APPEAL NO. 022946
FILED JANUARY 7, 2003

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 October 14, 2002. With respect to the issues before him, the hearing officer determined that the respondent's (claimant) compensable injury of _____, extends to and includes the lumbar area and the diagnosed herniated nucleus pulposus (HNP) at L5/S1 with radiculopathy; therefore, pursuant to the designated doctor's recommendation, the hearing officer resolved that the claimant had yet to reach maximum medical improvement (MMI), so that assigning the claimant an impairment rating (IR) would be premature. The appellant (carrier) appealed the determinations on sufficiency grounds, and argued that the hearing officer should have followed the designated doctor's alternative certification of MMI/IR, and claimed that the hearing officer abused his discretion in admitting one of the claimant's exhibits. There was no response on file from the claimant.

DECISION

Affirmed, as modified.

We first note that the date of injury was entered as January 3, 2001, on page 1 (in Issue 1), page 8 (in Conclusion of Law 3), and page 8 (in the "Decision" portion). Because the correct date of injury is _____, we herewith modify the above-referenced date notations to read "_____."

We next address the carrier's charge that the hearing officer abused his discretion in admitting the Claimant's Exhibit No. 3, page 1, the most recent letter from the claimant's treating doctor. The carrier argued that the claimant had not timely exchanged the document, i.e., within the 15 days following the benefit review conference (BRC), which was held August 16, 2002. The carrier contended that the hearing officer failed to apply a due diligence test to the claimant's action to procure the document. The claimant maintained that he forwarded the document, dated September 5, 2002, to the carrier as soon as was practicable after his receipt of it. In addition, the claimant averred that he requested that his doctor write the letter the day of the BRC, after which he believed he might need it to support his claim of extent of injury. The hearing officer heard argument from both parties and determined that the claimant had good cause for his failure to timely exchange the exhibit. In determining whether there has been an abuse of discretion, the Appeals Panel looks to see whether the hearing officer acted without reference to any guiding rules or principles. Texas Workers' Compensation Commission Appeal No. 951943, decided January 2, 1996, citing Morrow v. H.E.B., Inc., 714 S.W.2d 297 (Tex. 1986). Using this standard, we believe that the hearing officer did not abuse his discretion in allowing the Claimant's Exhibit No. 3, page 1.

The hearing officer did not err in determining that the claimant's compensable injury of _____, extends to and includes the lumbar area and the diagnosed HNP at L5/S1 with radiculopathy. It is undisputed that the claimant sustained a compensable injury in the form of torn anterior cruciate ligament in his right knee when he fell from a truck while carrying a piece of heavy furniture. The claimant now contends that he also sustained the above-specified injuries to his lumbar spine. The claimant presented evidence from his treating doctor and referral doctors, orthopedic surgeons, who supported his contention. The carrier presented evidence from three peer review doctors, all of whom reported that the claimant's lumbar injuries were of a degenerative nature and not related to his compensable injury. The hearing officer decided that the claimant met his burden of proof, with the opinions of those doctors who had examined him, and believed that the peer review reports were not credible evidence.

The hearing officer did not err in determining that the claimant had not reached MMI, and so could not be assigned an IR. The designated doctor examined the claimant on June 27, 2002, and reported that, if the claimant's compensable injury was found to include his lumbar spine, then the claimant was not at MMI and could not be assigned an IR. The hearing officer found that the claimant's lumbar injuries were in fact a part of his compensable injury. Thus, the carrier's argument that the hearing officer did not give proper weight to the designated doctor's report is untenable.

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 carrier is **SOUTHERN VANGUARD** and the name and address of its registered agent for service of process is

ACTIVE PRESIDENT, VICE-PRESIDENT OR SECRETARY
2727 TURTLE CREEK BOULEVARD
DALLAS, TEXAS 75219-4801.

_____
Terri Kay Oliver
Appeals Judge

CONCUR:

_____
Elaine M. Chaney
Appeals Judge

_____
Gary L. Kilgore
Appeals Judge