APPEAL NO. 032174
FILED OCTOBER 9, 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 July 23, 2003. The hearing officer determined that the respondent (claimant herein) suffered a compensable injury on _____, and that the claimant had disability from November 4 through November 25, 2002, and again beginning on February 4, 2003, and continuing through April 15, 2003. The appellant (self-insured herein) files a request for review, contending that the claimant did not prove his injury was compensable because his testimony was not credible and was contradicted by other evidence. The self-insured also argues that, absent a compensable injury, the claimant could not have disability. Finally, the self-insured contends that the hearing officer erred in not finding that the claimant made an election of remedies, barring his claim. The claimant responds that the decision of the hearing officer was supported by the evidence and should be affirmed.

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.

There was conflicting evidence presented on the disputed issues of injury and disability. The issues of injury and disability are questions of fact. 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 to 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 basis to reverse the hearing officer's resolution of the injury or disability issues.

The hearing officer determined from the evidence presented that the claimant did not make an election of remedies and, therefore, did not foreclose entitlement to workers' compensation benefits. Whether a claimant has made an election of remedies in a given scenario is essentially a question of fact for the hearing officer to resolve. Texas Workers' Compensation Commission Appeal No. 93662, decided September 13, 1993. The Appeals Panel has frequently cited the case of Bocanegra v. Aetna Life Insurance Company, 605 S.W.2d 848 (Tex. 1980) in support of the proposition that any election of remedies, which is held to bar a claimant from seeking an alternative relief, must be made as a result of an (1) informed choice (2) between two rights, remedies, or states of fact that (3) are so inconsistent (4) *as to constitute manifest injustice*. (Emphasis added). However, the Bocanegra case makes clear that election be imposed sparingly, reserved for instances where the "assertion of a remedy, right, or state of facts is so unconscionable, dishonest, contrary to fair dealing, or so stultifies the legal process or trifles with justice or the courts as to be manifestly unjust." *Id* at 851. From our review of the evidence, we cannot conclude that the determination of the hearing officer on this issue was erroneous.

The decision and order of the hearing officer are affirmed.

The true corporate name of the insurance carrier is **(a self-insured governmental entity)** and the name and address of its registered agent for service of process is

**CITY MANAGER**
**(ADDRESS)**
**(CITY), TEXAS (ZIP CODE)**.

_____
Gary L. Kilgore
Appeals Judge

CONCUR:

_____
Chris Cowan
Appeals Judge

_____
Margaret L. Turner
Appeals Judge