APPEAL NO. 033256
FILED FEBRUARY 9, 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 November 24, 2003. The hearing officer decided that the respondent (claimant herein) sustained a compensable injury on _____, because the appellant (carrier herein) waived its right to contest the compensability of the claimed injury, and that the claimant had disability on February 14, 2003, and from February 19, 2003, and continuing through the date of the CCH. The carrier appeals, contending that the hearing officer erred in finding carrier waiver and in finding disability. 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 testified that he injured his low back at work on _____, while moving materials and driving a "skytrac" machine. The carrier stated that it received first written notice of the claimant's injury on February 21, 2003. It is undisputed that the carrier failed to dispute or pay benefits within 7 days of receiving first written notice of the claimant's injury. The carrier argued at the CCH and on appeal that it had newly discovered evidence, which permitted it to file a later dispute of compensability. The hearing officer stated in his decision that while newly discovered evidence may operate to extend the 60-day period for disputing compensability, a carrier must take some action within the first 7 days to be able to timely dispute within the first 60 days. While the carrier argues on appeal that the hearing officer did not address its argument concerning newly discovered evidence, we find that the foregoing analysis by the hearing officer not only answered the carrier's argument, but is consistent with our decisions in Texas Workers' Compensation Commission Appeal No. 031208, decided June 18, 2003, and Texas Workers' Compensation Commission Appeal No. 032540, decided November 14, 2003.

Section 409.021(a) requires that a carrier act to initiate benefits or to dispute compensability within 7 days of first receiving written notice of an injury or waive its right to dispute compensability. *See* Continental Casualty Company v. Downs, 81 S.W.3d 803 (Tex. 2002) (hereinafter Downs); Texas Workers' Compensation Commission Appeal No. 030380-s, decided April 10, 2003. In Appeal No. 030380-s, *supra*, we focused on language in the Supreme Court's decision in Downs and determined that the carrier is required to take some action within 7 days of receiving written notice of the injury in order to be entitled to the 60-day period in Section 409.021(c) to investigate a claim and deny compensability. Section 409.021(d) provides that a carrier is entitled to reopen the issue of compensability if there is a finding of evidence that could not have reasonably been discovered earlier. However, in Appeal No. 031208, *supra*, and

Appeal No. 032540, *supra*, we observed that a carrier is required to take some action within 7 days of receiving written notice of an injury in order to be entitled to reopen the issue of compensability based on newly discovered evidence.

The carrier asserts that it did not waive the right to contest the compensability of the claim because the hearing officer found that the claimant was not injured in the course and scope of his employment on _____, citing to Continental Casualty Co. v. Williamson, 971 S.W.2d 108 (Tex. App.-Tyler 1998, no pet. h.) (hereinafter Williamson). However, the key fact to consider in this case is that the claimed injury was a back injury and the hearing officer stated that there was damage or harm to the claimant's back in the form of a ruptured disc at L4-5 with stenosis. There is no carrier waiver under Williamson only in situations where there is a determination that the claimant did not have damage or harm to the physical structure of the body, as opposed to cases such as this, where there is an injury which was determined by the hearing officer not to be causally related to the employment. Texas Workers' Compensation Commission Appeal No. 030430, decided April 7, 2003. To interpret Williamson in the way the carrier argues would in essence mean that waiver would only apply to cases in which the claimant would have won absent waiver, which would in effect render Section 409.021 meaningless. We reject such an interpretation.

The carrier argues that the evidence was insufficient to support the hearing officer's finding of disability. There was conflicting evidence presented on the disputed issues of disability. The issue of disability is a question 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 issue of disability.

The decision and order of the hearing officer are affirmed.

The true corporate name of the insurance carrier is **ST. PAUL MERCURY INSURANCE COMPANY** and the name and address of its registered agent for service of process is

CORPORATION SERVICE COMPANY
800 BRAZOS
AUSTIN, TEXAS 78701.

_____
Gary L. Kilgore
Appeals Judge

CONCUR:

_____
Judy L. S. Barnes
Appeals Judge

_____
Elaine M. Chaney
Appeals Judge