APPEAL NO. 023295
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 (CCH) 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 claimant sustained a compensable injury on _____. The hearing officer determined that the claimant did not sustain a compensable injury on this date. The claimant appeals, contending that this determination was contrary to the evidence. The claimant also asserts error in the hearing officer's failing to review all of the evidence admitted at the CCH and in making an incorrect finding concerning the date of the claimant's termination. The respondent (carrier herein) replies that there is sufficient evidence to support the hearing officer's finding of no injury and it in fact finds support in the testimony of the claimant. The carrier contends that the hearing officer's finding concerning the date of the claimant's termination is not necessary to support her resolution of the injury issue.

DECISION

We reform the decision of the hearing officer by striking her finding as to the date of the claimant's termination as surplusage. 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 first address the procedural errors raised by the claimant. We are troubled by the following statement in the decision of the hearing officer:

> The claimant offered 433 pages of records produced by [Dr. A], into evidence as Exhibit 16 in Claim No. 2. I asked the Claimant's attorney to identify what documents she wanted me to review by highlighting pertinent parts with a blue highlighter. She identified less than one dozen pages as containing passages that she believed were important. I explained that I would review only those pages when reviewing the Exhibits.

In his appeal, the claimant asserts this was an error, stating as follows:

> The Hearing Officer arbitrarily refused to consider 428 pages of medical evidence that was timely exchanged and offered without objection because she wanted it highlighted. The Hearing Officers (sic) job is to

review the evidence and not to make objections *sua sponte* to otherwise admissible evidence.

We certainly understand the problems that can arise with voluminous evidence and have permitted hearing officers to encourage attorneys to highlight important passages in voluminous evidence to facilitate the expeditious review of such evidence. See Texas Workers' Compensation Appeal No. 951052, decided August 10, 1995; and Texas Workers' Compensation Commission Appeal No. 020562, decided April 30, 2002. However, there is certainly a distinction between a hearing officer suggesting such a procedure and requiring it. It is the duty of the hearing officer to review the evidence in a case, and we are discomforted when a hearing officer explicitly states she did not review documents that she has admitted into evidence. In Appeal No. 020562, *supra*, by contrast, the hearing officer admitted documents into evidence over the objection that they were highlighted and explicitly stated that the entire record, and not merely the highlighted portions, would be considered. In the present case, the claimant did not object at the CCH when the hearing officer stated she was only going to consider the highlighted portions of Claimant's Exhibit No. 16. The claimant's attorney then proceeded to highlight portions of Claimant's Exhibit No. 16 after the hearing officer made this statement. Under these circumstances, we find the claimant has failed to preserve error for our review. For this reason, and this reason alone, we will not reverse the decision of the hearing officer and remand this case to the hearing officer for her to consider all of the admitted evidence.

The hearing officer in Finding of Fact No. 5 found that the claimant's employment was terminated on September 13, 2000. There was evidence that the claimant had some employment disciplinary actions prior to September 13, 2000, and that his employment was terminated at some point. The date of termination is not altogether clear. It was undisputed that the claimant was terminated, but the date of his termination was not relevant to any issue before the hearing officer. We therefore reform the decision of the hearing officer by striking Finding of Fact No. 5 as surplusage. The question of whether an injury occurred is one of fact. Texas Workers' Compensation Commission Appeal No. 93854, decided November 9, 1993. 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).

A finding of injury may be based upon the testimony of the claimant alone. Gee v. Liberty Mutual Fire Insurance Co., 765 S.W.2d 394 (Tex. 1989). However, as an interested party, the claimant's testimony only raises an issue of fact for the hearing officer to resolve. Escamilla v. Liberty Mutual Insurance Company, 499 S.W.2d 758 (Tex. Civ. App.-Amarillo 1973, no writ). In the present case the hearing officer found no injury, contrary to the testimony of the claimant and medical evidence. The claimant had the burden to prove he was injured in the course and scope of his employment. Reed v. Aetna Casualty & Surety Co., 535 S.W.2d 377 (Tex. Civ. App.-Beaumont 1976, writ ref'd n.r.e.). We cannot say that the hearing officer was incorrect as a matter of law in finding that the claimant failed to meet this burden. 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.).

We affirm the decision and order of the hearing officer 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 the date of termination, which to me is directly relevant to whether or not the injury occurred, and credibility issues therein. There being no "issue" on termination, I fail to understand how a "building block" finding that leads to the outcome on the injury issue goes beyond the hearing officer's powers or the issues in the case.

_____
Susan M. Kelley
Appeals Judge