APPEAL NO. 033202
FILED FEBRUARY 10, 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 was held on November 12, 2003. The hearing officer determined that the respondent/cross-appellant's (claimant) _____, compensable injury includes the lumbar spine and a left knee meniscus tear, and that the claimant had disability beginning February 11, 2003, and continuing through October 21, 2003. The appellant/cross-respondent (carrier) appeals both the extent-of-injury and disability determinations as being unsupported by the evidence. The claimant responded, urging that the determinations as to the lumbar spine and left knee meniscus tear, and that the claimant had disability, should be affirmed, as supported by the evidence. The claimant cross-appeals the hearing officer's apparent limitation of the lumbar spine injury to a lumbar strain, when there was no extent of the lumbar spine injury before him, and takes issue with the hearing officer's ending date of disability. The carrier did not respond to the claimant's cross-appeal.

DECISION

Affirmed in part; reversed and remanded in part.

The carrier notes that the hearing officer omitted the names of witnesses from the Decision and Order. We correct this oversight by reforming the Decision and Order to show that WP testified as a witness for the claimant, and that KW, ET, and DJ testified as witnesses for the carrier. We also correct the spelling of the claimant's last name.

EVIDENTIARY OBJECTION

The carrier asserted that the hearing officer erred in excluding the transcribed statement of the telephone interview between the claimant and the adjustor solely on the basis that the claimant did not sign it. We cite the carrier to the oft-cited Section 410.165(a): "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. Conformity to legal rules of evidence is not necessary." We also cite to the next provision of the 1989 Act, Section 410.165(b): "A hearing officer may accept a written statement signed by a witness and shall accept all written reports signed by a health care provider." Generally, telephonic interviews are not signed by the person being interviewed. We have held that absent some indicia of authenticity, and where timely objection is made, transcriptions of such interviews should not be admitted. Texas Workers' Compensation Commission Appeal No. 92490, decided October 28, 1992. However, when there is a notarized affidavit by the person transcribing the tapes certifying to the transcription, we have indicated that this is sufficient authentication to warrant its admissibility. Texas Workers' Compensation Commission Appeal No.

94179, decided March 23, 1994. This case, with the signature of the transcriber, falls between the cases with no indicia of authenticity and the cases with a notarized affidavit by the person transcribing the tapes certifying to the transcription. Under this circumstance, since the hearing officer has the discretion to admit or exclude evidence, we perceive no error in his rejection of a rendition of a telephonic interview of the claimant that is unsigned by the claimant and does not have a notarized affidavit from the transcriber. In addition, we have reviewed the transcription to determine if its exclusion resulted in prejudicial error and conclude that any error was not reasonably calculated to cause and probably did not cause the rendition of an improper judgment. Hernandez v. Hernandez, 611 S.W.2d 732 (Tex. App.-San Antonio 1981, no writ).

EXTENT OF INJURY

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. 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). In this case, there was simply conflicting evidence as to the extent of the claimant's left knee injury, and the hearing officer's decision is supported by sufficient evidence. The evidence is also sufficient to support the hearing officer's determination that the claimant sustained a lumbar spine injury; we dismiss that portion of Finding of Fact No. 4 that purports to limit the lumbar spine injury to a strain as being beyond the scope of the issue before the hearing officer and not necessary to his determination of the issues.

DISABILITY

Although the hearing officer states that the "Claimant testified he was released to return to work on October 22, 2003," we are unable to find any support in the record for that statement. We do not see any evidence at all that supports the ending date of disability found by the hearing officer. As such, we have no option except to remand to

the hearing officer to either specify where such evidence is contained in the record or reopen the record to take further evidence on the ending date of disability.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Texas Workers' Compensation Commission's Division of Hearings, pursuant to Section 410.202, which was amended June 17, 2001, to exclude Saturdays and Sundays and holidays listed in Section 662.003 of the Texas Government Code in the computation of the 15-day appeal and response periods. *See* Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

The true corporate name of the insurance carrier is **AMERICAN HOME ASSURANCE COMPANY** and the name and address of its registered agent for service of process is

CORPORATION SERVICE COMPANY
800 BRAZOS, SUITE 750, COMMODORE 1
AUSTIN, TEXAS 78701.

_____
Michael B. McShane
Appeals Panel
Manager/Judge

CONCUR:

_____
Chris Cowan
Appeals Judge

_____
Thomas A. Knapp
Appeals Judge