APPEAL NO. 030623
FILED APRIL 28, 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 January 28, 2003. The hearing officer resolved the disputed issues by deciding that the respondent (claimant) sustained a compensable injury on _____; that the claimant had disability resulting from the injury sustained on _____, from July 30 through August 2, 2002, and from August 13, 2002, through January 28, 2003; that the claimant complied with the Texas Workers' Compensation Commission (Commission) rules regarding change of treating doctors; and that the respondent (carrier) is not relieved of liability for health care provided by or at the direction of Dr. H. The carrier appealed, arguing that the hearing officer's determinations are against the great weight and preponderance of the evidence. The claimant responds, urging affirmance.

DECISION

Affirmed.

Injury and disability are questions of fact for the hearing officer to resolve. 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). Applying this standard, we find no grounds to reverse the factual findings of the hearing officer.

The carrier contends that the hearing officer erred in determining that Dr. W was the claimant's treating doctor. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 126.9(c)(1) through (3) (Rule 126.9(c)(1) through (3)) specify three circumstances in which the first doctor providing health care does not constitute the initial choice of

treating doctor, with Rule 126.9(c)(3) specifying that "any doctor providing emergency care unless the injured employee receives treatment from the doctor for other than follow-up care related to the emergency treatment." The hearing officer commented that the first doctor, Dr. K, treated the claimant for the "flu or other malady" symptoms and the claimant sought treatment from Dr. W who "at the time was treating her for a prior work related injury." The hearing officer commented that the fact that the claimant treated once with a doctor that does not automatically make him the claimant's treating doctor. The evidence sufficiently supports the hearing officer's determination that the claimant's treating doctor for workers' compensation purposes was Dr. W.

The carrier also contends that the hearing officer applied an incorrect standard of review in determining the claimant's request to change treating doctors. The Appeals Panel has addressed the standard to be used in reviewing a change of treating doctor in Texas Workers' Compensation Commission Appeal No. 020022, decided February 14, 2002, and Texas Workers' Compensation Commission Appeal No. 022245, decided, October 22, 2002. In Appeal No. 020022 the Appeals Panel stated that while the Commission has previously considered changes of treating doctor in language encompassing "abuse of discretion," Advisory 2001-01, dated January 15, 2001, reflected a concern of the Commission that inconsistency was to be avoided in approving such changes and that the issue was "expressly broader than merely an abuse of discretion in approval of the Employee's Request to Change Treating Doctors (TWCC-53)." In Appeal No. 022245 the issue was framed, as it was in this case, whether the claimant was "entitled to change treating doctors." The Appeals Panel cited Appeal No. 020022 and held that the issue is "broader than whether a particular Commission employee who approved the change abused his or her discretion." The hearing officer was to evaluate whether a change should be allowed in accordance with the standards set forth in Section 408.022 and Rule 126.9 and the hearing officer is not limited to considering a change of treating doctor issue only in terms of whether the Commission abused its discretion. Texas Workers' Compensation Commission Appeal No. 020414, decided April 3, 2002. The hearing officer commented in her Statement of the Evidence paragraph that the change of treating doctors was based on the claimant's assertions that "…she was not improving, [Dr. W] indicated to her he no longer knew what to do with her and suggested she treat with her family physician… she lost confidence in [Dr. W] and requested a change of treating doctor to [Dr. H]." The hearing officer could conclude from the evidence that the treatment by the current doctor was medically inappropriate; that the employee was not receiving appropriate medical care to reach maximum medical improvement; and that a conflict existed between the employee and the doctor to the extent that the doctor-patient relationship was jeopardized or impaired. We hold that the hearing officer properly applied the applicable law that the claimant appropriately requested and provided a proper foundation for the request of change of treating doctor.

The hearing officer's decision and order are affirmed.

The true corporate name of the insurance carrier is **AMERICAN CASUALTY COMPANY OF READING, PENNSYLVANIA** and the name and address of its registered agent for service of process is

CT CORPORATION SYSTEM
350 NORTH ST. PAUL
DALLAS, TEXAS 75201.

_____
Gary L. Kilgore
Appeals Judge

CONCUR:

_____
Daniel R. Barry
Appeals Judge

_____
Thomas A. Knapp
Appeals Judge