APPEAL NO. 032907
FILED JANUARY 7, 2004

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 October 1, 2003. The hearing officer decided that the respondent/cross-appellant (claimant herein) did not sustain a compensable injury; that the date of the alleged injury was _____; that the claimant timely reported an injury; that the claimant did not make an election of remedies; and that the claimant did not have disability. The claimant appeals the hearing officer's finding of no injury, contending that the evidence clearly established that she was injured by exposure to mold at work. The appellant/cross-respondent (carrier herein) responds that the hearing officer's finding of no injury was supported by the evidence. The carrier appeals the hearing officer's decision that the claimant timely reported her injury and that the claimant did not make an election of remedies. The carrier argues that the evidence established that the claimant did not timely report her injury and that the claimant made an election of remedies when she sought group health and disability benefits. 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, as reformed.

While the hearing officer resolves the issue of whether the claimant sustained a compensable injury, she does not list it as a disputed issue in her decision. The benefit review conference report lists injury as being a disputed issue and the parties at the beginning of the CCH agreed that injury was a disputed issue. We, therefore, reform the hearing officer's decision to reflect that a disputed issue at the CCH was, "Did the claimant sustain a compensable injury in the form of an occupational disease?."

The question of whether an injury occurred is one of fact. Texas Workers' Compensation Commission Appeal No. 93854, decided November 9, 1993; Texas Workers' Compensation Commission Appeal No. 93449, decided July 21, 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). There was conflicting evidence in the present case as to whether or not the claimant's exposure to mold at work caused her to suffer an injury. Applying the standard of review outlined above, we cannot say that the hearing officer was incorrect as a matter of law in finding that the claimant failed to prove a work-related injury. 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.).

The 1989 Act generally requires that an injured employee or person acting on the employee's behalf notify the employer of the injury not later than 30 days after the date on which the injury occurred, or if the injury is an occupational disease, the date on which the employee knew or should have known that the injury was related to the employment. Section 409.001. In the present case, the hearing officer concluded that the claimant did timely report an injury. This conclusion was based upon two factual findings by the hearing officer—the finding that the claimant's date of injury was _____, and the finding that the claimant reported an injury to her employer within 30 days of _____. The hearing officer's finding that the date of injury was _____, is unappealed and has become final pursuant to Section 410.169. There was conflicting evidence as to when the claimant reported an injury, but the hearing officer's finding that the claimant reported an injury within 30 days is supported by the claimant's testimony and is not contrary to the great weight and preponderance of the evidence.

As far as election of remedies is concerned, the hearing officer found that the carrier failed to meet its burden of proof to establish that the claimant's seeking of group health and disability benefits met the requirements set out in Bocanegra v. Aetna Life Insurance Company, 605 S.W.2d 848 (Tex. 1980) to establish an election of remedies. We perceive no legal error in the hearing officer's finding that the carrier failed to meet its burden to prove an election of remedies.

Finally, with no compensable injury found, there is no loss upon which to find disability. By definition disability depends upon a compensable injury. *See* Section 401.011 (16).

The decision and order of the hearing officer are affirmed.

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

ROBIN M. MOUNTAIN
6600 CAMPUS CIRCLE DRIVE EAST, SUITE 300
IRVING, TEXAS 75063.

_____
Gary L. Kilgore
Appeals Judge

CONCUR:

_____
Robert W. Potts
Appeals Judge

_____
Margaret L. Turner
Appeals Judge