APPEAL NO. 031313
FILED JULY 11, 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 April 30, 2003. The hearing officer decided respondent (claimant herein) is entitled to lifetime income benefits (LIBs) based on the loss of both feet at or above the ankle and that the compensable injury of _____, does not include peripheral vascular disease of the right leg. The appellant (carrier herein) files a request for review, arguing that the hearing officer erred in finding the claimant was eligible for LIBs, in determining that the claimant was eligible for LIBs without determining when the claimant became eligible for LIBs, and in determining that the claimant's compensable injury does not include peripheral vascular disease. There is no response from the claimant to the carrier's request for review in the appeal file.

DECISION

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.

The claimant contended, and the hearing officer found, that the claimant was entitled to LIBs due to the total loss of use of both feet.[1] The carrier first argues that the hearing officer's decision that the claimant is entitled to LIBs is contrary to the evidence. Both parties recognize that the Appeals Panel has held on many occasions that the correct legal standard for determining whether there is entitlement to LIBs based upon total loss of use is found in Travelers Insurance Company v. Seabolt, 361 S.W.2d 204 (Tex. 1962) (hereinafter Seabolt), which provides that the standard is whether the members no longer possesses any substantial utility as members of the body or whether the condition of the members is such that the claimant cannot get and keep employment requiring the use of the members. We explained in our decision in Texas Workers' Compensation Commission Appeal No. 94689, decided July 8, 1994, as to why the Seabolt standard applied to the 1989 Act and have followed that holding ever since.

The question of whether or not the claimant met the disjunctive test of Seabolt turns upon factual determinations. In the present case the hearing officer found that the claimant met both of the disjunctive prongs of Seabolt when she stated as follows in her Finding of Fact No. 7:

> Claimant has a total loss of use of his lower left leg and of the lower right leg because of the compensable injury: he no longer possesses any substantial utility of the lower left leg and the lower right leg, and as result

[1] Pursuant to Section 408.161(a)(2) a claimant is entitled to LIBs for the permanent and total loss of use of both feet at or above the ankle.

of the compensable injury he is prevented from procuring and retaining employment requiring the use of the lower left leg and the lower right leg.

This factual finding is supported by the claimant's testimony and medical evidence from Dr. M, Dr. A and Dr. S. This finding is arguably contrary to medical evidence from Dr. B and Dr. Si.

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 legal basis upon which to reverse the hearing officer's Finding of Fact No. 7 or the legal conclusion, which is based upon Finding of Fact No. 7, that the claimant is entitled to LIBs.

The carrier also alleges the hearing officer erred in finding entitlement to LIBs without specifying the time period of such entitlement. This argument is made without the benefit of any legal citation whatsoever. We presume that the carrier is attempting to discuss the effects of Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 131.1 (Rule 131.1), which provides LIBs are payable from the date of disability. The carrier apparently is arguing that we should invalidate this rule as being inconsistent with the 1989 Act and/or as being something that exceeds the rule-making authority of the Texas Workers' Compensation Commission (Commission). The validity of Commission rules is a matter for the courts, and not the Commission's Appeals Panel. Texas Workers' Compensation Commission Appeal No. 010160, decided March 8, 2001. The carrier also appears to be arguing that the hearing officer needed to find the beginning date of disability. This was not in dispute at the CCH and does not appear to be a matter that is likely to be in dispute in this case in which benefits have apparently been paid since 1992.

The carrier's appeal of the hearing officer's determination that the claimant's injury did not include peripheral vascular disease of the right leg, or for that matter how

carrier is aggrieved by this determination, is less than clear. However, we have held that the question of the extent of an injury is a question of fact for the hearing officer. Texas Workers' Compensation Commission Appeal No. 93613, decided August 24, 1993. Applying our standard of review for factual determinations set out above, we find no legal error in this determination.

The decision and order of the hearing officer are affirmed.

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

MR. FRED WERKENTHIN
C/O JACKSON WALKER, LLP
100 CONGRESS AVENUE, SUITE 1100
AUSTIN, TEXAS 78701.

_____
Gary L. Kilgore
Appeals Judge

CONCUR:

_____
Elaine M. Chaney
Appeals Judge

_____
Thomas A. Knapp
Appeals Judge