

APPEAL NO. 023130
FILED JANUARY 22, 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 November 25, 2002. The hearing officer held a consolidated hearing on this claim along with (Docket No. 1). While the hearing officer issued a single decision and order from the consolidated hearing, the appellant (claimant herein) requests that the Appeals Panel issue separate decisions in each of the two claims considered at the consolidated hearing to keep the facts of each claim separate in the event that judicial review is sought. We find this request reasonable under the facts of this case. Therefore, in this decision we shall only address the appeal of (Docket No. 2). The issue in this case was whether the _____, compensable injury extended to include the cervical and thoracic spine in addition to the right shoulder. The hearing officer determined that the claimant's _____, injury does not extend to include an injury to his cervical and thoracic spine. The claimant appeals, contending that the hearing officer's determination was contrary to the evidence and that the hearing officer addressed the issue of disability when that issue was not before her. The respondent (carrier herein) replies that there is sufficient evidence to support the hearing officer's extent-of-injury determination and that the claimant did not present evidence contrary to the hearing officer's disability determination.

DECISION

We reform the decision of the hearing officer by striking her finding on the disability issue that was not before her. Finding sufficient evidence to support the decision of the hearing officer and no reversible error in the record, we affirm the decision and order of the hearing officer as reformed.

We have held that the question of the extent of an injury is a question of fact for the hearing officer. Section 410.165(a) provides that the contested case 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). This is equally true regarding medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286, 290 (Tex. App.-Houston [14th Dist.] 1984, no writ). 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.); Aetna Insurance Co. 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 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). This is so even though another fact finder might have drawn other inferences and reached other conclusions. Salazar v. Hill, 551 S.W.2d 518 (Tex. Civ. App.-Corpus Christi 1977, writ ref'd n.r.e.). Applying this standard, we find sufficient evidence to support the hearing officer's finding that the claimant's injury did not extend to include an injury to his cervical and thoracic spine.

The issue of disability was not before the hearing officer; yet the hearing officer made the following Finding of Fact No. 3:

The Claimant lost three (3) days of work as a result of his injury of _____, in Claim No. 2 and has been paid no temporary income benefits as benefits have not accrued.

As the issue of disability was not before the hearing officer and we do not find that this issue was actually litigated, the hearing officer exceeded her authority in making Finding of Fact No. 3. We, therefore, reform the decision and order of the hearing officer by striking this finding.

The decision and order of the hearing officer are affirmed as reformed.

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

**CORPORATION SERVICE COMPANY
800 BRAZOS
AUSTIN, TEXAS 78701.**

Gary L. Kilgore
Appeals Judge

CONCUR:

Terri Kay Oliver
Appeals Judge

CONCURRING OPINION:

I concur but see no reason to strike the finding of fact on accrual of three days of disability, which to me is directly relevant to the extent (and seriousness) of the original injury. I cannot agree that this finding purports to adjudicate a disability issue, especially when the hearing officer's discussion makes clear that disability was not regarded as an issue in the case.

Susan M. Kelley
Appeals Judge