APPEAL NO. 033279
FILED FEBRUARY 11, 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 12, 2003. The hearing officer decided that the respondent (claimant herein) did not sustain an injury in the course and scope of her employment on _____, but that her injury is compensable because the appellant (self-insured herein) waived its right to contest the compensability of the injury, and that the claimant had disability from December 16, 2002, and continuing through the date of the CCH. The self-insured appeals, contending that the hearing officer erred in finding waiver and in finding disability. There is no response from the claimant to the self-insured'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 she was injured on _____, when she fell while moving materials to another work station. The parties stipulated that the self-insured received its first written notice of the claimant's injury on October 30, 2002. The self-insured initially accepted the claim, but filed a Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) on January 14, 2003. The self-insured argued at the CCH and on appeal that it had newly discovered evidence, which permitted it to file a late dispute of compensability. The hearing officer stated in her decision that the self-insured's contest of compensability was not based upon newly discovered evidence because the evidence relied upon by the self-insured contended as newly discovered could reasonably have been discovered earlier.

Section 409.021(c) provides that for benefits based upon claims for injury prior to September 1, 2003, that if an insurance carrier[1] does not contest the compensability of an injury on or before the 60th day after the date on which the insurance carrier is notified of the injury, the insurance carrier waives its right to contest compensability. Section 409.021(d) states that an insurance carrier may reopen the issue of compensability of an injury if there is a finding of evidence that could not reasonably have been discovered earlier.

Whether or not evidence could have reasonably been discovered earlier is a question of fact. There was conflicting evidence presented on this issue. 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

[1] In this context a self-insured is an insurance carrier.

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 finding that the evidence relied upon by the self-insured could have reasonably been discovered earlier.

The self-insured also 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 her employment on _____, citing Continental Casualty Co. v. Williamson, 971 S.W.2d 108 (Tex. App.-Tyler 1998, no pet. h.) (hereinafter Williamson). 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 decision and order of the hearing officer are affirmed.

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

CSC-THE U.S. CORPORATION COMPANY
400 NORTH ST. PAUL STREET
DALLAS, TEXAS 75201.

_____
Gary L. Kilgore
Appeals Judge

CONCUR:

_____
Chris Cowan
Appeals Judge

_____
Michael B. McShane
Appeals Panel
Judge Manager