, and a payment of $87,500.00 as severance based upon his years in the (league).[1] In addition, the employer paid more than $35,000.00 in medical expenses towards the claimant's compensable injury. It was not disputed that the carrier did not pay any benefits to the claimant or that the claimant, and other (league) players, paid a premium to the carrier in the form of a deduction from their salary. The claimant retired from the NFL on (date of retirement), after discussing with his doctor and family the risks of continuing to play football with his type of injury.

[1] The claimant received the severance pay only as a result of his retirement from the (league) on (date of retirement).

Section 406.095(a) of the 1989 Act reads as follows:

> (a) A professional athlete employed under a contract for hire or a collective bargaining agreement who is entitled to benefits for medical care and weekly benefits that are equal to or greater than the benefits provided under this subtitle ***may not receive benefits under this subtitle and the equivalent benefits under the contract or collective bargaining agreement***. An athlete covered by such a contract or agreement who sustains an injury in the course and scope of the athlete's employment shall elect to receive either the benefits available under this subtitle or the benefits under the contract or agreement. (Emphasis added.)

In subsection (c) of Section 406.095, it specifically lists persons employed by the NFL as being included in the definition of "professional athlete." Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 112.401(a) (Rule 112.401(a)) reads:

> (a) A professional athlete employed by a franchise with workers' compensation insurance coverage and subject to the Texas Labor Code, §406.095, shall elect to receive either the benefits available under the Act or the equivalent benefits available under the athlete's contract or collective bargaining agreement. The election shall be made not later than the 15th day after the athlete sustains an injury in the course and scope of employment. ***If the athlete fails to make an election, the athlete will be presumed to have elected the option which provides the highest benefits***. (Emphasis added.)

The remainder of Rule 112.401 pertains to the details of the athlete's election, including that it must be in writing and contain specific facts and circumstances not relevant to this claim as it is not in dispute that the claimant did not make a written or formal election of benefits.

The record reflects that in 2001, the claimant claimed income of greater than $300,000.00, so *ipso facto* his income benefits under the PAC/CBA were greater than under the 1989 Act. However, we must still address whether the medical benefits offered under the PAC/CBA were equal to or greater than those offered under the 1989 Act, namely, lifetime medical for the treatment of the compensable injury.

Rule 112.402(a) reads:

> (a) Medical care available to a professional athlete subject to the [1989]Act, Article 8308-3.075, is equal to or greater than the medical benefits under the [1989] Act if:

(1) the athlete is entitled to all health care reasonably required by the nature of the work-related injury as and when needed, including all health care that:

(A) cures or relieves the effects naturally resulting from the work-related injury;

(B) promotes recovery; or

(C) enhances the ability of the employee to return to or retain employment; and

(2) the employer's liability for health care is not limited or terminated in any way by the contract or collective bargaining agreement. (Emphasis added.)

In this case, the hearing officer determined that because the PAC/CBA health benefits were limited to the duration of the claimant's contract (which was terminated March 7, 2001), the benefits were not equal to or greater than benefits under the 1989 Act, which provides for lifetime medical for the compensable injury. The hearing officer thus reasoned that because the PAC/CBA benefits were not equal to or greater than the benefits under the 1989 Act, the claimant did not have to make an election and would be presumed, under Rule 112.401(a), to have elected the option that provides the higher benefits. In this case, the claimant is presumed to have elected to receive benefits under the 1989 Act, and the hearing officer wrote that the presumption was not rebutted with sufficient credible evidence. The hearing officer did not err in determining that the claimant is not barred from pursuing workers' compensation benefits because he received benefits under a PAC and/or CBA after the date of injury.

The hearing officer did not err in determining that the claimant had disability as a result of his _____, compensable injury from March 7 through April 17, 2001. The claimant's compensable injury was not disputed, and the claimant's medical records supported that period of disability, but not longer as the records indicated that the claimant would be "game ready" in April 2001, and could, at that time, obtain and retain employment at his preinjury wage no longer hindered by his compensable injury. *See* Section 401.011(16).

The hearing officer did not err in determining that the carrier is not entitled to a credit of the claimant's income and medical benefits due to medical and income payments received under the claimant's PAC/CBA. The hearing officer found that the employer paid all of the claimant's benefits prior to the CCH, and noted that the carrier did not offer evidence of the employer's assignment of its rights, if any, of reimbursement under the employment contract. Section 408.003(g) provides:

(g) If an employer is subject to a contractual obligation with an employee or group of employees, such as a collective bargaining

> agreement or a written agreement or policy, under which the employer is required to make salary continuation payments, the employer is not eligible for reimbursement under this section for those payments.

Therefore, the employer would not have had rights of reimbursement in this case to assign to the carrier. The carrier also argued at the benefit review conference that it was entitled to a credit pursuant to Sections 417.001 and 417.002 through subrogation rights, but the hearing officer dispensed with that argument because she found no evidence of any third party from whom to seek damages.

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 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). 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); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986). We do not find so here.

The decision and order of the hearing officer are affirmed.

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

CT CORPORATION SYSTEMS
350 NORTH ST. PAUL STREET
DALLAS, TEXAS 75201.

_____
Thomas A. Knapp
Appeals Judge

CONCUR:

_____
Gary L. Kilgore
Appeals Judge

_____
Margaret L. Turner
Appeals Judge